A NEW DEAL FOR THE PROTECTION OF FOURTEENTH AMENDMENT RIGHTS: CHALLENGING THE DOCTRINAL BASES OF THE *CIVIL RIGHTS CASES* AND STATE ACTION THEORY

*Ira Nerken**

State action theory is not so much a way of thinking about contemporary problems of civil rights and liberties as it is a substitute for thought. Confronted with private conduct infringing on fourteenth amendment concerns, the Supreme Court persists in maintaining that it cannot provide a remedy because the amendment only applies if the Court can find some way to characterize the conduct as not private at all, but rather as action by the state.

In 1883, the Supreme Court stated that the fourteenth amendment's very words forbade federal intervention to remedy claimed violations of civil rights unless there was something the Court called "State action."[1] So persuasive have lawyers and judges found the Court's analysis that they have rarely read the amendment themselves, relying instead on this nineteenth century exegesis. The consequences of such reliance are illustrated by the opening summary of a Note analyzing recent state action developments:

> By [its] express terms, . . . section 1 of the fourteenth amendment . . . proscribe[s] only governmental activities. [It] impose[s] no restrictions whatsoever on the conduct of private

* Attorney, Bureau of Consumer Protection, Federal Trade Commission. B.A. Yale Univ., 1972; J.D. Harvard Law School, 1976.

The views and opinions expressed herein are personal to the author. They are not intended nor should they be read as reflecting the views and opinions of the FTC.

The author wishes to express his appreciation to Professor Duncan Kennedy for his overall encouragement and insight and also would like to thank Professor Laurence Tribe for his helpful comments.

[1] Civil Rights Cases, 109 U.S. 3 (1883). Section 1 of the fourteenth amendment reads in part: "No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

> parties, a distinction recognized by the Supreme Court in its earliest decisions interpreting the fourteenth amendment.[2]

Before going further, it is well to lay this bugaboo to rest.

In the post-*Lochner* era, it is widely recognized that non-criminal private action infringing on the rights of others is sanctioned by law, law that is made or enforced by the state. With this recognition, simple distinctions between what is public and what is private generally have fallen as the complex interrelationship between state power and private economic power has been made apparent. Where once private power could boldly claim a right to be free of state control, now the state is seen to have affirmative obligations to protect individuals from the depradations characteristic of unrestrained action in the private sector.[3]

Thus, logically, the state action prohibited by the fourteenth amendment is always there.[4] Yet having come this far, we have avoided re-examining the relationship of private economic power and the state's recognized obligation to protect and extend individual rights and liberties within the context of the fourteenth amendment. It would be more than fair to say that, in the area of state action decisionmaking, the Court has failed to emerge from the *Lochner* era. Indeed, this would be a highly accurate characterization of the role of state action doctrine. State action theory has tied the destiny of protection of civil rights and civil liberties to nineteenth century theories of private property and private power and their privileged position vis-a-vis the state. Exploration of this thesis is a major task of this Article, which attempts to provide a means of releasing us from the tenacious hold of an obsolete and restrictive fourteenth amendment doctrine. In particular, this Article will argue that much of the doctrinal power which sustained state action theory from its inception was power derived from one of the most forceful concepts of nineteenth

---

[2] Note, *State Action and The Burger Court*, 60 VA. L. REV. 840 (1974). *See also* Note, *State Action: Theories for Applying Constitutional Restrictions to Private Action*, 74 COLUM. L. REV. 656 (1974).

[3] The affirmative obligation of the state is evidenced by legislation covering such concerns as labor relations, social security, consumer protection, and health care; together they comprise what is commonly called the "welfare state." *See generally* Reich, *The New Property*, 73 YALE L.J. 733 (1964).

[4] *See* Black, *Supreme Court, 1966 Term — Foreword: "State Action," Equal Protection and California's Proposition 14*, 81 HARV. L. REV. 69, 70 (1967) (footnote omitted): "We are now travailing after an answer to the problem posed by the 'state action' doctrine. Just look: 'No state shall . . . nor shall any State. . . .' I enlist myself with those who see the way to get this goose out of the bottle as, again, one of great simplicity: 'Yes, of course, but in all cases you put, in all cases that come to court, some state does.' "

century judicial theory: liberty of contract. On the now discredited liberty of contract theory state action rose but did not fall, and that is perhaps the most curious aspect of modern state action decisionmaking.

In *Shelly v. Kraemer*[5] the Court denied the rationale which had sustained state action theory until that time in holding that a restrictive covenant, a mere contract, was not exempt from the prohibitions of the fourteenth amendment. Enforcement of contracts, even as to private property, was declared to be state action, but the implications of this holding were ignored. *Shelley* was isolated on the judicial landscape of modern state action decisionmaking: the messenger was blamed for the message.

In *Burton v. Wilmington Parking Authority*,[6] the Court had the opportunity to clarify the scope of the state action doctrine,[7] but instead announced that the doctrine could only be elaborated on an ad hoc basis. *Burton* involved the refusal of a private restauranteur, leasing his restaurant from a city parking authority, to serve a black customer. A Delaware statute declared that keepers of inns, restaurants and other accomodations were not obliged by law to serve anyone "whose reception or entertainment by him would be offensive to the major part of his customers, and would injure his business."[8] Relying on the statute, the restauranteur refused to serve a black. The Delaware court found that there was no state action.[9]

The Supreme Court held that the discrimination did involve the state, but merely listed any number of ways in which the state could be seen to have acted rather than stating the reasoning which led to that conclusion.[10] The Court did not identify any controlling factors and, as if to rob the decision of all precedential value, ended by saying that the opinion did not hold that the state may not allow racial discrimination in buildings it leases or is associated with, but only that it may not lease public property "in the manner and for the purpose shown to be the case here."[11]

---

[5] 334 U.S. 1 (1948).

[6] 365 U.S. 715 (1961).

[7] *See* Lewis, *Burton v. Wilmington Parking Authority — A Case Without Precedent*, 61 COLUM. L. REV. 1458 (1968).

[8] DEL. CODE tit. 24, § 1501 (1953).

[9] 39 Del. Ch. 10, 157 A.2d 894 (1960).

[10] The factors considered by the Court included leasing the building and not including an anti-discrimination clause; payment of janitorial costs; providing convenient parking space for diners in the restaurant located in the municipal Parking Authority Garage; and placing flags on the rooftop. 365 U.S. at 720, 723-24.

[11] *Id.* at 726.

To justify its almost mysterious handling of the case, the Court cited, *inter alia*, the *Civil Rights Cases* and *Shelley* for the proposition that private action is not the subject matter of the fourteenth amendment. The Court insisted that fashioning and applying a precise formula to equal protection questions was an "impossible task" and "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[12] For all its verbiage, this opinion avoided the clear state action issue presented. As Justice Stewart noted in his concurrence, the result could be reached "by a route much more direct than the one traveled by the Court." Observing that the Supreme Court of Delaware had upheld the restaurant-teur's right to deny the black service on the basis of the statute mentioned above, Stewart pointed out that the record made no suggestion that the black customer was an "offensive" individual. "The highest court of Delaware," declared Stewart, "has thus construed this legislative enactment as authorizing discriminatory classification based exclusively on color. Such a law seems to me clearly violative of the Fourteenth Amendment. . . ."[13]

---

[12] *Id.* at 722. As Professor Lewis observed, "[i]t would be futile, indeed it would completely disregard the Court's admonition, to attempt to state the principle of law that emerges from or governs the case. This is the disturbing feature. It is disturbing not only because the Court provided so little guidance for those who must make judgments on the basis of the Court's decisions, but also, and more importantly, because there is lacking any apparent assurance that the Court properly exercised its adjudicatory function. Lewis, *supra* note 7, at 1462-63.

[13] 365 U.S. at 726-27 (Stewart, J., concurring). The Court persisted in asking "How did the state act?" even though *Shelley* should have made that question irrelevant by showing that the state acts whenever it enforces the "common law." Within the codified common law in *Burton*, in fact, lay one of the greatest ironies of the case, had the Court chosen to look: the statute in question was the direct descendant of a law which was passed specifically to resist the Civil Rights Act of 1875, the very act which Justice Bradley struck down as unnecessary federal interference in the Civil Rights Cases, 109 U.S. 3 (1883).

In 1873, noting that the law which was to become the 1875 Civil Rights Act had been proposed in Congress, the Delaware legislature declared "uncompromising opposition" to the proposal, and "to all other measures intended or calculated to equalize or amalgamate the negro race with the white race. . . ." R. BARDOLPH, THE CIVIL RIGHTS RECORD: BLACK AMERICANS AND THE LAW 1849-1970, 75-76 (1970), *quoting* a resolution passed by the Delaware legislature, Del. Laws 1871-1873, ch. 612, p. 686. Within a matter of weeks after passage of the 1875 Civil Rights Act, Delaware passed its statute declaring that innkeepers and other proprietors were not obligated to serve those "offensive to a major part of the customers." Delaware was plainly defying the Civil Rights Act. BARDOLPH, *supra*, *quoting* Del. Laws 1875, ch. 194, p. 322. *Accord*, C. MANGUM, THE LEGAL STATUS OF THE NEGRO 30-31 (1940).

Thus the implicit finding in *Burton* that enforcement of the statute, by itself, was private action, indicated that the Court had failed to learn what the Delaware legislature had

In sifting and weighing the facts of later cases, the Court has claimed that fairly obvious state involvement was actually not involvement at all, with the result that private groups are given license to wield substantial power without constitutional limitations. This problem is illustrated by the disturbing situation presented by the Court's decision in *Jackson v. Metropolitan Edison Co.*[14] *Jackson* held that when a heavily regulated utility enjoying a monopoly position by virtue of state law cut off a customer's electricity for alleged nonpayment, the termination was not state action and therefore due process clause requirements could not attach to the cut-off. Even though the state had approved the utility's tariffs, including its regulations regarding electricity terminations for nonpayment, Justice Rehnquist argued for the Court that this was insufficient state involvement absent a separate hearing by the state regulatory

---

realized seven years before the Civil Rights Cases were decided: to obtain the effect of prohibited state action, the state need only make available to the private sector "neutral" law for the enforcement of discriminatory conditions imposed by private parties. This manipulation of law to achieve superficially private discriminatory orderings is discussed at pp. 316-18 *infra*. *See also* the Jim Crow legislation of Tennessee, which was involved in the Civil Rights Cases, at p. 318 *infra*.

Two years after *Burton* was decided, the Delaware courts were again faced with a restauranteur who had relied on the Delaware innkeeper statute to discriminate against blacks, and a challenge to that law by a black who refused to leave the restaurant and was convicted of criminal trespass. State v. Brown, 56 Del. 571, 195 A.2d 379 (1963). This time the defendant introduced evidence that the law was discriminatorily motivated. The Delaware court, however, refused to be persuaded; it noted that since the statute had been reenacted in 1953, and since the legislature is presumed to consider changes in constitutional law at that time, such historical evidence was not binding. The innkeeper statute was seen to codify the common law, and thus not to constitute state action. Further, the court held that private owners of public accommodations may "constitutionally refuse service to patrons because of discrimination predicated upon a racial classification." *Id.* at 581, 195 A.2d at 385. However, the court went on to frame the question somewhat differently: "The question is whether the State may, at the request of a private owner of a public accommodation, arrest, prosecute and convict one who refuses to leave after being denied service because of his race and after being requested to leave by the owner. . . . [T]he question presented is whether judicial action expressed in this manner contravenes the requirements of the Fourteenth Amendment and Federal Constitution." *Id.* The court then found that the state could not assist the private owner in this manner — citing Shelley v. Kraemer. *Id.* at 582, 195 A.2d at 386. Like the Court in *Shelley*, the court here refused to concede that the decision of the private party to exclude, standing alone, was unconstitutional. However, the one non-violent means that the private party had to effect his will — his private power — was denied him.

After all the "sifting and weighing" in an attempt to find "non-obvious" state involvement, what had been obvious since the decision in *Shelley* ended the problem that *Burton* had so struggled with. Private power was made to act responsibly, with minimum apology by the state.

[14] 419 U.S. 345 (1974).

commission on the termination procedure. Justice Rehnquist's argument that the state had therefore not put its "*imprimatur*"[15] on the termination led Professor David Shapiro to conclude that the end result of the Court's perverse logic

> seems to be that a utility's practice is state action if the regulatory commission is sufficiently concerned or moved by others to investigate it — at least if it ends by uttering words of approval — but is not state action if the commission so wholeheartedly or routinely approves as not to investigate at all.[16]

Presumably the Court's response would have been: "quite right; the state really has to be *involved.*" We are thus invited to a pointless debate as to just when the state's relationship to the utility reaches the point of "meaningful involvement."[17] Reaching that inquiry is the indirect result of continuing to accept the assertion that the issue can only be resolved in terms of state responsibility. Thus, after condemning the non-integrated approach to the utility's conduct taken by the Court, the *Harvard Law Review* felt obliged to remind the court that

> [t]he object of state action doctrine is to preserve the autonomy of individual decisionmaking while preventing the state from

---

[15] *Id.* at 357.

[16] Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 357 (1976). Professor Shapiro went on to note that "[i]n what seems to be a final irony, Justice Rehnquist, at the end of the 1975 term, joined in a dissenting opinion arguing that a utility's filing a tariff with a state commission constituted sufficient involvement with the state to exempt the practice contained in the tariff from the reach of the federal antitrust laws. Cantor v. Detroit Edison Co., 96 S. Ct. 3110, 3128 (1976) (Stewart, J., dissenting). The dissent distinguished *Jackson* on the basis that exemption from the antitrust laws 'is a question of legislative intent, not constitutional law, and must be answered on a separate line of authority.' *Id.* at 3133 n.10 (Stewart, J., dissenting)." Shapiro, *supra*, at 357 n.327.

[17] In fact, the debate is harmful as well as pointless. Particularly in the wake of *Jackson*, the general effect of looking for deliberate state action is to put a premium on avoiding state regulation or drastically narrowing the scope of regulatory inquiry. One effect is to discourage reform legislation. Since even minimal codification of the common law crosses the state action barrier, the legislature is faced with a Hobson's choice. For example, in deciding whether to codify self-help repossession, the legislature must choose between inflicting the full panoply of fourteenth amendment procedural requirements and their attendant costs on creditors or denying consumers protection from the unbridled force of the common law doctrine. Thus a state can only avoid "responsibility" by acting irresponsibly.

> refusing to accept responsibility for decisions that it has in fact made. The fundamental state action question, therefore, is whether to assign responsibility for a particular decision to the state or to a private party.[18]

Jackson preserved the "autonomy of individual decisionmaking" with a vengeance. In arguing that the provision of electricity, far from being a public function, is "not traditionally the exclusive prerogative the state,"[19] the Court brought the doctrine to an impasse. Even accepting the Court's belief that the state is neither involved nor responsible, challenging the conclusion that this stops the Court from applying the fourteenth amendment may break more fertile ground.

Unfortunately, the Court has continued to re-till barren soil in debating the nature and significance of the "nonobvious" state involvement. Yet the "obvious" message of *Shelley* is not so easily avoided; the demand to address the question of private power as it affects civil rights and civil liberties can be ignored but it will not go away. This Article will not propose solutions to the difficult problem of holding private power, enforced by law, accountable to constitutional rules. That is a line-drawing task which can only be carried out after courts begin to address the issue in the manner suggested here.[20]

In the first section of the Article, state action's anachronistic character will be revealed through the examination of its *laissez-faire*-liberty of

---

[18] *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 47, 150 (1975).

