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Shelley v. Kraemer: Herald of Social Progress and of the Coming Debate Over the Limits of Constitutional Change

by Thomas B. McAfee

This spring we have celebrated the forty year anniversary of Jackie Robinson's breaking of the color barrier in major league baseball. Next year will be the fortieth anniversary of the Supreme Court's decision in *Shelley v. Kraemer*,¹ the case in which the Supreme Court held unconstitutional judicial enforcement of racially restrictive covenants. The temptation to compare these events is irresistible, for the surface similarities and differences are both quite striking. Robinson's self-consciously historical step was national news, and he was greeted throughout the country by thousands of spectators, black and white; in St. Louis in May, Robinson played before the largest weekday crowd of the National League season.² Mr. and Mrs. J.D. Shelley, on the other hand, moved in at 4600 Labadie Avenue, in St. Louis, on September 11, 1945, without having received any actual notice that the neighborhood was covered by racially restrictive covenants to avoid black entry beyond the five black families that lived in the covered district when the covenants were signed.³ The Shelleys had no intention of breaking any color barrier or establishing any test case; they simply wanted a place to live and had noted that blacks owned and occupied homes on the same block.⁴

Jackie Robinson entered the majors with his eyes open to what he would face—opposition, discrimination, and a stomach full of hostility for his bold decision to challenge an historical practice of discrimination. Indeed, he was handpicked as the person best equipped to play a particular role in an earth-shaking drama. By contrast, the Shelleys' black realtor arranged a dummy transaction to avoid a direct purchase from an original signor of the restrictive covenant, added an undisclosed "premium" for his efforts, and allowed them to move in without knowing what they would face.⁵ Indeed, the St. Louis trial judge ruled that the Shelleys took the property without effective legal notice of the covenant, given that the realtor's interest was antagonistic to theirs.⁶ The evening that they moved into their new home, however, the Shelleys were served with the summons and complaint seeking enforcement of the terms of covenant.⁷

Even as the Shelleys' lawsuit grew into a case of national significance, dif-

ferences with the Robinson "case" stick out. In the second "Shelleys' case," as one commentator described it,⁸ Shelleys' attorney, George L. Vaughn, determined to push ahead to the Supreme Court with or without the blessing and assistance of Thurgood Marshall and the national NAACP.⁹ Indeed, Marshall decided to go ahead and push

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

2. J. Tygiel, Jackie Robinson and His Legacy 189 (1983). The statements in text about Robinson reflect materials drawn from this book.

3. C. Vose, Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases 109, 111 (1959).

4. *Id.* at 111.

5. *Id.* at 110-11.

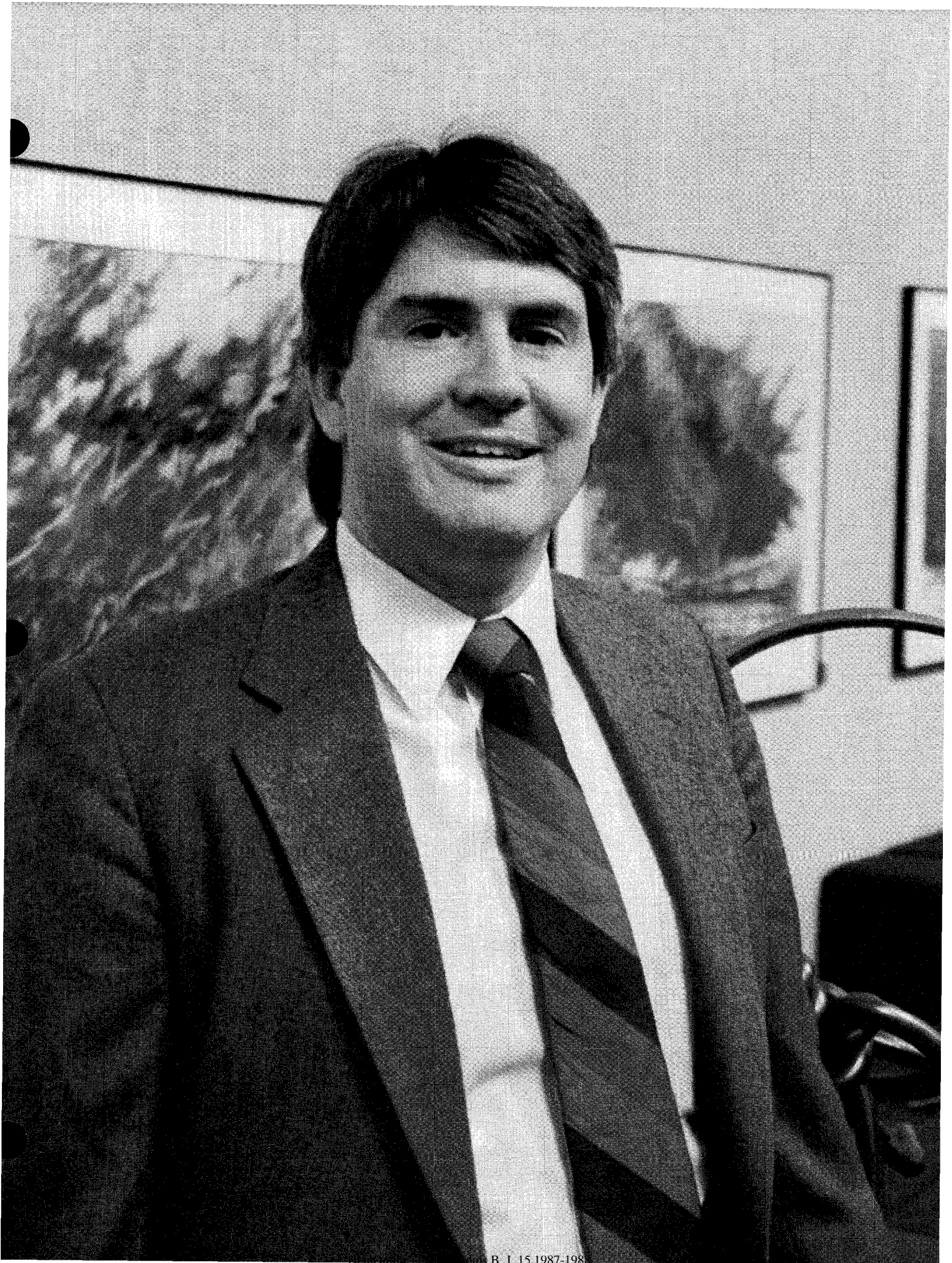
6. *Id.* at 116.