[19] 419 U.S. at 352-53. The Court also rejected the argument that acts of all businesses "affected with a public interest" might constitute state action. *Id.* at 353-54. As observed in *The Supreme Court, 1974 Term, supra* note 18, at 141 n.18, the theory that acts of businesses affected with a public interest were state action "had never been assumed valid since its original rejection in the Civil Rights Cases." This rejection is presumed from the fact that Harlan made that argument in dissent.

[20] Although Judge Friendly advocates a two-tiered fourteenth amendment analysis which would require a lesser showing of state involvement to constitute "state action" where there is racial discrimination, he has recognized that the appropriate inquiry involves the degree of state-enforced coercion affecting protected rights rather than a search for a particular kind of state involvement. In Coleman v. Wagner College, 429 F.2d 1120 (2d Cir. 1970), where a private college had expelled students without a hearing, Judge Friendly, concurring, found "state action" in legislation which required schools to submit their disciplinary regulations to the state but was silent in regard to the content of the regulations: "[T]he ordinary citizen must find it puzzling enough that there is a constitutional limit on the regulation of student conduct at Buffalo and Stony Brook [state universities] but none at Columbia and Cornell [private universities] that courts should not be averse to recognizing state action with respect to the latter when New York has departed even in a rather minor way from the hands-off policy followed [prior to the 1969 legislation]." *Id.* at 1127 (Friendly, J., concurring). *See generally* H. FRIENDLY, THE DARTMOUTH COLLEGE CASE AND THE PUBLIC-PRIVATE PENUMBRA (1968).

contract heritage. In the second section, the florescence and withering of that sensibility in every area of doctrine except state action is described. The Article will conclude by showing how the apparently disparate strands of current state action analysis can be resolved into one basic question which can and must be asked: how is the state to regard the power relationship between property owners and those citizens whose rights are affected by that ownership?

I. STATE ACTION AND PRIVATE CONTRACT: DOCTRINAL FORMULATION AND INTEGRATION

State action decisionmaking begins with the *Civil Rights Cases*,[21] in which Justice Bradley declared that the fourteenth amendment only prohibited "State action of a particular character." "Individual invasion of individual rights," Justice Bradley asserted, "is not the subject-matter of the amendment."[22]

The *Civil Rights Cases* decision invalidated the Civil Rights Act of 1875, which created a private cause of action and criminal penalties for discrimination in public accommodations,[23] as an overextension of Congress' power to enforce the fourteenth amendment. The Court declared

---

[21] 109 U.S. 3 (1883).

[22] *Id.* at 11.

[23] "An act to protect all citizens in their civil and legal rights," ch. 114, 18 Stat. 335 (1875). The act reads in relevant part: "Sec. 1. That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

"Sec. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities or privileges in said section enumerated, or by aiding or inciting such denial, shall for every such offense forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt with full costs; and shall also, for every such offense, be deemed guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars or shall be imprisoned not less than thirty days nor more than one year: *Provided*, That all persons may elect to sue for the penalty aforesaid or to proceed under their rights at common law and by State statutes; and having so elected to proceed in the one mode or the other, their right to proceed in the other jurisdiction shall be barred. But this proviso shall not apply to criminal proceedings, either under this act or the criminal law of any State: *And provided further*, That a judgment for the penalty in favor of the party aggrieved, or a judgment upon an indictment, shall be a bar to either prosecution respectively."

that the state was not involved in racial discrimination in public accommodations; such discrimination was merely "private" action. The decision signalled total abdication of federal responsibility for protection of the rights of newly freed black people through the fourteenth amendment.[24] It reflected the rapid deterioration of the nation's commitment to the civil rights of blacks as the country emerged from Reconstruction.[25]

---

[24] Donald King and Charles Quick refer to the *Civil Rights Cases* opinion as representing "the culmination of the restrictive rationale developed during the initial stage" of dealing with the legal rights of blacks after the war. King & Quick, *An Overall View: A Primer of Legal Process*, in LEGAL ASPECTS OF THE CIVIL RIGHTS MOVEMENT 13 (D. King & C. Quick eds., 1965). *See also* A. BLAUSTEIN & R. ZANGRANDO, CIVIL RIGHTS AND THE AMERICAN NEGRO 283 (1968): "The Civil Rights Cases of 1883 confirmed the fact that the national government was officially abandoning the negro to the caprice of state control. The next thirty years indicated the extent to which the Negro, though nominally freed from slavery, could be repressed and reduced to the status of second class citizenship by the force of law and the force of custom sustained by law."

Professor Scott notes how quickly the South perceived the political implications of the Civil Rights Cases opinion, quoting from a letter by Justice McBride of South Carolina to Chief Justice Waite congratulating the latter for Justice Bradley's opinion. "It has done much to confirm me in the doctrine of State Rights, and the probabilities of the revival of that doctrine seem imminent," wrote Justice McBride, adding that the South, desiring only to "use all lawful means to keep the white man supreme in politics," had moderate goals. Scott, *Justice Bradley's Evolving Concept of the Fourteenth Amendment from the Slaughterhouse Cases to the Civil Rights Cases*, 25 RUT. L. REV. 552, 569 (1971).

[25] *See* Graham, *The Waite Court and the Fourteenth Amendment*, 17 VAND. L. REV. 525, 527-28 (1964): "[The justices who made up the majority in the Civil Rights Cases knew and dealt with the problem of slavery] as one which emancipation had barely touched. Slavery for them was a system of caste — of *institutionalized* race prejudice, disability and discrimination. . . . [The fourteenth amendment was meant to eliminate these incidences of slavery.] All this was taken for granted in the late 1860's and '70's. . . . Backsliding and hedging developed later and culminated in the sectional bargain or 'settlement' of 1877. Justice Bradley's *Civil Rights* opinion thus was indeed 'a period piece' — an accommodation to national inertia and letdown, to the absurd belief that if the country only would ignore vestigial racism (and the then-recent constitutional pledges) the problems might disappear."

Particularly in view of Justice Bradley's membership in the Electoral Commission which reached the historic Compromise ending the Hayes-Tilden electoral crisis (and Reconstruction) in 1877, it can be argued that The Civil Rights Cases reflected the Supreme Court's accession, if not its contribution, to the Compromise. The electoral crisis was precipitated by contested electoral ballots in four states; the settlement of the dispute would determine the election. Congress chose four justices to sit on the electoral commission established to resolve the dispute. Two, Miller and Strong, were Republicans; two, Clifford and Field, were Democrats. The justices themselves elected Justice Bradley.

As regards the Compromise itself, historian Samuel Eliot Morison has noted that "there seems no doubt that a deal was made by the Republicans with Southern Democratic leaders, by virtue of which, in return for their acquiescence in Haye's election, they promised on his behalf to withdraw the garrison and to wink at non-enforcement of

The decision is usually considered to be of limited use in furthering modern understanding of state action doctrine; its major contribution being the problematic phrase itself, which is seen as growing ever more meaningless and hollow.[26] This Article will suggest that a revised understanding of Justice Bradley's decision is fundamental to the development

---

Amendment XV, guaranteeing civil rights to the freedmen." S. MORISON, OXFORD HISTORY OF THE AMERICAN PEOPLE 733-34 (1971). Scott, *supra* note 24, at 565-66, argues that the very liberal views Justice Bradley held elsewhere are totally absent in the Civil Rights opinion because of the Court's involvement in the Compromise. *See also* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 70-71 (3d ed. rev. 1974): "The cumulative weakening of resistance to racism was expressed also in a succession of decisions by the United States Supreme Court between 1873 and 1898. . . . In the *Slaughterhouse Cases* [83 U.S. (16 Wall.) 36 (1873)] and in *United States v. Reese* [92 U.S. 214] and *United States v. Cruikshank* [92 U.S. 542] in 1876 the Court drastically curtailed the privileges and immunities recognized as being under federal protection. It continued the trend in its decision in the *Civil Rights Cases* of 1883 by virtually nullifying the restrictive parts of the Civil Rights Act. . . . The Court [in the *Civil Rights Cases*], like the liberals, was engaged in a bit of reconciliation — reconciliation between federal and state jurisdiction, as well as between North and South, reconciliation also achieved at the Negro's expense."

[26] *See, e.g.*, Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083, 1085 (1960). The principle that the state and not the private individual is the addressee of the fourteenth amendment continues to be the law today. But the principle is such that the textual form can remain virtually intact while being interpreted by judges or commentators whose viewpoints are as different as those embodied in the majority and dissenting opinions in the *Civil Rights Cases*. *See also* Black, *supra* note 4, at 95: "Taking [scholarly commentaries on state action] as a whole, what we see exhibited is a 'doctrine' without shape or line. The doctrine-in-chief is a slogan from 1883. The sub-doctrines are nothing but discordant suggestions. The whole thing has the flavor of a torchless search for a way out of a damp echoing cave."

Too often, scholarly attention seems to focus precisely on the question of how the state is acting, with results that are less than satisfactory. *See* Lewis, *supra*, at 1084-85: "What are the limits of the phrase [in a later passage of the Civil Rights decision] 'acts done under State authority'?. . . Whether an act has the sanction of the state is by no means a simple problem. Does the state 'sanction' an individual act by enforcing it or recognizing its validity in a judicial proceeding? Does any amount of state help, however slight or inconsequential, make an act something more than that of a 'mere individual'? Can the state act by failing to act?" Professor Black has noted that "[n]othing in [Lewis'] article . . . has at all shown why or how, or to whom, the concept [of state action] has been in any degree 'helpful'; it has been presented, true to life, as a string of conundrums, not of solutions. So much of the commentary of this type, though thoughtful in its way, seems to me thoughtful about the wrong questions, because of insufficient probing of the assumption which makes necessary or relevant the questions being asked." Black, *supra* note 4, at 92. While he arrives at his conclusion from a different perspective — the underlying "assumption" troubling Black is that the state might ever be said *not* to be acting where significant acts of race discrimination are allowed to continue — it is nonetheless essentially the same as that arrived at here. The attempt to find doctrinal coherence by asking when the state is or is not acting is a search for a will o' the wisp, not likely to advance discussion of either the doctrine or the substantive issues to which it is applied.

of a coherent theory of state action and its doctrinal evolution. A recognition of the central role of nineteenth century contract theory in sustaining the arguments the Court put forward is necessary to this understanding. The doctrines and concepts underlying "liberty of contract" theory, which would dominate American jurisprudence into the first third of the twentieth century, were brilliantly integrated into the opinion in a manner calculated to buttress an otherwise vulnerable argument.[27] Through the work of a judge usually in the vanguard of judicial thinking,[28] the *Civil Rights Cases* turned the fourteenth amendment's guarantees into a tool of judicial conservatism, if not reaction, with effects which to this day are quite visible in civil rights and civil liberties adjudication.

Although state action was never systematically tied to contract theory, the two doctrines served purposes so similar that three general functional comparisons can be made. Each of the following connections identifies an aspect of contract and state action doctrine which was well adapted to the legal and political climate of the late nineteenth century and early twentieth century.[29]

A. State Action's Private-Public Distinction: The First Contract Connection

In ending primary and direct federal protection of civil rights, the *Civil Rights Cases* declared that Congress' "power to enforce" the four-

---

[27] Professor Kinoy notes that the Court "faced the immensely difficult task [in The Civil Rights Cases] of constructing a legal rationale which could justify the conclusion already reached by the new national majority — that the primary responsibility for the enforcement of the rights of the freedmen was to be turned over to the individual southern states." Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUT. L. REV. 387, 396 (1967). Justice Bradley was an acknowledged master of the judicial craft. *See* Fairman, *What Makes a Great Justice? Mr. Justice Bradley and the Supreme Court 1870-1892*, 30 B:U.L. REV. 49 (1950); Scott, *supra* note 24, at 569, who emphasizes the "colossal wrongness" of the Court's opinion in the Civil Rights Cases, but notes that "Bradley was a great jurist. He rewrote the Constitution persuasively."

The first Justice Harlan, in his eloquent dissent in the Civil Rights Cases, said he could not "resist the conclusion that the substance and spirit of the recent Amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism." 109 U.S. 3, 26 (1883). The subtlety and ingenuity displayed by Justice Bradley in itself might lead to the conclusion that the opinion was the product of a mind fully comprehending the most sophisticated attacks on the approach adopted, and cognizant of the validity of such attacks, and thus better able so to structure his argument as to anticipate them and blunt their effectiveness.

[28] *See* Fairman, *supra* note 27.

[29] *See generally* A. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887–1895 (1960).

teenth amendment "through appropriate legislation"[30] would be limited to granting courts the indirect, corrective power to undo the effects of state law and acts only after finding that the state had "acted" to deprive its citizens of their rights under section 1 of the Fourteenth Amendment.[31] Acts of "private" discrimination, no matter how vicious or pervasive, were beyond Congressional jurisdiction.

The indirect, corrective role of the federal judiciary required that the Court do more than simply determine that there had been an interference with civil rights.[32] Instead, it was to decide whether there was a relationship between purported acts of mere "interference" with or "invasion" of individual rights, characteristic of "private" action; and the "impair[ment] . . . depriv[ation] . . . destr[uction] . . . abrogation and denial . . ."[33] of rights, characteristic of "state" action. The fourteenth amendment, argued Justice Bradley, prohibited only the latter.

Discriminatory acts of the type the 1875 Civil Rights Act had tried to reach in the *Civil Rights Cases* — violations of rights by a railroad, an inn, and two theatres — were mere "invasions" of individual rights. "Unsupported by state authority," such acts were "simply private wrongs" perpetrated by private parties. The civil rights guaranteed by the fourteenth amendment "cannot be impaired by the wrongful acts of individuals"; the *Civil Rights Cases* plaintiffs could not be heard to complain where their rights had only been "invaded" but not "impaired." The plaintiffs' rights remained "in full force, . . . presumably [to be] vindicated by resort to the laws of the state for redress."[34]

---

[30] U.S. CONST. amend. XIV, § 5.

[31] "In order that the national will, thus declared, may not be a mere *brutum fulmen*, the last section of the Amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited state laws and state Acts, and thus to render them effectually null, void and innocuous. This is the legislative power conferred upon congress, and this is the whole of it. . . ." 109 U.S. at 11.

The Civil Rights Act of 1875 was unconstitutional because it operated directly against private discrimination, regardless of the correctness of state law. *See id.* at 14, 19: "An inspection of the [Act of 1875] shows that it makes no reference whatever to any supposed or apprehended violation of the Fourteenth Amendment on the part of the States. . . . It proceeds *ex directo* to declare that certain acts committed by individuals shall be deemed offences, and shall be prosecuted and punished by proceedings in the courts of the United States. It does not profess to be corrective of any constitutional wrong committed by the States; it does not make its operation to depend upon any such wrong committed . . . [The Civil Rights Act of 1875 is] not corrective legislation; it is primary and direct; it takes immediate and absolute possession of the subject of the right of admission to inns, public conveyances, and places of amusement."

[32] *See* note 21 *supra*.

[33] 109 U.S. at 17-18.

[34] *Id.* at 17.