7. *Id.* at 111.

8. Comment, *Restrictive Covenants and Equal Protection—The New Rule in Shelley's Case*, 21 S. Cal. L. Rev. 358 (1948).

9. Despite the nationwide coordination efforts of the NAACP as to legal strategy to overturn restrictive covenants, Vaughn unilaterally filed a petition for certiorari in *Shelley* on April 21, 1947. C. Vose, *supra* note 3, at 157. As to Vaughn's general independence from the national leaders, see *id.* at 121.

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for the elimination of restrictive covenants before the Supreme Court, despite his personal reservations that the time was not right, because the *Shelley* case was going ahead, with or without him.¹⁰ In short, Robinson was handpicked for a special job; J.D. Shelley, roughly speaking, fell into an historic role, but then pursued it with vigor.

Even so, in the bicentennial of our Constitution, we have cause to recall the case of J.D. Shelley, for the same reasons that we observe Jackie Robinson's important anniversary. However inadvertent his decision to purchase a home in the "wrong" neighborhood, Shelley made the decision to fight against the injustice presented by private racial discrimination in housing. At the personal level, this decision no doubt required the same sort of courage that Robinson's required. Shelley was taking on the white American establishment, as represented by bankers, realtors groups, and neighborhood associations formed for the purpose of preserving white separatism and supremacy. And while he represented the black race, as did Robinson, Shelley and his attorney pressed the cause of justice without regard for the support, material or spiritual, of the "official" representatives of the interests they sought to advance.¹¹

Beyond their personal courage, however, Shelley and Robinson symbolize black America's quest for freedom, justice, and human dignity. The segregation in housing and baseball were appendages of a vast system of segregation, public and private, that permeated American life of the period. And as Charles Black so eloquently pointed out years later in defending the Supreme Court's decision in *Brown v. the Board of Education*,¹² that system of segregation operated for the purpose of stigmatizing the black race with a badge of inferiority in support of a regime of racial oppression.¹³ While ending segregation in baseball and invalidating racial covenants in property would, by themselves, hardly dismantle that system of segregation and oppression, they were steps along that path and opportunities for the teaching of a national seminar on civil rights and human dignity.

In the case of housing, the ending of legally-supported racial discrimination also confronted perhaps the most pressing problem facing blacks in post-World War II America—the lack of adequate housing in a society facing a housing shortage.¹⁴ Racially restrictive covenants had been around for years, and they had become especially prevalent subsequent to the Supreme Court's holding that local government

could not constitutionally zone neighborhoods according to race.¹⁵ A Chicago study, commissioned after riots there in 1919, described a familiar pattern of cooperation between real estate dealers and neighborhood associations to create white-only areas, a system which resulted in the creation of black ghettos, with associated problems of poverty, disease, crime, and related social problems.¹⁶ Although World War II brought with it new economic opportunities, and hence buying power, the hold of the covenants reinforced the poverty of many and significantly restricted opportunities of the emerging middle class to move to better housing.¹⁷ To a non-historian who has for several years taught the opinion in *Shelley*, but who was born after it was decided, I was perhaps most struck by the degree of organization that characterized the nationwide litigation of which *Shelley* was part.¹⁸ One is not surprised to discover that segregation in housing was a target of the NAACP, or that the campaign against the covenants was well-organized.¹⁹ But it was nevertheless striking to me that a May, 1946 conference, called by the NAACP and the Chicago Council Against Racial and Religious Discrimination, was "sponsored by more than forty labor, civic, religious, housing and veterans groups."²⁰

Various organizations encouraged and sponsored sociological and legal writing against the covenants, and the

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10. *Id.* at 157; R. Kluger, *Simple Justice* 249 (1977). Kluger observes, however, that several other local attorneys were pushing for going forward; Vaughn was simply the one who pushed everything ahead by filing for certiorari.

11. The historical record reveals that Vaughn received relatively little financial assistance either from the local or national NAACP, and Vaughn "bore special burdens" in pursuing the case. C. Vose, *supra* note 3, at 121.

12. 347 U.S. 483 (1954).

13. Black, *The Lawfulness of the Segregation Decisions*, 69 Yale L.J. 421 (1960).

14. Vose, *NAACP Strategy in the Covenant Cases*, 6 W. Res. L. Rev. 101, 104-05 (1955).

15. *Buchanan v. Warley*, 245 U.S. 60 (1917).

16. Vose, *supra* note 14, 114-15.

17. Vose, *supra* note 14, at 104-05.

18. *Shelley* was consolidated with *McGhee v. Sipes*, 334 U.S. 1 (1948), and *Hurd v. Hodge*, 334 U.S. 24 (1948), was decided the same day. In the years leading to *Shelley* there was litigation in most major cities of the country.