Private "invasion," Justice Bradley declared in the opening paragraphs of the opinion, "is not the subject-matter of the amendment. . . . It has a deeper and wider scope. It nullifies and makes void all state legislation, and State action of every kind which *impairs* the privileges and immunities of citizens . . . ."[35] What is remarkable about drawing a fine conceptual distinction between "impairment" and "invasion" is that the word "impairment" never appears in the fourteenth amendment. Though the opinion relied on the strictly literalist argument that, since the fourteenth amendment says "No state," only "state action" is prohibited, it then conveniently ignored its own literalism. One of the most critical words in the fourteenth amendment's text,[36] "abridge[ment]," was used by Justice Bradley only in quoting the amendment itself. The word "impairment," on which the Justice did rely, has deep associations not with the fourteenth amendment, but with article I, section 10 of the Constitution: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ."[37] The significance of this association was not likely to be lost (at least on a subconscious level) on a Court which had parsed that phrase several years before.[38] Nor was this a coincidence. After quickly stating the text of the fourteenth amendment and immediately restating it in terms of impairment[39] of rights, Justice Bradley attempted to clarify the distinction between unconstitutional legislation which, like the Act of 1875, prohibits individual "invasions" of rights, and constitutional legislation which is corrective of prohibited "impairments" of rights by a state — state action. He suggested the following example:

> An apt illustration of this distinction [between direct and corrective legislation] may be found in some of the provisions of

---

[35] 109 U.S. at 11 (emphasis added).

[36] "No State shall make or enforce any law which shall *abridge* the privileges and immunities of citizens. . ." U.S. CONST. amend XIV, § 1 (emphasis added).

[37] *Id.* art. 1, § 10.

[38] *See* Edwards v. Kearzey, 96 U.S. 595, 599-600 (1877) (Swayne, J.) (retroactive application of a homestead exemption law unconstitutional as an impairment of the obligation of contract): "The Constitution of the United States declares that 'no State shall pass any . . . law impairing the obligation of contracts'. A contract is the agreement of minds, upon a sufficient consideration, that something specified shall be done, or shall not be done. The lexical definition of 'impair' is 'to make worse; to diminish in quantity, value, excellence, or strength; to lessen in power; to weaken; to enfeeble; to deteriorate.' Webster's Dict. [sic] 'Obligation' is defined to be 'the act of obliging or binding; that which obligates; the binding power of a vow, promise, oath, or contract,' & c. Id. The word is derived from the Latin word *obligatio*, tying up, and that from the verb *obligo*, to bind or tie up. . . ."

[39] 109 U.S. at 10-11.

> the original Constitution. *Take the subject of contracts, for example.* The Constitution prohibited the States from passing any law *impairing* the obligation of contracts. This did not give to Congress power to provide laws for the general enforcement of contracts; nor power to invest the courts of the United States with jurisdiction over contracts, so as to enable parties to sue upon them in those courts. It did, however, give the power to provide remedies by which the *impairment* of contracts by State legislation might be counteracted and corrected: and this power was exercised [by Congress]. . . . No attempt was made [by Congress] to draw into the United States courts the litigation of contracts generally; and no such attempt would have been sustained. . . .
>
> And so in the present case, until some State law has been passed, or some State action through its officers or agents has been taken, . . . no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity. . . .[40]

A modern perspective allows the identification of a more fundamental flaw in the contracts clause-fourteenth amendment analogy: the failure to recognize that state power requires very different obligations under the contracts clause and the fourteenth amendment. Contract has come to be seen not as an institution existing independent of and prior to the creation of the state, but rather as the embodiment of sovereign power and will, ready to enforce privately imposed obligations. The contracts clause orders the states to lend their power to the maintenance and enforcement of private contractual relations, thus not to "impair" contractual obligations. The Court, in fact, had a basic understanding of this aspect of contract.[41] The demand being made on the states by the contracts clause was a conservative one with which the states were likely to comply

[40] *Id.* at 12-13 (emphasis added). It is difficult to image a less "apt" illustration: if the black man had as little trouble enforcing his rights as people ordinarily have enforcing contracts, the Court could have celebrated the end of racial discrimination and gotten on to other things. Conversely, if people had as much difficulty enforcing their contracts as blacks had in enforcing their rights, the Court would have celebrated the end of the American economic system.

[41] In Edwards v. Kearzey, 96 U.S. at 600, the Court gave the following highly interesting review of the state's role in "private" contracts: "The obligation of a contract includes every thing within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it, the contract, as such, in the view of the law, ceases to be, and falls into the class of those

automatically save in the most unusual circumstances. The fourteenth amendment, however, made a nearly opposite demand on state power in ordering that state power be withheld (by neither "making" nor "enforcing" any law) from relations which "abridged the privileges and immunities" of citizens. In a federation which had only recently ceased to enforce such institutions as slavery and the Black Codes, this was a potentially revolutionary demand on state power.[42]

In linking the contracts clause to the fourteenth amendment, Justice Bradley minimized the opportunity for making such a demand. The public-private distinction he thereby imposed on the question of rights enforcement seemed almost inevitable, but in fact was not. The "making or enforcing" of laws which "abridged" the rights of citizenship suddenly had two levels, public and private, where there had been only one before. Private parties could "invade" or "interfere" with individual rights, much the way they could interfere with or breach a contract, but, so the argument went, private parties could not "impair" individual rights any more than they could "impair" the obligation of contract.

The almost subliminal connection made in Justice Bradley's opinion between "private action" and contract was tightened in a later, critical passage. He confronted the troublesome fact that the declaratory section of the Civil Rights Act of 1866,[43] an act of unquestioned constitutional-

---

'imperfect obligations,' as they are termed, which depend for their fulfilment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable. 'Want of right and want of remedy are the same thing'. 1 Bac. Abr., tit. Actions in General, letter B."

[42] *Cf.* Civil Rights Cases, 109 U.S. at 45 (Harlan, J., dissenting) (emphasis in original): "In illustration of its position, the Court refers to the clause of the constitution forbidding the passage by a state of any law impairing the obligation of contracts. That clause does not, I submit, furnish a proper illustration of the scope and effect of the fifth section of the Fourteenth Amendment. . . . [A] prohibition upon a State is not a *power* in *Congress* or *in the national government*. It is simply a *denial* of *power* to the *State*. And the only mode in which the inhibition upon state laws impairing the obligation of contracts can be enforced, is, indirectly, through the courts, in suits where the parties raise some question as to the constitutional validity of such laws. The judicial power of the United States extends to such suits for the reason that they are suits arising under the Constitution. The Fourteenth Amendment presents the first instance in our history of the investiture of Congress with affirmative power, by *legislation*, to *enforce* an express prohibition upon the States."

[43] *See* 42 U.S.C. §§ 1981 & 1982 (1970). These provisions were derived from Section 1 of the Civil Rights Act of 1866, Ch. 31, 14 Stat. 27, which was reenacted after adoption of the fourteenth amendment (in July of 1868) by the Act of May 31, 1870, Ch. 114, 16 Stat. 140, 144, and then codified as §§ 1977 and 1978 of the Revised Statutes of 1874, whence they were carried into Title 42 of the U.S. Code. The 1866 Act, as reenacted in 1870, declared all persons to have the same rights to contract, sue and be sued, purchase and sell real and personal property, etc. "as [are] enjoyed by white citizens."

ity,[11] lacked any reference to state action or law in its guarantees of rights; it apparently reached private conduct directly, not simply through indirect "corrective" prohibitions against the state.[45] A civil rights act passed in 1866 seemed to be able to do what the Court now said a civil rights act in 1875 could not do. This inconsistency was only slightly mitigated by the fact that the penal section of the 1866 Act was directed to acts "under color of state law, statute, ordinance, regulation or cus-

[11] Regarding Justice Bradley's own commitment to the constitutional validity of the 1866 Act, *see* Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock & Slaughter-House Co. 15 F. Cas. 649 (C.C.D. La. 1870) (No. 8,408) (Bradley, Circuit Justice), *rev'd sub nom.* Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872). Justice Bradley participated in the *Slaughter-House Cases* at the appeals level as the Justice riding the deep South's Fifth Circuit. After holding that the newly enacted fourteenth amendment did guarantee the right to pursue the trade of slaughtering, Justice Bradley faced the problem of justifying his enjoining the operation of the state-sponsored slaughter-house, which was putting the plaintiffs out of business. The federal courts had not as yet been given jurisdiction over such cases. Justice Bradley ruled, however, that the Civil Rights Act of 1866, even though passed before the fourteenth amendment, *see* note 43 *supra*, gave jurisdiction to the federal courts. *See* Scott, *supra* note 24, at 554. It would clearly have been difficult at the time of the Civil Rights Cases decision to say, even had he wanted to, that the 1866 Act was unconstitutional.

In the Supreme Court's decision, Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872), Justice Bradley not only offered his own dissent, but joined in that of Justice Field, which relied in part on the 1866 Civil Rights Act. 83 U.S. (16 Wall.) at 91, 92. (Field, J. dissenting).

[45] In Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), the Warren Court contended that the declaration of rights in the first section of the 1866 Act was meant to cover "private" as well as "governmental" (*i.e.*, public or state) interference with rights. The penal section of the Act, both as initially passed and later reenacted, only punished regulation or "custom." The Court argued that Congress' failure similarly to qualify the rights as declared in both the original and reenacted first section ("all persons . . . shall have the same right . . . as is enjoyed under color of state law, statute, ordinance, or custom by white persons") implied that the declaratory section swept more broadly than the penal section into the private area.

Professor Fairman has called the Court's conclusion on this point, based on a bold reinterpretation of legislative history, an "effort of marvelous fragility." "[T]he Court," he comments, "appears to have had no feeling for the truth of history, but only to have read it through the glass of the Court's own purpose. It allowed itself to believe impossible things — as though the dawning enlightenment of 1968 could be ascribed to the Congress of a century agone [sic]. . . . If the 1860's are to be called to reprove the practices of the 1960's, let the lesson be restrained and truthful: that a Congress reflecting a wide range of opinion determined that the members of the emancipated race were now citizens of the national community, and secured to them the equal capacities and immunities that at the moment seemed appropriate. Measured from the situation six years earlier, this was a worthy achievement." C. FAIRMAN, 6 HISTORY OF THE SUPREME COURT OF THE UNITED STATES (Reconstruction and Reunion: 1864–88, Part I) 1257, 1258-59 (P. FREUND, ed., 1971) (footnote omitted). *See also* Note, *Section 1981 and Private Groups: The Right to Discriminate Versus Freedom from Discrimination*, 84 YALE L. J. 1441 (1975).

tom."[46] How Justice Bradley coped with this potential liability to his argument, using it to support his conclusion that the fourteenth amendment did not protect against "private wrongs," can only be understood by concentrating on the use of the connection to contract:

> In the Revised Statutes [reenacting the 1866 Act], it is true, a very important clause, to wit, the words "any law, statute, ordinance, regulation or custom to the contrary notwithstanding," which gave the declaratory section its point and effect, are omitted; but the penal part, by which the declaration is enforced, and which is really the effective part of the law, retains the reference to State laws . . . thus preserving the corrective character of the legislation. . . . The Civil Rights Bill here referred to is *analogous in its character to what a law would have been under the original Constitution, declaring that the validity of contracts should not be impaired*, and that if any person bound by a contract should refuse to comply with it, under color or pretence that it had been rendered void or invalid by a State law, he should be liable to an action upon it in the courts of the United States, with the addition of a penalty for setting up such an unjust and unconstitutional defence. *In this connection* it is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be *impaired* by the wrongful acts of individuals. . . . [They are] simply . . . private wrong[s]. . . .[47]

Justice Bradley could not have been drawing a connection with the declaratory section of the Act since he acknowledged that the statutory language itself made no distinction between public and private wrongs. Similarly, the penal section said nothing about the public or private nature of the "rights guaranteed by the Constitution"; it only stated that the federal government would criminally prosecute violations under color of statute. Justice Bradley drew his connection to neither of these highly pertinent though unhelpful sections, but rather linked his key concept of civil rights violation as "private wrong" to the concept of contract. In

[46] The penal section of the Act, § 2, provided "That any person, who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act . . . shall be deemed guilty of a misdemeanor. . . ." For evolution of the provision into 18 U.S.C. § 242 (1970), see United States v. Price, 383 U.S. 787, 804 (1966); Screws v. United States, 325 U.S. 91, 98-99 (1945).

[47] 109 U.S. at 16-17 (emphasis added) (citation omitted).

Justice Bradley's skillful hands, enforcement of civil rights became a problem no different from that posed by contract enforcement; race relations were as private an affair as contractual relations.

B. The "Fictive Option" and "Private" Interference with Rights: The Second Contract Connection

Having accomplished his first objective, constructing a public-private distinction in the civil rights area by wedding everything but "state action" to concepts of private contract, Justice Bradley was able to move to the most daring and critical part of his argument: that no matter how grievous the violation of a black man's civil rights might be, "if [that violation was] not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State. . . ."[48] The assertion that the black person's rights "remained in full force" involved an elaborate fiction, most easily understood as having two interrelated parts: first, that there was a body of state laws to which the black man could "resort for redress" and, secondly, that the black man could resort to any option at all. The successful perpetration of both these fictions owed much to Justice Bradley's reliance on a contract connection.

Obviously, the black man could look at, if not to, a body of state law governing different aspects of private relations, including tort, property, criminal, and contract law. Justice Bradley argued that federal law which operated "*ex directo*" in areas covered by such state law was necessarily duplicative, an overreaching of Congressional power, destructive of states' rights under the federal system: nothing less than a direct attack on the tenth amendment's reservation of powers to the states.[49]

---

[48] *Id.* at 17.

[49] *Id.* at 13-15: "Such legislation [under the fourteenth amendment] cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. . . . That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the State legislatures and to supersede them. . . .

"If [the 1875 Civil Rights Act] is appropriate for enforcing the prohibitions of the amendment, it is difficult to see where it is to stop. Why may not Congress with equal show of authority enact a code of laws for the enforcement and vindication of all rights of life, liberty and property? . . . [W]hy should not Congress proceed at once to prescribe due process of law for the protection of every one of these fundamental rights, in every possible case, as well as to prescribe equal privileges in inns, public conveyances and theaters? . . . The assumption [that the prohibitions of the fourteenth amendment give Congress direct power to 'legislate generally upon that subject' rather than only correctively] is certainly unsound. It is repugnant to the Tenth Amendment of the Constitution. . . ."

Direct civil rights legislation in the private law area, from this perspective, was not only unconstitutional, but absurd. Where a contract was breached, an individual neither looked to nor needed federal law for enforcement, for barring state "impairment" of the obligation of contract, his rights could be "vindicated by resort to the laws of the State for redress." Similarly, Justice Bradley said that the black man need not look to federal law when his civil rights were invaded. The black man had been emancipated for *twenty years*, the Civil War had been over some *eighteen years*.[50] The time had come, then, for the black man to learn to enforce his rights as a citizen the way others enforced their rights: for example, as contracting parties. But, as noted earlier, such a connection between contract and civil rights was totally specious.

For judges to free themselves from the contract analogy so persuasively put forward by Justice Bradley, they would have had to realize that contract enforcement and rights enforcement under state law differed fundamentally. Contract enforcement was so surely backed by state power that respect for contract rights was almost automatic. Rights enforcement was so totally ignored by state power that respect for the newly freed black man's civil rights was nearly nonexistent.[51]

There could be no more effective a rebuttal to the line of argument put forward in the *Civil Rights Cases* opinion than that offered by Justice Bradley himself eleven years earlier in his dissent in the *Slaughter-House Cases*.[52] There he envisioned a system of federal civil rights protection which would involve "little, if any, legislation on the part of Congress"; where fourteenth amendment rights violations would be regularly raised in individual lawsuits, with final reference to the federal courts. "As the privileges and immunities protected are only those fundamental ones

---

[50] *Id.* at 25. Justice Bradley continued this line of argument, actually put forward to counter views that the thirteenth amendment authorized the 1875 Civil Rights Act, by noting that "[t]here were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty and property the same as white citizens; yet no one, at that time, thought that it was any invasion of his personal *status* as a freeman because he was not admitted to all the privileges enjoyed by white citizens, or because he was subjected to discriminations in the enjoyment of accommodations in inns, public conveyances and places of amusement. Mere discriminations on account of race or color were not regarded as badges of slavery." *Id.* at 25 (emphasis added).

Compare id. at 43 (Harlan, J. dissenting): "I am of the opinion that such discrimination . . . [as that outlawed in public accommodations in the 1875 Civil Rights Act] is a badge of servitude the imposition of which Congress may prevent under its power, by appropriate legislation, to enforce the Thirteenth Amendment. . . ."

[51] *See* note 61 *infra*.

[52] 83 U.S. 36, 111 (1873) (Bradley, J., dissenting).

which belong to every citizen, they would soon become so far defined as to cause but a slight accumulation of business in the Federal courts."[53] Only under such circumstances could the fourteenth amendment arguably be operating as automatically as the contracts clause; only where the enforcement of the amendment's prohibitions was as regular and routine as the enforcement of the contracts clause's prohibition, could any valid "contract connection" be made. As Justice Bradley stated in the *Slaughter-House* dissent, "[l]ike the prohibitions against passing a law impairing the obligation of a contract, [the fourteenth amendment] would execute itself."[54]

The contracts clause was, indeed, self-executing. Were the fourteenth amendment similarly reinforced by federal power in the form of severe damage actions and/or penalties in federal court for its violation, civil rights of blacks and others could be expected to be honored as the rule, not the exception. Absent directly available federal power, applicable to all situations where the privileges and immunities of citizenship were abridged, however, the enforcement section of the fourteenth amendment[55] becomes a mere *brutum fulmen*, notwithstanding Justice Bradley's later protestations in the *Civil Rights* opinion.[56]

By withholding federal power to enforce black civil rights save where there was "state action," Justice Bradley effectively denied resort to any redress at all. "Presumably" a black person's rights "may be vindicated by resort to the laws of the state," argued the *Civil Rights Cases* opinion. The person who suffers when a black man's rights are violated, according to this rationale, is not so much the black man; his rights, while invaded, remain unimpaired. It is rather the violator, who by his discrimination "render[s] himself amenable to satisfaction or punishment; and amenable therefore to the laws of the State. . . ."[57] The proposition that the black man had the option of resorting to state laws to resist discrimination deserves closer examination. By relying on it, Justice Bradley, after having masterfully intertwined private contract and "private action," was able to harness the doctrinal power of liberty of contract theory and put it to work legitimizing civil rights violations by "private action."

The black who had been discriminated against by the private owner of a railroad, inn, or other public accommodation might seek to exercise

---

[53] *Id.* at 123-24 (Bradley, J., dissenting).

[54] *Id.* (Bradley, J., dissenting).

[55] U.S. CONST. amend. XIV, § 5.

[56] *See* 109 U.S. at 11.

[57] *Id.* at 17.

his option by suing the private owner in state court for breach of the common law duty imposed on keepers of public accommodations.[58] One of the cases before the Court in the *Civil Rights Cases* was *Robinson v. Memphis & Charleston Railroad*, a suit brought under the 1875 Civil Rights Act challenging the refusal of the railroad to seat Mrs. Robinson in the ladies' car on the train because she was black.[59] If the option Justice Bradley offered were truly available, Mrs. Robinson, having lost in the Supreme Court, could have returned to Tennessee and sued the railroad for failure to fulfill its obligations as a common carrier under state common law.

One problem with using state common law remedies for the vindication of rights which Congress seeks to guarantee on a nationwide basis is that each state has the power to repeal its common law. The Tennessee legislature had done just that in a law enacted three weeks after Congress passed the Civil Rights Act of 1875: *"Be it enacted by the General Assembly of the State of Tennessee,* That the rule of a common law giving a right of action to any person excluded from any hotel, or public means of transportation, or place of amusement, is hereby abrogated."[60] Tennessee's attempt to deny any legal remedy to the victim of racial discrimination in public accommodations was typical of states' efforts to frustrate civil rights plaintiffs.[61]

---

[58] Justice Bradley had stated that "[i]nnkeepers and public carriers, by the laws of the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them." 109 U.S. 25. *See also* Williams v. Carolina & W. R.R., 144 N.C. 498, 57 S.E. 216 (1907); Zabron v. Cunard S.S. Co., 151 Iowa 345, 131 N.W. 18 (1911). *See generally* Arterburn, *The Origin and First Test of Public Callings*, 75 U. PA. L. REV. 411 (1927).

[59] 109 U.S. at 8.

[60] Act of March 23, 1975, ch. 130, 1875 Tenn. Pub. Acts 216-17. *See* THE CIVIL RIGHTS RECORD: BLACK AMERICANS AND THE LAW, 82-83 (R. Bardolph ed. 1970).

[61] While no comprehensive discussion of the law of public accommodations and common carriers is attempted here, a cursory review of the laws of several states revealed that racial discrimination was legal in this area. For example, in State v. Steele, 106 N.C. 766, 11 S.E. 478 (1890), the court made an exhaustive investigation of the common law duties of innkeepers in a case involving ejection of a tradesman from an inn on non-racial grounds. The court noted that "[g]uests of a hotel, and travelers or other persons entering it with the *bona fide* intent of becoming guests, cannot be lawfully prevented from going in, or be put out, by force, after entrance, provided they are able to pay the charge . . . unless they be persons of bad or suspicious character, or of vulgar habits, *or so objectionable to the patrons of the house, on account of the race to which they belong*, that it would injure the business to admit them to all portions of the house." *Id.* at 782, 11 S.E. at 484 (emphasis added).

Like Tennessee, Delaware passed a statute changing the common law within weeks after passage of the 1875 Civil Rights Act. The statute declared the right of the owner of a

The state law to which Bradley had maintained the black person could resort was fast disappearing, replaced by an emerging doctrine which portrayed the decision to discriminate on the basis of race as a private, personal right under all circumstances. The doctrine, in effect, anticipated the approach taken in the *Civil Rights Cases* opinion by placing discrimination against blacks even in public accommodations squarely within the area of private prerogative which Justice Bradley would later call "private action." In fact, the Tennessee act not only abrogated the common law but declared that such undertakings as innkeeper and common carrier were absolutely private: the rights of such persons "to control access and admission or exclusion of persons . . . shall be as perfect and complete as that of any private person over his private house, carriage, or private theater, or places of amusement for his family."[62]

The further development of this trend was manifested by Tennessee's passage of what is widely regarded as the first Jim Crow statute,[63] which directed railroad companies to set up separate cars or portions of cars for first class negro passengers rather than placing them in second class accommodations as had been the custom. "In the ensuing twenty years," observed Professor Franklin, "separation of negroes and whites on public carriers became a favorite preoccupation of Southern legislators."[64] Thus by the time black plaintiffs were relegated to enforcing

---

public accommodation or common carrier to exclude or segregate those who "would be offensive to the major part of his customers and would injure his business." 15 Del. Laws, ch. 194, § 1 (1875). The statute, and the bearing it has on the later state action case of *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), is discussed at pp. 299-300 *supra*.

The Constitution adopted in Louisiana during Reconstruction contained an article which declared the right of all persons to be served in public accommodations without discrimination on account of race or color. LA. CONST. art. 13 (1868). Legislation prohibiting racial discrimination in public accommodations was passed to enforce this article, and never repealed. However, no post-Reconstruction Constitution, beginning with that adopted in 1879, contained the article guaranteeing rights in public accommodations. This led a court in 1944, in *dicta*, to maintain that the anti-discrimination law passed to enforce this article was repealed by implication when the article disappeared in 1879. *See* Vogel v. Saenger Theatres, 17 So.2d 467 (La. App. 1944). There is grave doubt as to whether the Louisiana civil rights statute enacted by a carpetbag legislature is still in effect. *See* Note, *The Matter of Racial Differences and Local Police Regulation*, 5 LOY. L. REV. 73, 74 (1949).

[62] Act of March 23, 1875, ch.130, 1875 Tenn. Pub. Acts 216-17.

[63] *See* Franklin, *History of Racial Segregation in the United States*, ANNALS, 6 (1956).

[64] *Id.* at 6. In fact, the lawmakers did not limit themselves to segregating transportation and accommodations. Justice White's concurring opinion in Evans v. Newton, 382 U.S. 296 (1966), recounts the similar changes wrought in Georgia's common law of

common law rights in state courts, they found that the common law itself had been abrogated.[65]

There was, then, only one realistic avenue still open to civil rights litigants: a direct constitutional challenge to the growing Jim Crow legislation itself. This was, of course, the approach which met with dismal defeat in the notorious "separate but equal" decision of *Plessy v. Ferguson*.[66] After *Plessy*, the only "right" which the black could "vindicate" by resort to state law was not to be placed in a car with whites.[67]

---

charitable trusts. Senator Bacon had given a park to Macon, Georgia, "for whites only," in accordance with recently adopted code provisions which made lawful a charitable trust which provided that "the use of said park . . . [may] be limited to the white race only . . . or to the colored race only. . . ." Ga. Code § 69-504 (1905), *quoted at* 382 U.S. at 305. Justice White offered extensive evidence that prior to that legislation, the common law of charitable trusts would not allow the limitation of use to less than the whole public. Therefore, he concluded, the revision "did involve the State in the private choice [of imposing racial conditions] by favoring private racial discrimination over private discrimination based on grounds other than race." *Id.* at 306-07. Although the Court ruled that the park could not be run on a segregated basis, the plaintiffs were eventually closed out by the judgment of the Court in Evans v. Abney, 396 U.S. 435 (1970), discussed at note 200 *infra*.

Note also that a full regime of racial segregation was in effect in the North by 1860. *See* WOODWARD, *supra* note 25, at 17.

[65] The logical next step, a federal suit charging that the common law abrogation was "state action" abridging the "privileges and immunities of citizenship," was mooted in Bell v. Maryland, 378 U.S. 226 (1964). There was nothing in Justice Bradley's opinion, in any event, to support the argument that service in public accommodations and on public carriers was a "privilege and immunity" protected under the fourteenth amendment from state infringement.

Justice Goldberg's concurring opinion in *Bell*, 378 U.S. at 306, maintained that Justice Bradley's opinion in the Civil Rights Cases was "expressly predicated" on what Justice Bradley had called the Court's "assumption that a right to enjoy equal accommodations and privileges in all inns, public conveyances and places of public amusement, is one of the essential rights of the citizen which no State can abridge or interfere with." 109 U.S. at 19. What Justice Goldberg overlooked, however, is that this assumption was only made arguendo. In the very next sentence Justice Bradley wrote that "[w]hether it is such a right, or not, is a different question which, in the view we have taken of the validity of the law [*i.e.*, the 1875 Civil Rights Act] on the ground already stated, it is not necessary to examine." *Id.* at 19.

A later point in the opinion finds Justice Bradley "conceding, for the sake of argument, that the admission to an inn, a public conveyance, or a place of public amusement, on equal terms with other citizens, is the right of every man and all classes of men." *Id.* at 24. The entire effect of the opinion is to cast in grave doubt whether the right to service in public accommodations and on common carriers was, except for purposes of argument, a "privilege and immunity" of citizenship under the fourteenth amendment.

[66] 163 U.S. 537 (1896).

[67] The statute under challenge in *Plessy* mandated segregated railroad cars, and exempted the railroad and conductor from legal liability for refusal to carry any passenger who refused to sit in the assigned car. Lousiana Railway Accommodations Act, Louisiana

There quite simply was no way for the black to vindicate his rights once the state action interpretation of the fourteenth amendment had been set in place by the *Civil Rights Cases* Court. The option Justice Bradley had offered him — vindication of his rights through resort to the laws of the state — was a fictive option. Though it was of no use to the black, it was of great use to a Court creating a doctrinal justification for denying meaningful protection of civil rights under the fourteenth amendment.

C. Portrayal of Gross Exploitation Within a Contractual Model: The Third Contract Connection

The Court's use of the fictive option device extended beyond civil rights adjudication to invalidate state laws which protected the welfare of workers. Here too the contractual model was applied to situations where exploitation prevailed over arm's-length bargaining. This section will compare the civil rights and labor law applications and place them within the context of nineteenth century legal and social doctrine.

The 1875 Civil Rights Act had represented a real option for blacks seeking to remedy private discrimination. Its effective implementation would have led to a major redistribution of power within the legal system with attendant changes in power relations within the economic and social systems. The black would have transacted his business in the private sector with the understanding that, behind his demand for service, lay the power of the federal courts which could be invoked directly if there was a refusal to deal on grounds of race. This, of course, has been our experience with the modern Civil Rights Acts.[68]

Laws, 1890, No. 111, pp. 152-54 *quoted* in BLAUSTEIN & ZANGRANDO, *supra* note 24, at 297-98. The exemption from liability was in response to the possibility of a suit for attempting to place someone in the wrong car (*i.e.*, the car of the other race). This led Plessy to make a highly contorted state action argument. To argue no further than that the state was denying him a right by not allowing him to sue when forced to sit with those of another race was, of course, self-defeating, in that it impliedly accepted the validity of racial segregation. Thus, Plessy was forced to argue that the exemption was state action not simply because it denied him a right to prosecute, but because this denial was somehow critically important to gaining the compliance of the railroad in segregating its cars: "The State very clearly says to the railway, 'You go forward and enforce this sytem of assorting the citizens of the United States on the line of race, and we will see that you suffer no loss through prosecution in OUR court.' Relying on this assurance, the company is willing to undertake the risk. Without it they might well shrink from such liability. The denial of *the right to prosecute*, then, becomes essential to the operation of the act, and if such 'denial' is in derogation of the restriction of the Fourteenth Amendment, the whole act is null and void." Brief for Plaintiff in Error at 8, Plessy v. Ferguson, 163 U.S. 537 (1896), *quoted in* BLAUSTEIN & ZANGRANDO, *supra* note 24, at 299.

[68] *See generally* Colley, *Civil Actions for Damages Arising Out of Violations of Civil Rights*, 17 HASTINGS L.J. 189 (1965).

The *Civil Rights Cases* Court, however, denied that racial discrimination was an inherent part of the system,[69] and through the state action argument left existing legal, political, and social structures intact. The fictive option allowed the Court to portray civil rights violations as the result of the black's failure to assert himself by resorting to state laws. The system was presented as self-correcting, provided the black cared enough to make it work; each civil rights violation being not a manifestation of a systematic bias, but a discrete transaction in which the black had failed to take advantage of the options available to him. The neutrality of the system was guaranteed, for the absence of state action, which the federal courts stood ready to assure, was presented as an indicator that the political system was dealing with blacks and whites on an evenhanded basis.

The effect of this argument was to thrust on individual black citizens primary responsibility for the protection of their rights and the advancement of their interests. The black was thus presumed to enter each commercial transaction as a free man, and was expected to make the best bargain he could. To sustain this argument, essentially a *laissez-faire* approach to fourteenth amendment civil rights protection, the Court drew on the conceptual power of liberty of contract theory and Social Darwinism. In this manner, the Court could use the fictive option device to atomize the problem of black civil rights, portraying violations as discrete, isolated, individual transactions, the outcome of which was determined by the individual circumstances and initiative of the black participant in each transaction. The doctrinal relationship between civil rights violations and contract can be clarified by further exploration of the assumptions inherent in this approach.

1. State Action, Private Action, and Liberty of Contract Theory

Contract law traditionally has stressed the exchange of promises, a presumably affirmative act of will on both sides resulting in mutual consent to an agreement.[70] The slave could not be said to "agree" to being treated in an inferior way: he was forced to accept such treatment. When Justice Bradley wrote in 1883, however, the "status" of the black

---

[69] *See* pp. 317-18 *supra*.