19. See generally Vose, *supra* note 14.

20. *Id.* at 120.

law reviews were flooded with articles and student pieces offering the legal rationales for invalidating racial covenants.²¹ Based on efforts that began at a September, 1947 conference, the NAACP attempted to coordinate (to the limited extent possible) the filing of *amici curiae* briefs, and eventually nineteen such briefs were filed by various organizations.²² Perhaps as important as any other development, at the recommendation of President Truman's Committee on Civil Rights,²³ and with the aid of effective lobbying from within and without, the Truman administration decided to have the Justice Department file an *amicus curiae* brief against restrictive covenants.²⁴

But it was the extent of organization of those seeking to uphold the covenants that struck me most. In St. Louis, the Marcus Avenue Improvement Association sponsored the litigation against the Shelleys.²⁵ With numerous potential plaintiffs, Mrs. Fern Kraemer was chosen because her parents had signed the original restriction.²⁶ Her part was limited to her testimony at trial that she had inherited the property from a signatory, after which she was said to have become nervous and upset over the publicity generated by the case.²⁷ This pattern of sponsorship of enforcement actions by white property owners' associations and of eventual clashes with organized advocates of racial equality characterized each of the companion cases to *Shelley* at the Supreme Court level.²⁸ Ironically, then, this "private" dispute that would turn on the issue as to the reach of the concept of "public," or state action, was in an important sense private in form only. This was a clash of large groups and interests across the nation.

The support system, however, went far beyond property owner associations. Realtors boards across the nation, as well as the national realtors' association, wrote the duty to preserve the racial identity of white neighborhoods into their codes of professional ethics.²⁹ Newspapers, like the Washington, D.C. *Evening Star*, refused to print advertisements offering restricted property for sale to black people.³⁰ Indeed, the *Star* enforced this policy by relying on citizens' associations for checking

to ensure that such advertisements were not run in areas covered by the covenants.³¹ And, of course, the covenants were lent support by the state in the form of anti-miscegenation statutes, school segregation, and various other laws and policies that reinforced the overall climate of racism that undergirded the system of segregated housing.

There was, to be sure, much less coordination among the defenders of the covenants, even as the cases winded their way to the Supreme Court. The associations that sponsored the litigation were local in nature; there was no equivalent to the NAACP

to pull together those who were working to preserve the old order.³² The *amici curiae* briefs filed are nevertheless instructive. Three property-owners'

21. *Id.* at 130-33.

22. *Id.* at 133-38, 141.

23. *Id.* at 138-40.

24. *Id.*

25. C. Vose, *supra* note 3, at 112.

26. *Id.* at 112-13.

27. *Id.* at 113.

28. For description of these phenomena as to the related cases, see *Id.* at 74-99, 122-50.

29. *Id.* at 77, 199.

30. *Id.* at 77.

31. *Id.*

32. *Id.* at 174-76.

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associations from major cities filed briefs, along with a federation representing sixty-nine white citizens' associations in the District of Columbia.³³ In addition, the National Association of Real Estate Boards filed a brief favoring enforcement of the covenants.³⁴

Shelley did not end extensive segregation and racial discrimination, even in the housing industry. The countervailing forces were, and still are, powerful. In St. Louis, the Real Estate Exchange zoned the city and forbade members of the exchange, under pain of expulsion, from selling property to blacks within the white zones.³⁵ The Shelleys' real opponent, the Marcus Avenue Improvement Association, organized block committees to place pressure on anyone who advertised to blacks.³⁶ Nationwide, similar steps of resistance were taken, and discipline was imposed on real-estate salespersons who arranged transactions involving whites and blacks.³⁷ For some time after *Shelley*, the Federal Housing Administration continued to refuse to fund loans involving sales to black families in white residential areas.³⁸ And more broadly, over the years the combination of white flight and pervasive racial discrimination, with and without institutional support, continued to assure a largely segregated pattern of housing.³⁹

Nevertheless, *Shelley's* impact has been significant. With respect to the problem of segregation in housing, the

decision broke the back of the rigid system of segregation that existed under the covenants and has enabled thousands of blacks to purchase homes they otherwise could not have purchased. Equally important, the Supreme Court's reasoning in *Shelley* cut sharply against the philosophy that undergirded *Plessy v. Ferguson's* "separate but equal" doctrine.⁴⁰ In addressing the equal protection issue, the Court rejected the contention that equal enforcement of all covenants would suffice, concluding that "[e]qual protection of the laws is not achieved through indiscriminate imposition of inequalities."⁴¹ It is difficult to see how a regime of state-imposed inequality posing as (at most) surface and tangible equality could long survive the Court's willingness to see prohibited discrimination in the apparent neutrality of state enforcement of private racially restrictive covenants.⁴²

Most fundamentally, *Shelley* symbolizes American society's fledgling efforts at coming to terms with its heritage of racial discrimination. The tide had begun to turn, as more and more Americans perceived the vicious lies that undergirded the regime of segregation and white supremacy. If it in some ways seems remarkable, at least to this writer, that the prestigious American Law Institute endorsed the legality and desirability of racially restrictive covenants as late as 1944,⁴³ it is also moving that so many were awakened to the need for fundamental

change in American race relations. Though *Shelley* was neither the beginning nor the end of this long-developing, and not yet completed, process of transformation, it is an important landmark on the path that leads to the fulfillment of Dr. Martin Luther King's dream. For this reason alone, the case is worth remembering.

II.

If *Shelley* marks an important point in the progress of American race relations, it may be even more significant as a symbol of the vexing search for the boundaries between purely private and state action and, more specifically, the reach of the protections of the Fourteenth Amendment in a changing world. As we shall see, *Shelley* can be read as a watershed decision that in a single stroke (1) eliminated the independent significance of the Supreme Court's long-adopted state action doctrine; and (2) lent significant momentum to an emerging view of equal protection as calling forth at least some affirmative state duties to provide individuals or groups with aid in obtaining access to basic human goods or needs.

While both of these understandings of *Shelley* are controversial, and neither would necessarily be embraced explicitly by the Supreme Court today, understanding *Shelley* from these perspectives may render it most coherent and better enable us to see the long-term currents of American constitutional change. In gaining such perspective, we may better perceive some basic ten-

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33. *Id.* at 197-98.

34. *Id.* at 199.

35. *Id.* at 223.

36. *Id.* at 224.

37. *Id.*

38. *Id.* at 225.

39. See, e.g., Report of the National Advisory Commission on Civil Disorders 118-23 (1968) (indicating extent and causes of persistent racial segregation in housing throughout the nation).

40. 163 U.S. 537 (1896).

41. *Shelley*, 334 U.S. at 22.

42. See Comment, *supra* note 8, at 366.

43. Restatement (First) of Property sect. 406, comment 1, at 2411 (1944). For discussion, see C. Vose, *supra* note 3, at 4-5. The most striking thing about the Restatement position, which was after all an accurate description of the holdings of most courts, was the sense of denial it conveyed. The comment referred hypothetically to covenants as to "Buddhists, Communists, or Mohammedans," when the social problem associated with the covenants was obviously that of racial discrimination against blacks.

sions in American political thought and confront the dilemma posed by such tensions for constitutional decision-making. If *Shelley* can thus illuminate a great deal about modern controversy in constitutional law, this provides another important reason to mark the decision as we observe the bicentennial of the Constitution.

Law students confront *Shelley* in the section of their casebook dealing with the Fourteenth Amendment state action requirement. This requirement flows partly from the text—section one reads that “No State shall . . .” —but perhaps even more fundamentally from the conventional understanding of constitutional rights as regulating the relationship between individuals and the state rather than the relationship among individuals.⁴⁴ With respect to equal protection, the underlying assumption, rooted in liberal political theory, was that in general government does not act to harm an individual’s interests, or the right to equal protection, by allowing the “natural” forces of individual choice (the market) to operate.

In this traditional view, the state’s failure to act constituted a denial of equal protection only when it involves a (perhaps willful) failure to enforce legal rights found in the positive or common law of the state or in the federal constitution.⁴⁵ The systematic refusal to protect blacks against lawless behavior of white persecutors, for example, literally denied them the “protection” guaranteed them. But viewing state failure to enforce pre-existing rights as denial of equal protection did not erode the traditional view that equal protection does not create any affirmative duties on the state to ensure any sort of equality except (a fairly constrained concept of) equality before the law.⁴⁶ Modern inroads on the traditional constraint of the state action requirement are generally rooted in a changing vision of the meaning and application of the underlying constitutional protection.

Shelley is a hard case because racially restrictive covenants appear as classic examples of the purely private discrimination that the Fourteenth Amendment has traditionally been held not to reach. It appears that the state merely acquiesces in private discrimination that is not prohibited by

pre-existing law. Nevertheless, adopting an argument set forth in a well-known law review article,⁴⁷ the Supreme Court converted *Shelley* into a seemingly easy case by finding that *judicial enforcement* of the covenants constituted the required state action.⁴⁸ The Court acknowledged that the restrictive covenants themselves were purely private and that therefore they were valid so long as the parties voluntarily adhered to their terms.⁴⁹

Even so, given that “judicial action is not immunized from the operation of [the Fourteenth Amendment],”⁵⁰ the Court concluded that the state had acted discriminatorily. And with the state action problem solved, the court quickly rejected the view that state neutrality was demonstrated by the equal enforcement of all covenants, without regard to race. Considering that Fourteenth Amendment rights are “personal rights,” the Court reasoned, it is “no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color.”⁵¹

But hard cases are not so easily converted into easy ones. It is not difficult to sense the Court’s sleight of hand, at least by reference to traditional starting points. No one doubts that judicial activity is “state action;” the question is necessarily whether that sort of state action can make the state accountable for the racial discrimination originating in private agreements. While one can choose to say that enforcement of racial covenants deny rights of ownership and occupancy “on grounds of race and color,” one might as plausibly assert that these rights were “denied” because, given the private covenants, they simply were never brought into existence by a valid transaction. As Herbert Wechsler put it, rather than calling judicial enforcement of racial covenants “a state discrimination,” we might as well have called it “a legal recognition of the freedom of the individual.”⁵²

It is perhaps easy to see that some state involvements in private discrimination, such as the uniform provision of fire and police service, are so neutral as to not implicate the state in that discriminatory behavior. But judicial enforcement of valid private rights

arguably is neutral in much the way. The right to obtain enforcement of legally recognized rights is a traditional civil right, one that is prominently included in the Civil Rights Act of 1866 on which the Fourteenth Amendment was based.⁵³ Many state con-

44. The classic formulation is in the *Civil Rights Cases*, 109 U.S. 3 (1883).

45. See, e.g., Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 Yale L.J. 1353 (1964).

46. See Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. Pa. L. Rev. 473, 479-80 & n. 11.

47. McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional*, 33 Calif. L. Rev. 5 (1945).

48. 334 U.S. at 14-18.