[70] *See* L. SIMPSON, 2 HANDBOOK OF THE LAW OF CONTRACTS § 3 (2d ed. 1965): "An agreement in the broadest sense of the word is a manifestation of mutual assent by two or more persons to one another. Agreement in its narrower sense as an essential element of a contract may be defined as a manifestation of mutual assent by two or more persons to affect their legal relations by means of a bargain concluded between them consisting of an exchange of mutual promises or an exchange of a promise for a performance."

had changed: he was a "free" person, free as any other citizen who could resort to the laws of the state for redress. Justice Bradley had warned against "running the slavery argument into the ground."[71] Slavery and similar servitudes, he noted, were "exacted from another without the latter's consent." "Is there any similarity," he asked,

> between such servitudes and a denial by the owner of an inn, a public conveyance, or a theatre, of its accommodations and privileges to an individual, even though the denial be founded on the race or color of that individual? . . . . [W]hat has it to do with the question of slavery?[72]

If abject racial discrimination had nothing to do with slavery, if there was, indeed, no similarity, it had to be because the discrimination by the railroad or inn was exacted with the black's consent, manifested by his failure to resort to state law. The railroad, innkeeper, or other owner might set extremely discriminatory terms, including total exclusion, and had the admitted power to do so, but the black had the power of resorting to the fictive option by refusing to agree to the terms. The Court thus assumed an exchange of promises whenever a putative civil rights violation took place. The railroad, for example, promised to serve the black only on discriminatory terms, and the black promised to abide by the terms and pay for his ticket. If the black refused to reach agreement on such terms, there was no contract, but there was also no violation of rights. If the railroad set the most extreme of discriminatory terms, refusal of service, this could be viewed as either an exercise of the right not to contract and thus purely private action: or an example of just the situation in which a free man could resort to the fictive option of requesting the state court to rid the transaction of its discriminatory term, returning it to a bargain between equal citizens in a neutral state.

The contractual model as presented seems strained in accommodating a highly exploitative relationship which looks more like slavery than like a normal contract. This was, however, within the emerging tradition of liberty of contract theory. Where state action theory would allow the Court to strike down federal legislation protecting black rights as an interference with "private action," liberty of contract theory would strike down state legislation protecting the worker's rights and public welfare through such devices as minimum wage and maximum hour laws, pro

[71] 109 U.S. at 24.

[72] *Id.* at 21.

union laws, and price regulation as an interference with the private "right to contract." From a doctrinal standpoint, the approaches were remarkably similar.

While liberty of contract theory as such was first articulated by the Supreme Court in *Allgeyer v. Louisiana*[73] in 1897, and most fully developed by the Court during the *Lochner* substantive due process era of the 1920's and 1930's,[74] it had been developing during the entire 19th century. Professor Morton Horwitz has discussed how the perceived dictates of 19th century market forces led to a judicial attack on the equitable conceptions formerly underlying contract theory, leading to liberty of contract theory and modern contract law:

> [I]n a society [such as that developing in late 18th and 19th century America] . . . principles of substantive justice were inevitably seen as entailing an "arbitrary and uncertain" standard of value. Substantive justice, according to the earlier view [of contract theory], existed in order to prevent men from using the legal system in order to exploit each other. But where things have no "intrinsic value," there can be no substantive measure of exploitation and the parties are, by definition, equal. *Modern contract law was thus born staunchly proclaiming that all men are equal because all measures of inequality are illusory.*[75]

Like contract theory, the rationale of the *Civil Rights Cases* decision recognized no "substantive measure of exploitation." The inquiry merely pointed to the options available to each side without evaluating relative values or the real bargaining power of each party. The proclamation of theoretical equality ignored the reality of grinding racial inequality. A comparison of a liberty of contract case decided at the height of the *Lochner* era with the *Civil Rights Cases* may help illustrate the conceptual unity of private liberty of contract and "private action," and thus allow greater understanding of how state action doctrine was able to grasp legal thought with the tenacious hold of Lochnerian contract doctrine.

---

[73] 165 U.S. 578 (1897).

[74] *See* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 550 (9th ed. 1975). The *Lochner* era takes its name from Lochner v. New York, 198 U.S. 45 (1905) (maximum hour legislation an unnecessary and unconstitutional interference with liberty of contract).

[75] Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, 918-19 (1974) (emphasis added).

In *Coppage v. Kansas*,[76] for example, the Supreme Court struck down as an unconstitutional infringement on liberty of contract state legislation which outlawed labor contracts conditioning employment on the laborer's promise neither to remain in nor join a labor union, so-called "yellow dog" contracts. Ignoring the realities of the labor market in which a laborer had no choice but to accept the terms of the employer, the Court maintained that the worker had an option: he could forego employment by exercising his right *not* to contract and join a union.[77] But the "full right" to join a union was a fictive option indeed. The refusal of the Court to lend the positive power of the state to the demand by the black for service and the demand of the laborer for the right to organize left existing power relations intact and ensured continued exploitation.

The effect of both decisions was to give the owner of property the real power to set conditions adverse to the interests of the exploited group, leaving only the fictive power to resist. That this was the result of striking down the 1875 Civil Rights Act was not lost on Justice Bradley. By its terms, the Civil Rights Act seemed to guarantee all persons the right to public accommodations, but Justice Bradley preferred to portray it as an attack on the liberty of the public accommodations owner to set the terms for use of his property.[78] The Court preserved the right of the owner to set conditions and the right of all persons to "full and equal enjoyment" of public accommodations by preserving the power of the owner and giving a fictive option to the black.

The conceit common to both the *Civil Rights Cases* and *Coppage* was that the Court could have it both ways by expanding the options of the exploited on a theoretical level without diminishing the real options of the exploiter. According to the Court, the law only could expand the options of those having sufficient initiative to better their own lot, and could do so only if the equal right of the property owner to exercise his

---

[76] 236 U.S. 1 (1915).

[77] Justice Pitney, writing for the Court, noted that "we do not intend to say, nor to intimate, anything inconsistent with the right of individuals to join labor unions. . . . Conceding the full right of the individual to join the union, he has no inherent right to do this and still remain in the employ of one who is unwilling to employ a union man. . . ." *Id.* at 19.

[78] "The essence of the law is, not to declare broadly that all persons shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances, and theatres; but that *such enjoyment shall not be subject to any conditions* applicable only to citizens of a particular race or color, or who had been in a previous condition of servitude." 109 U.S. at 9-10 (emphasis added).

own options through "private action" was not disturbed. Though this might mean imperfect equality in individual circumstances, it was only at this level of theoretical options that the Court could concern itself with equality; it was an imperfect world.[79] What made liberty of contract so attractive to the late 19th century and early 20th century judges was that it could so neatly justify a refusal to take on the "disillusioning" task of "analysis";[80] the role of the courts in a *laissez-faire* economy was to guarantee the enforcement of contracts, not to examine their justness. The same philosophy informed the state action doctrine. The Court was attempting to seem neutral and apolitical, returning to normalcy after the trauma of Reconstruction. It similarly portrayed its role as guaranteeing the stability of "private action," not examining that action for its substantive justice.[81]

Liberty of contract and state action grew out of similar appeals to 19th century notions of Social Darwinism. Graham Sumner, the noted Social Darwinist, published *What the Social Classes Owe to Each Other* in the same year that the *Civil Rights Cases* opinion was handed down. While praising the social progress made in the United States, Sumner commented:

> The modern [capitalist] system is based on liberty of contract, and on private property. *The ties by which all are held together are those of free co-operation and contract.*
>
> [T]he modern free system of industry offers to every living human being *chances of happiness* indescribably in excess of

[79] As Justice Pitney put it in *Coppage*, "[n]o doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it *naturally* happens that parties negotiating about a contract are not equally unhampered by circumstances. This applies to all contracts, and not merely to that between employer and employé. . . . [I]t is *from the nature of things impossible* to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights. *But the Fourteenth Amendment . . . recognizes "liberty" and "property" as co-existent human rights,* and debars the States from unwarranted interference with either." 236 U.S. at 17 (emphasis added).

[80] Professor Corbin observed that liberty of contract theory is itself a concept requiring "an analysis that it has seldom received and one which if made is at least mildly disillusioning." 6A CORBIN ON CONTRACTS 20, § 1376 (1962).

[81] In this regard, Professor Paul observed that there was a general understanding among the nation's lawyers and judges that the courts were the only institution capable of "assuring order during a period of social agitation." During this period the judiciary was under extreme pressure to limit a broad range of progressive reforms and freedom of contract doctrine was often the chosen means of invalidating legislation. *See* PAUL, *supra* note 29, at 13-18.

> what former generations have possessed. It offers *no such guarantees as were once possessed by some*, that they should in no case suffer.[82]

Sumner stressed what he considered a fundamental distinction in the historical movement from "status" to "contract": no "guarantees," but only "chances of happiness" or options. He depicted the freedom enjoyed by blacks in the 1880's as an example of the advantages of the modern system of contract:

> The Negroes, once slaves in the United States, used to be assured care, medicine, and support; but they spent their efforts, and other men took the products. They have been set free. *That means only just this: they now work and hold their own products, and are assured of nothing but what they earn.* In escaping subjection they have lost claims. Care, medicine, and support they get, if they earn it. Will any one say that the black men have not gained? . . . If any one thinks that there are or ought to be somewhere in society guarantees that no man shall suffer hardship, *let him understand that there can be no such guarantees, unless other men give them — that is, unless we go back to slavery, and make one man's effort conduce to another man's welfare.*[83]

This harsh viewpoint echoes in Justice Bradley's admonition that the black could no longer be the "special favorite of the laws," and in Justice Pitney's assertion that it was "impossible" to uphold the rights of property and contract without "recognizing as legitimate those inequalities of fortune that are the necessary result of exercise of those rights."[84]

While dismissing the ability of the law to guarantee better lives, both the *Civil Rights Cases* and the *Coppage* Courts ignored the fact that the statutes they struck down were attempts to do just that. In fact, there was

---

[82] G. SUMNER, WHAT THE SOCIAL CLASSES OWE TO EACH OTHER 56-57 (Caxton ed. 1970).

[83] *Id.* at 57.

[84] Coppage v. Kansas, 236 U.S. 1, 17 (1915). Ironically and somewhat mysteriously, Sumner concludes his discussion by noting that there will always be some who will maintain that a better life can be assured by society: "Of course, if a speculator breaks loose from science and history, and plans out an ideal society in which all the conditions are to be different, he is law-giver or prophet, and those may listen to him who have leisure." SUMNER, *supra* note 82, at 57.

no iron rule requiring the Court to strike down any attempt to legislate practical versus theoretical guarantees of the range of options recognized as liberty. As Professor Hurst commented in discussing the more progressive trends in social thought at the close of the 19th century,

> [t]o think of liberty as possession of a range of options quickly brings one up against rude facts of environment and soon brings demands upon the positive power of the state. . . . Liberty as enlargement of options is the liberty we know as created by laws which secure public health, education, the market and peaceable political process.[85]

The Civil Rights Act of 1875 and the Kansas statute prohibiting yellow dog contracts were particular expressions of this "demand on the positive power of the state" to guarantee to the individual the "enlargement of options" and to reap the social benefits of doing so. While this kind of protective legislation would have limited the property owner's "liberty" to impose antisocial conditions on the use of his property, it also would have had the benefit of reducing the social costs of exploitation.[86]

During the late 19th and early 20th century, the Supreme Court refused to acknowledge that the property owner's right to impose these conditions and their attendant social costs depended on the state's permitting them to follow as a prerogative of property ownership. "One does not have 'liberty of contract,'" noted Professor Corbin, "unless organized society both forbears and enforces, forbears to penalize him for making his bargain and enforces it for him after it is made."[87] By announcing that the fourteenth amendment would not allow the state to prohibit yellow dog contracts, the Court in *Coppage* dictated that the states forbear punishment of the anti-union employer and enforce the anti-union contract. By finding in the *Civil Rights Cases* that the fourteenth amendment would not allow the federal government to prohibit

---

[85] J. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES 36-37 (1971).

[86] As Professor Hurst notes, *id.* at 105, it was only in the latter half of the 19th century that Americans realized that there were social costs to unfettered exploitation of resources or people. Toward the end of the century the country began to recognize that "efficiency and equity required that public subsidies to private persons be openly assessed, and not accomplished by inattention or concealment. . . . Toleration of child labor subsidized industries by allowing them to enjoy a cheaper wage bill; the community in the long run paid the difference, in disease and in educational deficiencies which reacted on the social stock of political and economic skills." *Id.*

[87] CORBIN, *supra* note 80, at 20, § 1376.

private discrimination, the Court assured that as a nation we would forbear punishing such violations, allowing enforcement of private civil rights violations, unless and until state action was found. Thus did the vision of private liberty to violate civil rights under the label "private action" become part of the Court's dogma as it entered the *Lochner* era.

2. *Slavery, Contract, and Private Action — The Limits of Social Responsibility in 19th Century Law*

The recognition of this vision of the Court is even more important when it is located within the social context of the period. Emancipation of the slave, which is usually seen as a movement from status to contract, can also be seen as the movement from one highly exploitative model of contractual relations to another only slightly less so. Within the slavery relationship it is possible to see an ongoing contract between master and slave. The master promised to feed and shelter the slave, and the slave promised to work for the master. Clearly, the master was able to impose almost irresistible conditions; clearly, the slave had little "free will." But the master could free the slave, and the slave could, on the other hand, attempt to escape or simply refuse to work. A major problem for the slave in exercising these fictive options was that he or she risked punishment or worse.

The Black Codes made the intrinsic relationship between slavery and more recognizable forms of contract explicit; Mississippi statutes in 1865 "looked to a system in which the freedmen would enter into long-term written contracts of labor. Any black laborer who later quit 'without good cause' could be arrested, and taken back to his employer."[88] As Justice Harlan noted in his dissent to the *Civil Rights Cases* decision,

> between the adoption of the Thirteenth amendment and the proposal by Congress of the Fourteenth amendment . . . the statute books of several of the States had become loaded down with enactments which, under the guise of Apprentice, Vagrant, and Contract regulations, sought to keep the colored race in a condition, practically, of servitude.[89]

It was just such laws which the Civil Rights Act of 1866[90] attempted to eradicate. Nonetheless, the problem of contract laws which were aimed

---

[88] L. FRIEDMAN, A HISTORY OF AMERICAN LAW 441 (1973), *citing* Miss. Laws ch. 4 (1865).

[89] 109 U.S. at 43 (Harlan, J., dissenting).

[90] 42 U.S.C. §§ 1981 & 1982 (1970). The Act guaranteed, *inter alia*, the same right to make contracts as that possessed by white persons. *See* note 43 and pp. 311-12 *supra*.

at nearly re-enslaving black labor persisted. As late as 1911, in *Bailey v. Alabama*,[91] the Supreme Court confronted an Alabama statute which made a failure to perform a contract for labor or services a presumptive fraud punishable by a fine or hard labor[92] — the only type of involuntary servitude permitted by the thirteenth amendment. Before emancipation a runaway slave was returned to his master for punishment; under the statute challenged in *Bailey*, the runaway freedman was turned over to the state for punishment instead. The contract in *Bailey* was of limited duration, unlike slavery. A freedman lucky enough to find work, however, would go from one such "contract" to another, facing the same enforcement mechanism.[93]

The Supreme Court invalidated this law under a federal statute passed to enforce the thirteenth amendment which prohibited any state law which had the direct or indirect effect of attempting to establish or enforce involuntary labor or peonage "in liquidation of any debt or obligation, or otherwise."[94] The majority found it unnecessary to reach the fourteenth amendment arguments raised by the plaintiff in *Bailey*, resting instead on the thirteenth amendment. Justice Holmes, dissenting,[95] seemingly recognized that a consistent judicial dedication to liberty of contract would bar application of the federal statute to Alabama's penal law. In his view, the punishment at hard labor simply intensified the motive for right conduct, making effective the existing law of contracts.[96] This position raises the question which the majority avoided: how could Congress reach a "voluntary" agreement under the thirteenth

---

[91] 219 U.S. 219 (1911).

[92] As originally passed in 1865, the Alabama statute had simply penalized the making of a fraudulent services contract. A 1903 amendment, however, had made a failure to perform the contract *prima facie* evidence of fraud. Since Alabama's common law of evidence would not allow a witness to testify as to his own intent, the statute effectively operated to make a failure to perform conclusive evidence of fraud. *Id.* at 234.

[93] As Hale has noted, "[t]he majority [in Bailey v. Alabama] does not insist that compulsory labor in the jail constitutes peonage; the peonage, in the majority view, consists in the labor that would be rendered *to the private master* [under the contract] through fear of the jail sentence with its accompanying jail labor." Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149, 159 (1935) (emphasis added).

[94] 219 U.S. at 242 (Holmes, J., dissenting).

[95] *Id.* at 245, 246 (Holmes, J., dissenting).

[96] *Id.* at 247 (Holmes, J., dissenting): "Peonage is service to a private master at which a man is kept by bodily compulsion against his will. But the creation of the ordinary legal motives for right conduct does not produce it. Breach of a legal contract without excuse is wrong conduct, even if the contract is for labor, and if a State adds to civil liability a criminal liability or fine, it simply intensifies the legal motive for doing right, it does not make the laborer a slave."

amendment? Had the Court admitted that the law, in fact, abridged the privileges and immunities of citizenship under the fourteenth amendment,[97] it would have had to face the conflict presented by its prior position that a law enforcing private agreements was not state action.

Justice Hughes insisted that "what the State may not do directly it may not do indirectly."[98] Yet whenever a private party called on the state to bind a party to a rule of law in a way which invaded the latter's rights, the private party clearly was asking the state to do indirectly what it could not do directly. "[I]t is apparent," noted Justice Hughes,

> that [Alabama law] furnishes a convenient instrument for the coercion which the Constitution and the act of Congress forbid; an instrument of compulsion peculiarly effective as against the poor and ignorant, its most likely victims. *There is no more important concern than to safeguard the freedom of labor upon which alone can enduring prosperity be based.*[99]

Yet safeguarding the freedom of individual labor and the particular vulnerabilities of the poor and ignorant ended where liberty of contract began, just as protection of individual civil rights ended where private action began. Deciding where slavery left off and the right of private contract began was nothing less than a decision as to how the thirteenth amendment's direct concern for rights would be allowed to infuse what Justice Bradley called the fourteenth amendment's "corrective" posture.[100] The thirteenth amendment thus posed a continual threat to both the state action and liberty of contract approaches, constantly suggesting that, if the nation wanted to, its positive power could be brought to bear on relationships such as discrimination which state action sought to portray as contractual, privately based, and thus beyond governmental intervention.

State action and liberty of contract were doctrinal fortresses erected to protect the prerogatives of the propertied economic actors, seen as

---

[97] The Court struggled mightily to avoid the dilemma. While Justice Holmes noted in his dissent that the Alabama law was known to operate largely against blacks, the majority refused to confront the issue, stating: "We at once dismiss from consideration the fact that the plaintiff in error is a black man. While the action of a State through its officers charged with the administration of a law, fair in appearance, may be of such a character as to constitute a denial of the equal protection of the laws, such a conclusion is here neither required nor justified. The statute, *on its face*, makes no racial discrimination, and the record fails to show its existence in fact." *Id.* at 231 (emphasis added) (citation omitted)

[98] *Id.* at 244.

[99] *Id.* at 244-45 (emphasis added).

[100] *See* note 124 and pp. 337-38 *infra*

responsible for economic progress, against the demands of the oppressed for social progress. The blindness of these Justices to the social costs of lending full, undiscriminating support of judicial power to private entrepreneurs without regard to the effects of their activities on the victims was characteristic of judges during the greater part of the 19th century. *Caveat emptor*, the fellow servant rule,[101] and the contributory negligence rule are among the better known examples of this bias.[102] Each was of a piece with the fictive option approach set forth in the *Civil Rights Cases* and *Coppage*, throwing back on the individual primary responsibility for avoiding the effects caused by economic actors. For example, the contributory negligence rule did not simply presume that the injured party had consented to the injury, but that he had contributed to it. In what Professor Friedman called a "typical case" applying this rule, a New York court was faced with the claim of a plaintiff who had been struck head-on by a railroad engine operated in an unquestionably negligent

---

[101] *See* FRIEDMAN, *supra* note 88, at 413. Under the fellow servant rule, "[an employee] could sue his employer for injuries, if the employer caused them, personally, through negligent misconduct. But this right meant nothing in a factory or railroad yard. The employer was a rich entrepreneur, or a soulless corporation. In a crossing accident, or a mishap at a textile mill, it was a fellow servant who was negligent, if anybody. The fellow servant, of course, was liable at law: but it would have been pointless for one worker to sue another, equally poor." *Id.* Suing the fellow servant was, then, the fictive option left to the employee.

[102] Railroad law at mid-century furnishes a wealth of particularly graphic examples. Friedman cites the well-known case of Ryan v. New York Cent. Ry., 35 N.Y. 210 (1866), where the New York Court of Appeals refused to hold the railroad liable for a fire caused by negligent operation of a railroad engine which destroyed the plaintiffs' neighboring homes. The railroad, argued the court, simply could not be held liable; the advance of civilization depended on protecting the actor from being forced to compensate those he injured. "To sustain such a claim . . . would subject [the railroad] to a liability against which no prudence could guard, and to meet which no private fortune would be adequate . . . In a country . . . where men are crowded into cities and villages . . . it is impossible [to] . . . guard against the occurrence of accidental or negligent fires . . . A man may insure his own house . . . but he cannot insure his neighbor's. . . . To hold that the owner . . . must guarantee the security of his neighbors on both sides, and to an unlimited extent . . . would be the destruction of all civilized society . . . In a commercial country, each man, to some extent, runs the hazard of his neighbor's conduct, and each, by insurance against such hazards, is enabled to obtain a reasonable security against loss." 35 N.Y. at 216-17, *quoted in* FRIEDMAN, *supra* note 88 at 411.

The neighbors of the railroad were not deprived of property through the railroad's negligence; they had the "option" of resorting to insurance, an option particularly unavailing after the damage has taken place. If the neighbors could not afford or obtain insurance, such were the "inequalities of fortune" to which Justice Pitney averted in *Coppage*: "[N]o doubt, wherever the right of private property exists, there must and will be inequalities of fortune." 236 U.S. at 17.

manner by the defendant railroad.[103] "A man who rushed head-long against a locomotive engine [!] without using the ordinary means of discovering his danger," observed the Court, "cannot be said to exercise ordinary care." The judge felt forced to take the case away from the jury because the juror's compassion for the "feeble" might exercise "an influence which, however honorable to them as philanthropists, is wholly inconsistent with the principles of law and the ends of justice."[104]

The plaintiffs in the *Civil Rights Cases* suffered a similar, albeit less damaging, injury by the railroad when they were excluded. This mere "private wrong" arguably caused no greater injury than that suffered by other plaintiffs having an action against the railroad.

In any event, the black man was his own self-insurer: he had only to resort to the laws of the state for redress. The state might be called on to stop and take notice of the harm done; the private actor, however, was seemingly too important, too busy, too involved with contributing to the economic well being of the country to be forced to become conscious of the injuries for which his conduct was responsible.

There is, then, a sense underlying many of the legal theories developed during most of the 19th century that any private actor who is good enough to open his property to the public by putting it into the lines of commerce should not be discouraged by imposing even the most limited of social duties on his conduct. He need not take special care to protect consumers from harmful merchandise, employees from harm, travelers from collision, or blacks from abject discrimination. The law was too busy protecting the private actor to protect private individual victims from the antisocial by-products of the actor's activity. The law was too busy limiting social duty to account for social costs.[105]

II. STATE ACTION IN THE FIRST HALF OF THE TWENTIETH CENTURY

Through the tenuous connections laid in the *Civil Rights Cases* between fourteenth amendment and nineteenth century contract theory,

---

[103] Haring v. New York & E.R.R., 13 Barb. 2 (N.Y. 1852).

[104] *Id.* at 15-16, *quoted in* FRIEDMAN, *supra* note 88, at 413.

[105] *See* G. GILMORE, THE DEATH OF CONTRACT 95-96 (1974): "[A] system in which everybody is invited to do his own thing, at whatever cost to his neighbor, must work ultimately to the benefit of the rich and powerful, who are in a position to look after themselves and to act, so to say, as their own self-insurers. As we look back on the nineteenth century theories, we are struck most of all, I think, by the narrow scope of social duty which they implicitly assumed. No man is his brother's keeper, the race is swift: let the

state action derived its full measure of doctrinal power. It reached the height of its restrictive force when the equation of private action violative of civil rights and liberty of contract was asserted by the *Lochner* Court without qualification or apology. Its doctrinal power nearly disintegrated after the New Deal era, and the doctrine declined into its present state of conceptual disarray when the Court severed the connections which bound the state action theory of the fourteenth amendment to a discredited view of the latitude the state should give private power. The zenith and nadir of state action's strength were reached in two cases, *Corrigan v. Buckley*[106] and *Shelley v. Kraemer*,[107] which challenged the judicial enforcement of racially restrictive covenants under the fourteenth amendment. As cases involving the state only in its role as enforcer of contracts, and with contracts entered into for the sole purpose of binding parties to an agreement violative of civil rights, *Corrigan* and *Shelley* forced the Court to decide directly whether private power to abridge the privileges and immunities of citizenship was coextensive with the type of unrestrained power to contract guaranteed private parties through liberty of contract theory. How the Court dealt with racially restrictive covenants in effect determined whether the connections established in the *Civil Rights Cases* were to remain intact or to be critically undermined. *Corrigan*, decided at the height of the *Lochner* era in 1926, upheld the enforcement of the covenants, and realized the full restrictive potential of the state action view of the fourteenth amendment. *Shelley*, decided by the New Deal Court in 1948, not only denied enforcement and brought an end to the system of racially restrictive covenants on property,[108] but shattered the consensus as to the limits of fourteenth amendment doctrine and the elements involved in state action decisionmaking. The evolution of state action doctrine from *Corrigan* to *Shelley* deserves fuller critical analysis to lay bare the reasons for the changing judicial approaches to the problem of private discrimination.

---

devil take the hindmost. For good or ill, we have changed all that. We are now all cogs in a machine, each dependent on the other. The decline and fall of the general theory of contract and, in most quarters, of laissez faire economics, may be taken as remote reflections of the transition from nineteenth century individualism to the welfare state and beyond."

[106] 271 U.S. 323 (1926).

[107] 334 U.S. 1 (1948).

[108] *Shelley* found that judicial enforcement of a racially restricted covenant was state action forbidden by the fourteenth amendment. A last attempt to thwart the effect of *Shelley* is seen in Barrows v. Jackson, 346 U.S. 249 (1953), where the Court struck down an attempt to enforce the covenants by damage actions against the covenantor who broke the agreement by selling to blacks.

A. Corrigan v. Buckley *and the White Primary Cases: Defining the Strategy for Circumvention of the Fourteenth Amendment by Private Power*

The petitioners in *Corrigan v. Buckley* challenged an injunction enforcing a racially restrictive covenant on the sale of property by a white seller to a black buyer. The complaint charged that the injunction violated the fifth, thirteenth, and fourteenth amendments, but Justice Sanford, speaking for the Court, dismissed the constitutional arguments as "entirely lacking in substance or color of merit"[109] without mentioning the rights of the buyers. After reciting the declaration in the *Civil Rights Cases* that "[i]ndividual invasion of individual rights is not the subject matter of the [fourteenth] Amendment,"[110] Justice Sanford had no difficulty in disposing of constitutional objections to the covenant's enforcement: "It is obvious that none of these amendments [the fifth, thirteenth, and fourteenth] prohibited private individuals from entering into contracts respecting the control and disposition of their own property; and there is no color whatever for the contention that they rendered the indenture void."[111] The Court refused to consider whether principles of equity barred enforcement of a racially discriminatory contract and dismissed the action for want of a substantial constitutional question.

The question, however, was not whether the fourteenth amendment "prohibited private individuals from entering into contracts respecting the control and disposition of their own property." The Court had ended constitutional inquiry at the point where it should have begun, for the issue was whether private parties, through resort to contract law or other common law rules for the "control and disposition of property," could call on courts to enforce conditions on property which had the direct effect of significantly infringing on the constitutional rights of others. In the *Lochner* era, however, the Court defended liberty of contract against all arguments tending to restrict it. Thus the defense of unlimited power to contract and the defense of unlimited private action in violation of fourteenth amendment rights became one.

That the covenants in *Corrigan* infringed on the rights of others did not even enter into the Court's analysis. When faced with the appellants' subsidiary question of how enforcement of the covenants could be squared with the 1866 Civil Rights Act's guarantee to all citizens of the right to purchase and hold property, Justice Sanford could simply wonder

---

[109] 271 U.S. 323, 330 (1926).

[110] *Id.*

[111] *Id.*

at its relevance.[112] The primary obligation of the Court was to uphold liberty of contract, and here that obligation meant upholding the restrictive covenant. This relieved the Court of any need even to consider the discrimination against the victim as a relevant factor, for the black buyer had not been one of the parties to the covenant. A condition contained in a prior existing contract forbade sale to blacks, and the right of covenanting parties to enforce this contractual condition was superior to any positive demands of the state, including the Civil Rights Act of 1866.[113] There was no need to speak of redress through the state courts since the black could show no legally cognizable harm.

The covenant in *Corrigan* was no more a discrete, individual transaction than was the labor contract in *Coppage* or the "invasions" of civil rights in the *Civil Rights Cases*. The covenant represented only one part of a network of property relations which tied up land that might otherwise be sold to blacks. The fictive option approach of state action theory, however, in tandem with liberty of contract theory, atomized vast social problems. *Corrigan* became a simple contract dispute in which the black was a hapless third party. The unstated fictive option here was that the black could seek equal housing in a community which chose to integrate. Like the employee in *Coppage*, he could go elsewhere. The overwhelming bargaining power of the community of covenantors was ignored, as was the fact that the covenantors did not seek to control their own land, but someone else's.

In the case of *Buchanan v. Warley*,[114] decided nearly a decade before *Corrigan*, the Supreme Court had declared that a white owner had a constitutional right to sell to a black, and that ordinances forbidding black occupancy infringed on that right in violation of the fourteenth amendment. *Corrigan* allowed covenants to do what ordinances could not; taken together, *Corrigan* and *Warley* defined a clear strategy for private sector evasion of all constitutional restraints on its action. To avoid the prohibition against state action, the individual or group had only to avoid the appearance of involvement by the state by funneling state power into private law schemes. Covenants replaced ordinances, turning state action into a game of "cat and mouse" in which private individuals and corporations could avoid constitutional sanctions by subterfuges designed to avoid the appearance of state involvement, which nevertheless was ever-present.

---

[112] *Id.* at 331.

[113] The 19th century theory that private contract preceded and was thus independent of and superior to the state is discussed *infra* at note 146.

[114] 245 U.S. 60 (1917).