49. *Id.* at 13-14.

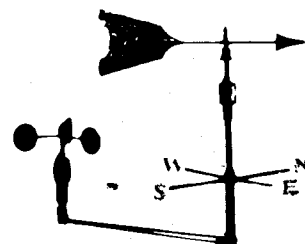
50. *Id.* at 18.

51. *Id.* at 22.

52. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 29 (1959).

53. Section 1 of the Civil Rights Act guaranteed to blacks the “full and equal benefit of all laws and proceedings for the security of person and property.” See 42 U.S.C. sect. 1982 (current codification).

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stitutions include provisions that guarantee access to the courts to enforce private rights.⁵⁴ In terms of modern equal protection doctrine, it is difficult to find that state enforcement of racial covenants invokes an explicit racial classification, evidences a discriminatory purpose on the part of the state, or is without a rational basis.

Equally troubling, if the state becomes fully accountable for the exercise of private rights whenever the machinery of the state is required to make them effective, it would appear that a startling range of private decisions would suddenly become subject to constitutional constraints. The classic example is the individual home-owner who must rely on state power, in the form of assistance of law enforcement personnel and judicial enforcement of trespass laws, to make effective his discriminatory decision not to be a host to a black dinner party guest.⁵⁵ Since neither the Supreme Court nor the commentators are willing to extend the principle of *Shelley* to such a case, we are struck by the Court's failure to articulate any limiting principle that would square its state action holding with the assumptions that have been thought to undergird the requirement.

Discussion of the *Shelley* opinion thus raises several main themes. First, notice that the discussion of state

action shades into the issue as to the reach of the equal protection clause. The state always holds some relationship to discriminatory behavior—even non-action can be seen as a form of “state action”—and the question becomes whether the equal protection clause requires the state to act other than as it does. This is why so many commentators look most immediately to *Shelley* to develop the case for the view that that state action should not survive as an independent question.⁵⁶

Second, not surprisingly, in the years since *Shelley* commentators have sought a meaningful account of its holding and a principled description of its boundaries, whether in terms of the state action limitation or equal protection law. Finally, a question raised is whether *Shelley* can be reconciled with the liberal political underpinnings of state action and equal protection described above. A brief review of the principle alternative rationales will point up the enduring nature of the questions raised by the case.

Most commentators have sought to avoid some of the problems created by *Shelley*'s emphasis on judicial enforcement by focusing the search for state action on the state common law policy of recognizing the legal validity of racially restrictive covenants. Given that traditional state policy in most

states was not to prohibit most forms of private racial discrimination, however, there has remained the need to explicate why mere recognition of the validity of the covenants violates equal protection norms as well as to offer a meaningful limiting principle. Several alternatives have been offered.


One explanatory (and limiting) principle focuses on the right to own and dispose of property as a basic civil right. The 1866 Civil Rights Act provided that “[a]ll citizens of the United States shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property.”⁵⁷ Racially restrictive covenants, on this view, have the effect of preventing black citizens from being able to purchase and hold real property on equal terms with whites and thus interferes with the enjoyment of this basic civil right.⁵⁸ This argument's equal protection credentials are arguably enhanced by the Supreme Court's decision in *Jones v. Alfred H. Mayer Co.*,⁵⁹ holding that the 1866 Act prohibits private discrimination in housing. The 1866 Act was, after all, the pattern for section one of the Fourteenth Amendment.⁶⁰

The central issue raised is whether the equal “right” to own and enjoy protects a purchaser against a private party's discriminatory covenant. Alternatively, this “right” may only stand in opposition to legally-imposed restrictions on property rights. Traditionally, the “right” to own and enjoy property did not speak to private discrimination, and most scholarly commentators have viewed *Jones* as a misconstruc-

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54. *E.g.*, III. Const. art. 1, sect. 12.

55. See Wechsler, *supra* note, at 29-30. The examples could be proliferated, such as whether *Shelley* prohibits the legal effectuation of testamentary dispositions with religious or racial conditions attached. *Id.*

56. *E.g.*, L. Tribe, American Constitutional Law 1168-70 (1978); Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. Pa. L. Rev. 1349, 1352 (1982); Horowitz, *The Misleading Search for "State Action"*, 30 S. Cal. L. Rev. 208 (1957).

57. See 42 U.S.C. sect. 1982 (current codification).

58. Indeed, the Court in *Shelley* pointed to the Civil Rights Act in deciding *Shelley*, though it did not rest its decision on the statute. 334 U.S. at 10-11.

59. 392 U.S. 409 (1968).

60. See R. Berger, *Government by Judiciary* 20-36 (1977).

tion of the 1866 Civil Rights Act.⁶¹ Ironically, despite the equal protection clause's more open-textured language, the Supreme Court has through the years asserted that even equal protection does not of itself prohibit voluntary private discrimination in housing.⁶²

Moreover, unless the property right principle were artificially limited to protecting only the interests of willing sellers and buyers,⁶³ it may not provide the needed limit. After all, a guest in a private home holds a sort of property interest called a license. While licenses traditionally could be withdrawn at will, it was equally clear prior to *Shelley* that property interests could be contractually limited so as to preclude a valid conveyance to members of the black race. If such definitions of property rights are unconstitutional because they deny more basic acquisition rights to blacks, we are still in need of an explanation as to the point at which such rights may be said to give way, and as to why.

An alternative is to contend that state law reveals its lack of neutrality by failing to apply the traditional prohibition on unreasonable restraints on alienation as to racially restrictive covenants.⁶⁴ Racial covenants had a tremendous impact on the alienability of land and do seem to cut against the traditional values favoring alienability. Racial covenants were defended on the ground that they were less complete than the total prohibitions on alienability condemned at common law. Even so, many have suspected that in a context not infected with pervasive racism the covenants may well have been condemned by courts seeking to explicate the underlying policies at stake in this area of property law.⁶⁵

The "unreasonable restraints" rationale for *Shelley*, however, is not likely to yield much satisfaction. To begin, even the few courts that found that the covenants ran afoul of the common law principle favoring alienability nevertheless found that similar covenants against use and occupancy would not run afoul of the principle.⁶⁶ While use and occupancy covenants create the same result, the distinction between use and alienation restrictions is firmly rooted in the law of property. If there is something non-neutral, or violative of equal protection, about recognizing the validity

of racial covenants, it is the unacceptability of the law of the state permitting this kind of pervasive disadvantage of a race of people rather than significant incongruity with the balance of common law property rules.

Finally, as with the redescription of the "right" to property described above, the theory based on the "unreasonable restraints" doctrine informs us that the state must not stand by and allow pervasive racial discrimination to occur, but without offering a constitutional theory by way of justification. In both cases, however, traditional notions that the state may, if it chooses, establish a neutral posture toward private discrimination is undercut. While both rationales focus on property rights, no reason appears why the same approach to "rights" could not be extended to settings beyond both race and property. As explications of *Shelley*, they are at most starting points rather than complete theories.

A potentially more fruitful approach to explaining and limiting the decision would be to focus more on the nature of the private activity involved than on

the legal rules that sanction it. Two years prior to *Shelley* the Supreme Court in *March v. Alabama*⁶⁷ applied the First Amendment to the act of dis-

61. See C. Fairman, 6 History of the Supreme Court of the United States, Reconstruction and Reunion: 1874-1888, at 1207-58 (1971); Henkin, *On Drawing Lines*, 82 Harv. L. Rev. 63, 82-87 (1968). But see Levinson, Book Review, 26 Stan. L. Rev. 461 (1971).

62. See *Reitman v. Mulkey*, 387 U.S. 369 (1967) (acknowledging that state neutrality toward private discrimination is acceptable if state does not in some way act to encourage or authorize the discrimination).

63. As, for example, in Justice Vinson's dissenting view in *Barrows v. Jackson*, 346 U.S. 249 (1953), that a damage remedy is distinguishable from the equitable relief sought in *Shelley* because it operates directly against the breaching covenantor rather than against the third party who entered into a contract with a willing seller. For a similar view and its critique, compare Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. Pa. L. Rev. 1 (1959), with Lewis, *The Meaning of State Action*, 60 Colum. L. Rev. 1083, 1109-1114 (1960).

64. See generally Choper, *Thoughts in State Action*, 1979 Wash. U. L. Q. 757, 769-71.

65. For useful discussion, see C. Vose, *supra* note 3, at 19-22. Vose observes that a few courts did invalidate racial covenants as restraints on alienation, finding that such pervasive limits on sale for such an extended group of people effectively deprived the fee simple possessor of complete ownership.

66. E.g., *White v. White*, 108 W. Va. 128, 150 S.E. 531 (1929).

67. 326 U.S. 501 (1946).

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tributing religious literature on the sidewalk of a privately-owned company town. The Court reasoned that the private town was engaged in a public function and was thus subject to freedom of speech restrictions.⁶⁸ It has been contended that since the system of putting racial covenants in place had the effect of closing off entire areas of cities, it amounted to a form of private zoning that effectively performed a public function subject to constitutional constraints.⁶⁹

This reading claims the virtue of explaining and limiting *Shelley* by reference to the systematic discrimination represented by the covenants. It poses no threat to homeowners' decisions about their guests. It also seems plausible, in part because the system of covenants appear to have been virtually imposed on districts by a well-organized minority and to have worked against the will of later buyers and sellers who had little effective choice with respect to them. State recognition of the validity of the covenants, and its enforcement of them, might thus be viewed as a delegation of a public function.

The covenants differed from governmental zoning, of course, in that no original homeowner ever had the decision literally imposed on her as a regulation from without; she understood it to be an agreement with others based on mutual consideration. That such agreements were voluntary is shown by the fact that many housing districts

included covenants that were signed by less than a hundred per cent of the owners. Even later owners of the property had the choice whether to buy property that was so encumbered, though admittedly the extent of the covenants would have impacted on the extent of meaningful freedom the buyer enjoyed. In any event, given that the purpose of private covenants is always to regulate the use and disposition of property, it might be contended that it is odd to describe that very function as governmental simply because many property owners are involved.

To the extent that we are applying the Supreme Court's more recent standard requiring that a "public function" is one "traditionally exclusively reserved to the State," restrictive covenants probably do not qualify.⁷⁰ It has been observed, however, that the Court's more recent formulations downplay the emphasis in *Marsh v. Alabama* and other cases on the relevance of the extent of the power of private groups to impact on constitutional values in determining whether they perform a "public function."⁷¹ The point is well taken, but it perhaps proves too much, at least to the extent that the use of public function analysis is intended to preserve a link between *Shelley* and the traditional assumptions underlying state action doctrine.