The white primary cases, a series of Supreme Court decisions beginning with *Nixon v. Herndon*,[115] suggest some of the most perplexing and disturbing aspects of this "now you see it, now you don't" approach to state action.[116] The white primaries, by which blacks were excluded by political parties from participating in the selection of candidates, were tantamount to elections in the one-party political systems of the South and became a fixture of Southern politics after Reconstruction. State government played a vital role in the operation of the primaries, extending full cooperation and sanctions to the "private" selection process.[117] The Texas law challenged in *Herndon*, for example, specifically prohibited black participation in party primaries. The Supreme Court struck down this statute as clear state action in violation of the fourteenth amendment but failed to decide the separate fifteenth amendment question of whether there was a federally guaranteed right to vote in the primaries.[118]

Five years later in 1932 the Court confronted the Texas response to *Herndon:* a new state law gave the executive committees of the political parties the power to set their own qualifications for primary voters. Predictably, the executive committees disqualified blacks. In *Nixon v. Condon*[119] the Court found this scheme unconstitutional because the state had delegated[120] power to the executive committee, making the committee a "representative" of the state. The next step for the political parties was to set up racially discriminatory qualification schemes on their own. In 1937, a unanimous Court in *Grovey v. Townsend*[121] found no state action in this arrangement, holding that it involved only the rules of membership in a private political organization. Despite the supposed guarantees of the fourteenth amendment, blacks were, in reality, no better off after *Grovey* than before the Court had struck down the discriminatory state statute in *Herndon* ten years earlier; the option offered the black to vindicate his rights once again had proved fictive.[122] Through the distortive lens of

---

[115] 273 U.S. 536 (1927).

[116] For a concise discussion of state action and the white primary cases, see Lewis, *supra* note 26, at 1089-94.

[117] The later case of Smith v. Allwright, 321 U.S. 649, 653 n.6 (1944), notes such state contacts with the privately conducted primaries as laws determining the date and conduct of the primary; laws relating to qualifications for appearance on the primary ballot; provision by the state of absentee ballot machinery; and court oversight of the primaries.

[118] See pp. 336-37 *infra* for a discussion of the fifteenth amendment question.

[119] 286 U.S. 73 (1932).

[120] Delegation of power to private groups is discussed at pp. 346-47 *infra*.

[121] 295 U.S. 45 (1935).

[122] The "cat and mouse" game was played out more recently in the series of cases culminating in Evans v. Abney, 396 U.S. 435 (1970). See the discussion of the facts in the earlier case of Evans v. Newton, 382 U.S. 296 (1966), *supra* at note 64. When the city of

state action, the political party looked like private property, with the party "owners" able to impose the same conditions on use as a homeowner might impose on his guests. The fourteenth amendment had secured the right of the private parties to impose conditions violative of civil rights on use of their "property" without what Justice Bradley had called "direct" federal interference.

Relief from the egregious discrimination of the white primary finally came from the Court not under the fourteenth amendment, but under the second section of article one and the fifteenth amendment. In *United States v. Classic*[123] the Court concluded that the right to vote in federal elections secured by article one, section two included the right to vote in primaries. Noting *Classic*'s "recognition of the place of the primary in the electoral scheme," the Court held in *Smith v. Allwright*[124] that the fifteenth amendment barred a state from "casting its electoral powers in a form which permits a private organization to practice racial discrimination." In later cases, the white primaries were again attacked in the federal courts, and racial discrimination in primary elections was prohibited.[125] Freed of the distortive lens of state action under the fourteenth amendment, the Court had no difficulty focusing upon the precise arguments needed to put the lie to any claim that primaries were "private." This phenomenon echoes the interrelationship of the thirteenth and fourteenth amendments.[126] We might say that where the Court was to stop

---

Macon broke the terms of Senator Bacon's trust by integrating the park he had left, the park was put in the hands of private trustees who sought to bar blacks. In *Newton*, the Court held that the substitution of private trustees did not transfer the park from the public to the private sector. The Georgia Supreme Court then ruled against an action in equity to remove the offensive condition, and held that the trust must fail, causing the park to revert to Bacon's heirs. Evans v. Abney, 224 Ga. 826, 165 S.E. 2d 160 (1968), *rev'd*, 396 U.S. 435 (1970). In *Abney*, the Court decided that the state court decision to enforce the racial provision was not discriminatory state action. Once again, private actors had learned how to reach their goal by finding legal routes involving the state in a way which the court would disregard.

[123] 313 U.S. 299 (1941).

[124] 321 U.S. 649, 664 (1944).

[125] Terry v. Adams, 345 U.S. 461 (1953) (highly private and voluntary Jaybird political club exercising considerable power in one county in Texas violates the fifteenth amendment by discriminating against minority groups; the state has a duty to prevent discrimination in the electoral process); Baskin v. Brown, 174 F.2d 391 (4th Cir. 1949) (fifteenth amendment violation when the Democratic party of North Carolina, reconstituted as a club, excludes blacks by conditioning membership on the taking of an oath declaring one's belief in white superiority and racial separation); Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948) (party may not impose discriminatory rules even if North Carolina has repealed all laws regarding primaries). *See generally* Lewis, *supra* note 26, at 1091-92.

[126] *See* p. 330 *supra*.

reading the fourteenth amendment and start reading the fifteenth was the question; deciding where the right to make private contract-like arrangements violative of political rights ended, and the right of all citizens to participate in the political process began, was nothing less than a decision as to how far the fifteenth amendment's concern for political rights would be allowed to infuse the fourteenth amendment's "corrective" posture. The state action requirement had eviscerated any substantive content of the fourteenth amendment, leaving to other amendments and doctrines or to socially responsible private action the task of securing the "privileges and immunities of citizenship" of which the fourteenth amendment had spoken so eloquently. A private government, making its own laws without regard for civil rights and liberties and assured of their enforcement through the courts, openly competed with the fourteenth amendment for power. The Court's deference to private contract, signalled by the decision in *Corrigan*, gave private lawmaking a clear advantage over the Constitution.[127]

---

[127] This private lawmaking, however, does not have absolute power so long as the Court can avail itself of devices other than the fourteenth amendment. In Runyon v. McCrary, 427 U.S. 160 (1976), the Court, basing its decision on the thirteenth amendment and 42 U.S.C. § 1981 (1970), held that private schools could not discriminate on the basis of race. The decision seems to invade the prerogative of private parties to choose those with whom they will contract, but Justice Powell, concurring, distinguished between "personal" and "public" contracts. In attempting to avoid the difficulty of reconciling the decision with the seemingly blanket protection given to contracts under the fourteenth amendment, Justice Powell argued that "[s]ection 1981, as interpreted in our prior decisions, does reach certain acts of racial discrimination that are 'private' in the sense that they involve no *state* action. But choices, including those involved in entering into a contract, that are 'private' in the sense that they are not part of a commercial relationship offered generally or widely, and that reflect the selectivity exercised by an individual entering into a personal relationship, certainly were never intended to be restricted by the Nineteenth Century Civil Rights Act. *The open offer to the public generally involved in the case before us is simply not a 'private' contract in this sense.*" *Id.* at 189 (Powell, J., concurring) (emphasis added). As striking as this conclusion may seem, it was not unheralded. Justice Harlan, dissenting in Evans v. Newton, 382 U.S. 296 (1966), pointed out that "[f]or all the resemblance, the majority assumes that its decision leaves unaffected the traditional view that the Fourteenth amendment *does not compel private schools to adapt their admission policies to its requirements*, but that such matters are left to the States acting within constitutional bounds. I find it difficult, however, to avoid the conclusion that this decision opens the door to reversal of these basic constitutional concepts, and, at least in logic, jeopardizes the existence of denominationally restricted schools while making every college entrance rejection letter a potential Fourteenth amendment question." 382 U.S. at 322 (Harlan, J., dissenting) (emphasis added).

The fear that abandoning the state action requirement would make all private conduct subject to constitutional restraint arguably could be answered by reading the thirteenth and fourteenth amendments together. The Court, under this approach, would remain tied to its

B. Reformulating the Relation of Private Power and Contract to the State and to the Rights of Individuals

Between *Corrigan* and the 1948 decision of *Shelley v. Kraemer*[128] there had been a drastic change in the nation's view of the relationship of government to the economic and social life of its citizenry. Professor Miller has referred to this period, beginning with the New Deal, as the coming of the "Positive State," characterized by the

> express acceptance by the federal government — by government generally and thus by the people — of affirmative responsibility to further the economic well-being of the people. [The Positive State] is a societal undertaking of a duty to attempt to create and maintain minimal conditions within the economy — of economic growth, of employment opportunities, of the basic necessities of life. . . .[129]

In constitutional terms, Miller noted, "the development is toward the creation of a concept of 'constitutional duty,'" and in political and economic terms it is toward the creation of "the American version of the welfare state."[130]

Beginning in 1937, the Supreme Court broke with its liberty of contract-substantive due process tradition, releasing the severe restraints it had imposed on the intervention of public power into formerly "private" economic and social affairs, and thus making way for development of the new socio-economic order. In a landmark case of that year, *West Coast Hotel v. Parrish*,[131] the Court finally upheld minimum wage legislation, and in so doing literally redefined its concept of liberty and due process. Noting that minimum wage laws were attacked as depriva-

---

conventional state action formulae in most instances, but would reach what would otherwise be viewed as private action where racial discrimination is involved. *Cf.* note 20 *supra* (discussing Judge Friendly's argument that state action should be found more readily when racial classifications are involved). This position is unacceptable because it would limit the ability of a court to remedy invasion of economically powerful private actors. Moreover, if the Court were to adopt this posture it should do so explicitly, perhaps by referring to some intent of the framers that the fourteenth amendment should reach a more limited set of actors than either the thirteenth or the fifteenth. By leaving this relationship undefined, however, the Court diminishes the understanding, and thus the effectiveness, of all of the amendments as tools to prevent discrimination.

[128] 334 U.S. 1 (1948).

[129] A. MILLER, THE MODERN CORPORATE STATE 86 (1976).

[130] *Id.* at 87.

[131] 300 U.S. 379 (1937).

tions of liberty of contract, the Court observed that the constitution never mentioned this unrestrained liberty, and that the liberty protected by the Constitution was "liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people."[132] Any private claim to "liberty," including liberty to enter contractual arrangements, was thus subject to the restraints which society deemed necessary to protect the greater good: restraints which the Court now called "due process." "[R]egulation [by the state] which is reasonable in relation to its subject and is adopted in the interests of the community," the Court declared, "is due process."[133] In quick succession, the Court upheld such extensive governmental involvement in private orderings as the National Labor Relations Act[134] and social security legislation.[135] The line between private and public was blurring; as the country emerged from the Depression, simplistic *laissez-faire* approaches gave way to the complex demands of twentieth century society.

As the New Deal developed, legal scholars laid the intellectual ground work for the changes in political-legal perspective which would accompany it. Broadly speaking, the concern of these scholars[136] was the nature of "private government" and the relationship of lawmaking in the private sector to the greater public's welfare.[137] Three lines of attack on

[132] *Id.* at 391.

[133] *Id.*

[134] NLRB v. Jones & Laughlin Steel, 301 U.S. 1 (1937).

[135] Steward Machine Co. v. Davis, 301 U.S. 548 (1937); Helvering v. Davis, 301 U.S. 619 (1937).

[136] Included in this group were two professors whose work is of particular interest for the purposes of this article: Robert Hale, of the Columbia University Law School; and Morris Cohen of the City University of New York. *See generally* E. PURCELL, THE CRISIS OF DEMOCRATIC THEORY (1973). Professor Edmund Cahn, in a review of R. HALE, FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER (1952), noted that Robert Hale "has long been recognized as a most perspicacious expounder of the Constitution." "The legal theory of private government has already been analyzed," he added, not only in relation to constitutional questions (as by Hale), but also "in terms of social morphology (as by Max Weber, and, of late, Professors Harold Lasswell and Myres McDougall of Yale), in terms of the assimilations between private and public governments (as by Adolph A. Berle) and on the plane of legal philosophy (as by Morris R. Cohen)." Cahn, *Book Review*, N.Y. Times, Jan. 18, 1953, § 7 (Book Review Section) at 14. No attempt is made here to offer a complete list.

[137] *See, e.g.*, Jaffe, *Law Making By Private Groups*, 51 HARV. L. REV. 201, 202 (1937): "We are increasingly aware of the fact that the most significant and powerful components of the social structure are economic groups, competing and complementary in varying degrees. . . . [E]ach group demands the aid of government. . . . [I]t is in part a demand for group privileges over and against the rest of society; in part a demand by the more explicit elements in a group that the group as a corporate body be given power to coerce under sanction of law dissentient members of the group."

the "old order" emerged, aimed at liberty of contract, 19th century conceptions of property, and the distinction between private and public power. Insofar as their work bore simply on economic rights, the triumph of these scholars' ideas may be seen in the New Deal's legislative program, and the post-1937 Court's decisions upholding it. Less appreciated, however, is the fact that these inquiries into the nature and effect of private government had direct implications for civil rights as well as economic rights, implications which were first clearly manifested in *Shelley v. Kraemer.*

The attack on 19th century property concepts began to gather momentum in 1927 when Morris Cohen published his article *Property and Sovereignty*, in which he argued that private property was a form of power, not unlike the power of a sovereign over its subjects.[138] A property right, he maintained, "is a relation not between an owner and a thing, but between the owner and other individuals with reference to things." The essence of private property, he continued, "is always the right to exclude others. . . . To the extent [the things the law of property assigns to me] are necessary to the life of my neighbor, the law thus confers on me a power, limited but real, to make him do what I want."[139]

The "fictive option" of liberty of contract doctrine was based on the idea that the owner of property did not have the power to "make others do what he wants"; those who sought to use the property had the freedom to decide not to use it, and thereby to avoid coming under the owner's control involuntarily. Implicit in Justice Bradley's assertion that the owner of a railroad or other public accomodation could only "invade" but not "impair" rights by excluding the black was the notion that the owner was only controlling his railroad, not destroying the black's ability to transport himself. To use Professor Cohen's phraseology, the exclusion was portrayed as a relation between the owner and a thing, not between the owner and individuals with reference to a thing.[140] In adopt-

[138] Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8 (1927). Cohen began his discussion by noting that "[p]roperty and sovereignty, as every student knows, belong to entirely different branches of law. Sovereignty is a concept of political or public law and property belongs to civil or private law." He then proceeded to explode this conventional wisdom.

[139] *Id.* at 12.

[140] In 1937, Jaffe, *supra* note 137, at 217, reiterated what Cohen had said earlier: "[P]roperty (of which contract and the right to contract is an instance) equips the possessor with great powers of exclusion — enforced or sanctioned by law — not in any way depending on consent, and this power to exclude is a source of regulating others' conduct, either as it prescribes complete exclusion or participation on terms. Under ordinary circumstances the fact is obscured, but monopolies in their many forms make it more palpable." As an example of the lawmaking power which this involved, Professor Jaffe specifically cited

ing the approach which would be rigidly applied during the *Lochner* era of the Court, Justice Bradley had closed the inquiry in the *Civil Rights Cases* decision after simply determining whether the property was public or private. The question of whether the type of privately owned property covered by the 1875 Civil Rights Act was peculiarly "necessary to the life of [one's] neighbor" was never reached. This not only allowed Justice Bradley to equate demands for use of private railroad cars and homes since both were private property,[141] but also allowed the Court to ignore the particularly vital nature of the services offered by railroads and public accommodations and the resultant power over the public enjoyed by the owners of these facilities — facts of which Justice Bradley was clearly aware.[142]

Hale's observation that the exclusion of negroes from public accommodations in the South was a full regime of law with terms laid down by the property owner and enforced by the state. *Id.* at 217-18.

[141] In closing off the thirteenth, as well as fourteenth, amendment to the plaintiffs in the Civil Rights Cases, Justice Bradley had said "[i]t would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab car. . . ." 109 U.S. at 24.