If private power to affect constitutional values is the key, it would appear that the less formal methods for ensuring segregation in housing

employed after *Shelley*, or even simply the pervasive housing discrimination of a racist society that produces black ghettos, should also qualify as forms of "private zoning." It might be contended that when the state holds the restrictive covenants to be valid, it effectively delegates authority to act in a way not present in the other settings. The state's property law rules and enforcement machinery can be viewed as such a delegation, just as the Court has suggested that the granting of power to labor unions as exclusive bargaining representative makes them accountable under the Constitution.⁷²

On the other hand, it can be argued that the state permits intrusion on the ideal of a meaningful equal opportunity to obtain housing virtually as much by acquiescing in the less formal exercise of private power as by enforcing the covenants. In each case, the state acts neutrally or indifferently to the results of the exercise of private power—in one case by giving effect to private agreements consistent with our common law heritage and in the other by doing nothing at all. If the state is as responsible for the results of private ordering based on common law property concepts as it is for the consequences of granting unique and exclusive power to elected unions to represent workers, it is not apparent why it should not also be responsible for permitting pervasive racial discrimination in housing. That the system of enforcing racially restrictive covenants is more effective than less formal approaches does not seem like a distinction of constitutional significance.⁷³



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68. *Id.*
69. *E.g.*, Lewis, *supra* note 63, at 1116-20; Groner & Helfeld, *Race Discrimination in Housing*, 57 Yale L.J. 426, 454 (1948).
70. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974); *accord*, *Flagg Bros. v. Brooks*, 436 U.S. 149, 157 (1978).
71. *E.g.*, G. Stone, L. Seidman, C. Sunstein, & M. Tushnet, *Constitutional Law* 1528 (1986) [hereinafter cited as G. Stone]. The suggestion made is that a private group's action may be viewed as "public" because its power rivaled that of the state, rather than because of any particular function it had assumed." *Id.* at 1524.
72. *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944).
73. Indeed, Justice Douglas once contended that the pattern of discriminatory practices of builders, real estate brokers, and mortgage lenders constituted private zoning and hence created a state duty to retain fair housing legislation. *Reitman v. Mulkey*, 387 U.S. 369, 381 (1967) (Douglas, J., concurring).

That the "delegation" of power to regulate the use and alienability of property is probably not the key to *Shelley* is illustrated by the treatment that non-racial property restrictions receive by modern courts. Use regulations promulgated and enforced by modern homeowners-associations by and large have been treated as private in nature, though subject to statutory or public policy limitations.⁷⁴ In a number of instances, use regulations that would have been questionable as public zoning restrictions have been upheld as valid private restrictions.⁷⁵ The key to *Shelley* appears to be the quest for racial equality and an evolving sense of the concept of equal citizenship, rather than any uniform concept of public function.

With this key in mind, *Shelley* is best understood as a holding that, at least in the narrow context of the racial discrimination that has effectively denied the promise of freedom and equality to blacks, state neutrality in the face of debilitating patterns of discrimination amounts to a denial of equal protection of the laws. It is true, as noted above, that the holding in *Shelley* has been limited in application to racial covenants, and not in fact extended to private racial discrimination in housing generally. But this limit seems more formal than substantive in nature and reflects that "judicial enforcement" (or "public function") provides a hook for making *Shelley* appear to square with the traditional notions underlying the state action doctrine. This should not, however, blind us to the reality that *Shelley* is a new doctrine for a new time, and that it necessarily rests on the affirmative duty of the state to ensure a level of racial equality at the cost of limiting private liberty.

For many, this analysis of *Shelley* can only be disturbing. It seems reasonably clear that the decision to place the value of equality over liberty as to racial discrimination in housing would not have been the choice of most of the framers of the Fourteenth Amendment. The assumption underlying the state action doctrine and the equal protection clause was that, by and large, private liberty could be preserved while guaranteeing equality before the law. The decision to buy, sell, or encumber property would

almost certainly have been conceived as within the private sphere. Even the Congress that enacted the Civil Rights Act of 1875, which included many framers, would probably not have enacted the provisions of modern fair housing legislation.⁷⁶

It is true that the 1875 Act did prohibit private discrimination as to transportation, inns and hotels, and places of public amusement. And some proponents of the Act contended that features of these licensed and regulated businesses lent them a "public" character that carried with it a duty of non-discrimination and created a civil right of access to all members of the public.⁷⁷

74. See Ellickson, *Cities and Homeowners Associations*, 130 U. Pa. L. Rev. 1519, 1528 (1982).

75. Professor Ellickson observes that age discrimination as well as such mundane regulations as those dealing with exterior paint colors have been upheld, even though they would be of doubtful validity if contained in municipal zoning ordinances. *Id.*

76. For development of this view, see Avins, *Anti-Discrimination Legislation in Housing: A Denial of Freedom of Choice*, in *Open Occupancy v. Forced Housing Under the Fourteenth Amendment* 3 (A. Avins ed. 1963).

77. Indeed Senator Sumner expressed his view this way: "Show me, therefore, a legal institution, anything created or regulated by law, and I show you what must be opened equally to all without distinction of color." Cong. Globe, 42d Cong., 2d Sess. 242 (1871), quoted in Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 1972 Wash. U. L.Q. 421, 456 n.125.



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The more common defense of the legislation, however, focused on the common law right of access that purportedly existed as to each type of accommodation and the alleged failure of the states to enforce these common law rights.⁷⁸

Seen in this light, the Act arguably only remedied the breach of the rather prosaic affirmative state duty to enforce pre-existing rights. It was acknowledged that the purpose of the bill was to provide "a more efficient remedy" for the breach of these common law duties.⁷⁹ Indeed, at least one proponent even stated that the states could change their laws with respect to these facilities—presumably so as generally to permit arbitrary discrimination—but that they could not require non-discrimination in general and then authorize discrimination toward blacks.⁸⁰

But other evidence suggests that the traditional "liberal" paradigm of public

and private action was never as pure a conception as we sometimes assume. Congress had previously enacted legislation against discrimination by public conveyances, including the amendment of railroad charters to require non-discrimination on the basis of race as to any car.⁸¹ Those who rejected arguments on behalf of segregation and the right to discriminate based their vote on a conception of basic civil rights which common law rights of equal access embodied.⁸² This history buttresses the claim that "the equal protection clause, in the eyes of its contemporaries, froze into constitutional law the existing common law obligation of transportation companies to take all comers and to eliminate any possibility of their segregation."⁸³ Moreover, the 1875 Act itself did not provide any exceptions for states that had eliminated (or never adopted) such common law rights of access as to inns or places of public amusement, despite opposition

argument that many states did not require non-discrimination in these areas at common law.⁸⁴

Whatever the views of the supporters of the 1875 Act, however, the statute teaches us something. The common law recognized that some activities of private parties take on a public quality about them because of the nature of the rights and interests affected, the authority granted to the actor by the state, or by virtue of the expectations generated by customary practice that gives rise to common law rules. Discrimination by public conveyances and inns, for example, would have impacted adversely on the meaningful enjoyment of the right to travel, a traditional civil right, especially in the days when inns were few and far between.

While this form of reasoning was never applied to the acquisition of housing at common law, this common law insight at least prefigures the possibility of such an application in a positive state in which people now harbor expectations of state aid in various forms. *Shelley* must rest on a proposition that private racial discrimination that affects basic interests implicates equal protection concerns precisely because true equality, even equality before the law, will be absent without state intervention just as the right to travel would have been undercut without regulation of common carriers and inns. This application of equal protection is thus of a piece with the holdings that the right to counsel implies a state duty to supply an indigent with counsel,⁸⁵ and that equal protection requires

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78. See Avins, *The Civil Rights Act of 1875: Some Reflected Light in the Fourteenth Amendment and Public Accommodations*, 66 Colum. L. Rev. 873 (1967).

79. 2 Cong. Rec. 4082 (Senator Frelinghuysen), quoted in, Avins, *supra* note 78, at 903.

80. Avins, *supra* note 78, at 903 (summarizing Senator Frelinghuysen's remarks).

81. Frank & Munro, *supra* note 77, at 452-56.

82. *Id.* at 452-53. Even Senator Reverdy Johnson, the thoughtful conservative Senator who later opposed the Fourteenth Amendment, drew upon the familiar distinction between "civil" rights and mere "social" rights in supporting the legislation.

83. *Id.* at 455.

84. See *Id.* at 456; Avins, *supra* note, at 896 & n. 125.

85. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

the state to waive expenses to indigents on appeal.⁸⁶ *Shelley* suggests that the pursuit of racial equality, in some fairly rich sense, is a fundamental right; that right, however, is extended in *Shelley* beyond any original understanding of equal protection.

Two points may be added to those already made. First, the main limitation to *Shelley* suggested by this analysis is the recognition that it speaks to state duties with respect to racial equality and not necessarily to all other contexts. While the issue of racial equality has a special force in American history and law, a question raised is whether the positive character of the right recognized can be thus cabined in the long run. In the short run, it appears that the Supreme Court is back to a theory of state action that is in tension with *Shelley*, in part because its members sense that a general recognition of duties of intervention is the name of equal protection, beyond the narrow list of fundamental rights elaborated to date, would enmesh the Court more deeply yet in the difficult task of evaluating the competing claims of private groups in our society.

As to the reach of *Shelley* in the area of race, the Court has drawn its own boundaries but has never adequately explained *Shelley*. The most articulate alternatives propose a frank balancing of interests, the elaboration and application of the notion of customary public expectations as to equal treatment, and focus on the question as to when the demand for equal treatment runs up against constitutional constraints based on privacy and association interests.⁸⁷ In the end, each approach seeks to strike a balance between the goal of racial equality and competing values of constitutional weight.

Second, if *Shelley* is best explained as described here, and not by reference to judicial enforcement or public function, it appears to at least cut against the Supreme Court's more recent doctrine requiring a discriminatory purpose where a racial classification is not present.⁸⁸ *Shelley* can be seen as rejecting the state indifference to the impact of its policy of giving effect to private discrimination in the manner that it did. In turn, to the extent that *Shelley* is based on the state's failure to take account of the actual impact of its

policy of indifference to the results of private ordering, it shares a common premise with contentions for a more aggressive approach to defining the reach of *Brown v. Board of Education*⁸⁹ and in support of affirmative action.⁹⁰ Of one thing there is no room for doubt: *Shelley* is worth remembering for its current relevance, as well as for its historical impact.□

86. *Griffin v. Illinois*, 351 U.S. 12 (1956).

87. See Van Alstyne & Karst, *State Action*, 14 Stan. L. Rev. 3 (1961); Lewis, *The Role of Law in Regulating Discrimination in Places of Public Accommodation*, 13 Buff. L. Rev. 402 (1964); Henkin, *supra* note 47.

88. The "purpose" requirement was set forth in *Washington v. Davis*, 426 U.S. 229 (1976), and remains controversial to the present day.

89. 347 U.S. 483 (1954).

90. *Shelley* shares with the modern impulse for affirmative action the premise that state neutrality can be invidious when it fails to take into account the effects of past or present racial discrimination in formulating policies as to race. Some would defend affirmative action against constitutional challenge precisely on the ground that the state should be viewed as having an affirmative duty to remedy the effects of past discrimination. See G. Stone, *supra* note 71, at 608-09.

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