[142] The concern here for the impact on the public of operation of certain types of private property is similar to that of the "affected with a public interest" approach upholding state commercial regulation in the late 19th century — an approach to which Justice Bradley made important contributions. In Munn v. Illinois, 94 U.S. 113 (1877), decided only six years before the Civil Rights Cases, the Court upheld state laws regulating the operation of grain transporting railroads and the operation and rates of warehouses and grain elevators, declaring that "[p]roperty does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created." *Id.* at 126. Although the decision was written by Justice Waite, he relied heavily on a memorandum submitted to him by Justice Bradley. *See* Fairman, *The So-Called Granger Cases, Lord Hale, and Justice Bradley*, 5 STAN. L. REV. 587 (1953). Justice Bradley's memorandum suggested that the "fundamental principle" which should govern the decision was that "wherever a particular employment, or a business establishment becomes a matter of public consequence so as to affect the whole public and to become a 'common charge' [*i.e.* charging common tariffs to all], it is subject to legislative regulation and control. Whatever affects the community at large ought to be subject to such regulation, otherwise the very object of legislative power — the consulting of the general good — would be subverted." The importance of railroads, and the power of their owners, was clearly recognized in this discussion: "As to railroads, it is hardly necessary to say that there are in this country no more absolute monopolies of public service than they are. *The public stands on no equality with them.* They have every thing in their own hands especially since the consolidation of different lines has so fearfully progressed. . . . They are not only common carriers, but they are common carriers possessed of valuable public franchises, and a virtual monopoly of the

Cohen's argument related the nature and extent of the property one owned to the bargaining power one possessed, but this was precisely the relation which the liberty of contract and state action theories sought to avoid. The tremendous power of the large property owner, he stressed, was conferred, and could thus be denied, by the law which supported the terms fixed by the owners. This led Cohen to assert the positive obligation of the state, through its laws, to control the abuse of its power through control over property: that is, to control private action.[143]

Cohen later related contract enforcement to his more general concerns of private power.[144] In so doing, he exploded the notion that contracts were purely private, not involving interests of the state, and framed an argument which might have been the brief for the decision in *Shelley:*

> A contract . . . between two or more individuals cannot be said to be generally devoid of all public interest. *If it be of no*

---

whole land transportation of the country." *Quoted in id.* at 670, 673-74 (emphasis added). Justice Bradley's argument, of course, was made in the context of regulating the movement by rail of goods, not people. However, his rationale is equally applicable to the power of railroads over the travelling public.

The "affected with a public interest" approach represented an available progressive alternative to the classical liberal state/private action approach adopted by Justice Bradley in the Civil Rights Cases. With the rise of the *Lochner* era, the force of the latter approach grew and the "affected with a public interest" approach was rejected. *See, e.g.*, Chicago, M. & St. P. Ry. v. Minnesota, 134 U.S. 418 (1890), holding that the due process and equal protection clauses were violated by a rate-making scheme which did not provide for judicial review of the reasonableness of rates. Justice Bradley claimed in a harsh dissent that the judiciary was infringing on the prerogatives of the legislature. *Id.* at 461-65. *See generally* PAUL, *supra* note 29, at 39-44. The "affected with a public interest" approach was effectively resurrected only after substantive due process went into decline. *Compare* Williams v. Standard Oil Co., 278 U.S. 235 (1929) (business of selling gasoline is not "affected with a public interest" and state regulation of prices is therefore violative of due process clause of the fourteenth amendment) *with* Nebbia v. New York, 291 U.S. 502 (1934). Specifically citing *Munn*, the Court in *Nebbia* upheld a statute regulating prices of milk as regulation of a business affected with a public interest. It reaffirmed the legislature's power to regulate a business "in any of its aspects" to protect the public interest, and minimized the opportunity for judicial interference by enunciating a "rational relation" test for comparing the purposes and effects of legislation. *Id.* at 536-38.

[143] Cohen, *supra* note 138, at 76.

[144] Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 586 (1933). Contract law, Cohen declared, "through judges, sheriffs, or marshals puts the sovereign power of the state at the disposal of one party to be exercised over the other party. It thus grants a limited sovereignty to the former." *Cases, e.g.*, Shelley v. Kraemer, 334 U.S. 1 (1948). "[T]hese are cases in which the States have made available to such individuals [as are here seeking enforcement of discriminatory covenants] the full coercive power of the government to deny petitioners, on the grounds of race or color, the enjoyment of property rights . . ."

> *interest, why enforce it? . . . Enforcement, in fact, puts the machinery of the law in the service of one party against the other.* When that is worthwhile and how that should be done are important questions of public policy.[145]

The Court had denied that it had the power to consider a larger public interest in the regulation of private action and contract; the fourteenth amendment somehow forbade state "interference" with such private matters.[146] For the Court to refuse to interfere meant that it was choosing inaction for its own policy reasons. To paraphrase Cohen, why did it enforce such arrangements otherwise?[147] In upholding private action in violation of rights, or in striking down social welfare legislation, the Court had only adopted a view of the public interest as best served by the protection of the rights of the large property owner against the claims of the exploited.

---

[145] Cohen, *supra* note 144, at 562 (emphasis added).

[146] Where Cohen argued that the semi-sovereign status of the private economic actor derived from the state, the 19th century "historical" school claimed that this sovereignty was independent of and antecedent to the state, and thus by right demanded deference from the state. As embodied in contract doctrine, this view informs Justice Bradley's claim for an independent "private action" beyond the legitimate reach of the state and entitled to respect equal to or greater than that accorded state prerogatives.

Jaffe, *supra* note 137, at 207-08, attacked the jurists of the 19th century for work which laid the basis "for the constitutional dogma that contract was prior to and superior to legislation." Regarding judicial review of legislation, by the mid-1930's the Court was emerging from the grips of this dogma, so central to the rationale of the *Lochner* era. It had decided Nebbia v. New York, 291 U.S. 502 (1934), and West Coast Hotel v. Parrish, 300 U.S. 379 (1937). Yet the dogma endured when the Court was faced with fourteenth amendment civil rights questions, allowing the Court to maintain in the white primary cases, *see* pp. 335-36 *supra*, that there was no *state* action where a political party used common law mechanisms to maintain the white primary; such mechanisms were private and preceded the state. Note, *Delegation of Governmental Power to Private Groups*, 32 COLUM. L. REV. 80 (1932), written just as the Supreme Court granted *certiorari* in Nixon v. Condon, 286 U.S. 73 (1932), discussed at p. 336 *supra*, had urged the Court to view the case as an opportunity to reject the 19th century "historical" approach to private power, to look at the nature and extent of the property (the political party) which private groups controlled, and to confront directly the fact that such private activity could not be realistically differentiated from action by the state. Instead, the Court held that the Texas statute giving the executive committee of a political party the authority to set qualifications for voting in primaries was an unconstitutional delegation of state power, implying that private action absent such delegation was independent of state power. The result was the collapse of the Court's attempts to outlaw the white primary when it decided Grovey v. Townsend, 295 U.S. 45 (1935).

[147] *See also* Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691, 730 (1938): "In all private property there is some public interest, or individual rights therein would not be protected."

Robert Hale noted in 1943 that, prior to the New Deal, "[w]hat work we should do and how much we might consume were determined by a process known as freedom of contract." Yet, he observed, "in that process there was more coercion, and government and law played a more significant part, than is generally realized."[148] Hale helped to reconceptualize the power relations involved in private contract by insisting that compulsion, far from being the exception, was present in all contracts, for every concession made by a party to a contract was made to avoid a threat.[149] "One chooses to enter into a given transaction," wrote Hale, "in order to avoid the threat of something worse — threats which impinge with unequal weight on different members of society."[150]

By substituting the notion of "threats" being traded between parties to a contract for the more voluntaristic idea of "promises," Professor Hale not only surmounted an important semantic obstacle in discussion of contract doctrine, but also provided an important conceptual link between exploitative contracts and "private action" in violation of rights. Private action of the type confronting the Court in the *Civil Rights Cases* and *Shelley* involved the threat by owners of large amounts of property to exclude others from their property unless certain conditions were met. Yet, as Cohen had noted, the "essence" of property was the right to exclude, and thus the right seemed meaningless unless the owner could decide when it would be exercised, and under what conditions he would fulfill his threat. An attack on the private action in the *Civil Rights Cases* and *Shelley*, however, did not come down to a wholesale attack on private property ownership itself, for, to use Chief Justice Vinson's phrase, "there was more":[151] the property from which the owner threatened exclusion was peculiarly necessary to the lives of other citizens; and the conditions the owner imposed were that citizens abandon significant exercise of constitutional rights.[152]

---

[148] Hale, *Bargaining, Duress and Economic Liberty*, 43 COLUM. L. REV. 603 (1943).

[149] "A bargain is finally struck, each party consenting to its terms, in order to avert the consequences with which the other threatens him. This does not mean, of course, that in each purchase of a commodity there is unfriendliness, or debate or haggling over terms." *Id.* at 604.

[150] *Id.* at 606.

[151] Shelley v. Kraemer, 334 U.S. 1, 13 (1948). *See* pp. 356-60 *infra*.

[152] As Hale had noted in *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149 (1935), the rights-denying mechanism employed by the property owner was almost identical in both form and impact to a method employed by the states themselves in threatening businesses with exclusion from the state unless they agreed to give up certain rights. The imposition of "unconstitutional conditions" on the operations of businesses within the states was a problem with which the

Crippling the Court's ability to make the conceptual advances urged by Cohen and Hale as it began to emerge from the *Lochner* era was its failure to perceive the continuity which always existed between public and private power, a failure fully to grasp the complex mechanisms by which power flowed from the state to the private sector, there to be applied in ways which, when the power was still perceived to be in the state, were prohibited by the Court as unconstitutional. Where the transmission of state power to the private sector was obvious, the Court could recognize the inherent dangers, but the process was rarely so blatant. Thus in *Schecter Poultry Corp. v. United States*[153] the Court cautioned against the standardless delegation of legislative power when the New Deal's National Recovery Act sought to give private trade associations the power to formulate rules of competition within their industry. Concurring with the Court's decision to strike down the NRA, Justice Cardozo said that the delegated power which found expression in the industry code before the court "is not canalized within banks that keep it from

---

Supreme Court struggled for over fifty years. *See* Merrill, *Unconstitutional Conditions*, 77 U. PA. L. REV. 879 (1929); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1445-49 (1968); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960). When the Court finally clarified its position on such conditions and explained why they had to be prohibited, it specifically expressed its debt to Justice Bradley, who had had no difficulty in understanding the egregious nature of such a mechanism within the context of commercial rights. Terral v. Burke Constr. Co., 257 U.S. 529 (1922).

The issue first presented itself to the Court in 1874, when an insurance company challenged the constitutionality of a Wisconsin statute which conditioned the operation of a foreign insurance company within the state on the company's agreeing not to remove its cases to federal court. Insurance Co. v. Morse, 87 U.S. (20 Wall.) 445 (1874). Recognizing that the company was effectively forced to give up a *right to enter federal court*, the Court had no trouble declaring the scheme unconstitutional. Three years later, in Doyle v. Continental Insurance, 94 U.S. 535 (1877), the Court was again confronted with the problem — with Wisconsin now requiring no agreement, but simply threatening to exclude the company if it ever did, in fact, remove its cases — and this time upheld Wisconsin. Refusing to concede that the Court, in a manner inconsistent with its previous position, was "enabl[ing] the State of Wisconsin to enforce an agreement to abstain from federal courts," Justice Hunt, who had written the earlier opinion, argued for the majority that "[t]he effect of our decision in this respect is that the State may compel the foreign company to abstain from the Federal courts, or to cease to do business in the State. *It gives the company the option.* This is justifiable because the complainant has *no constitutional right to do business in that State. . . .*" *Id.* at 458 (emphasis added). The "option" given the company was, of course, a fictive one: unless it wished to lose an entire state's business it had to give up its right — *not* the right "to do business," but the right to enter federal court. *Doyle* was expressly overruled in Terral v. Burke Constr. Co., *supra*.

[153] 295 U.S. 495 (1935).

overflowing. It is unconfined and vagrant. . . ."[154] The same could have been said of the power "delegated" by the courts to such private groups as those who formulated and enforced racially restrictive covenants.

C. Marsh v. Alabama *and* Shelley v. Kraemer: *A New Understanding of Private Power*

The national experience with the New Deal and the trauma of the Second World War[155] created a growing sense of the power and obligation of the state to protect the rights of individuals and minority groups. The Supreme Court was becoming increasingly solicitous of civil rights and liberties.[156] Its decision in *Marsh v. Alabama*[157] in 1946 indicated substantial progress in the assimilation of more advanced contemporary thinking on questions of private power as it affects individual rights, and potentially provided the basis for a reformulation of state action doctrine.

The appellant in *Marsh* was a Jehovah's Witness who had refused to stop distributing leaflets on the sidewalk and leave the premises of a

---

[154] *Id.* at 551 (Cardozo, J., concurring) Schechter has since been "severely limited to its own facts" on the issue of delegation of legislative power. *See* Quincy College & Sem. Corp. v. Burlington Northern, 328 F. Supp. 808, 811 (N.D. Ill. 1971), and cases cited therein.

[155] *See, e.g.*, Lusky, *Minority Rights and the Public Interest*, 52 YALE L. J. 1 (1942): "One of the by-products of the effort to win the present war is a growing realization that the members of racial, national and religious minorities in this country can make an important contribution to the production of goods and the fighting of battles. . . . [T]he occasion is peculiarly appropriate for an analysis of the public stake in the cessation of discrimination against minorities. . . . [I]f . . . a continuing public interest demands the easing of social tensions created by the existence of a host of minority groups side by side in a single society, now is the time to describe that interest and make it a part of the public consciousness."

[156] One of the most notable examples of this trend was Justice Stone's footnote four in United States v. Carolene Prods., 304 U.S. 144, 152, n.4 (1938): "There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth."

See also Rosenfeld & Tannen, *Civil Liberties Under the Roosevelt Administration*, 5 LAWYERS GUILD REV. 182, 182-83 (1945): "As the scope of governmental concern with the welfare and security of its citizens expanded, so did the judicial concepts of their freedom. As social legislation attempted to ameliorate economic inequities, the Supreme Court continued to enlarge the area of political and religious freedom. The two movements cannot be divorced; they had their origin in a common source, best epitomized by saying that they reflected the essential policies of the Roosevelt administration. . . . The Roosevelt influence has led to an abandonment of any static approach to the problem of the relationship between the individual and the state."

[157] 326 U.S. 501 (1946).

privately owned "company town"[158] when requested to do so by the management. She was arrested by a deputy sheriff at the instigation of the management, and was later convicted of criminal trespass under Alabama law. After the defendant unsuccessfully challenged the conviction in the Alabama state courts, the Supreme Court ruled that a state could not, "consistent[ly] with the first and fourteenth amendments, . . . impose criminal punishment on a person who undertakes to distribute religious literature on the premises of a company-owned town contrary to the wishes of the town's management."[159] The company town was a most extraordinary variant of the monopoly, and provided a seemingly perfect opportunity for an object lesson on the power of "private action" to effect massive deprivations of individual rights. Yet as a heuristic device the company town had the weaknesses of its virtues: so complete was the control through company ownership of stores, homes, and other services, that the Court was able to portray the company's use of the property as an almost *sui generis* "public function," thus avoiding an admission that indeed this was nothing more than private action on a grand scale.[160]

---

[158] The Court noted that "[m]any people in the United States live in company-owned towns," and that "[i]n the bituminous coal industry alone, approximately one-half of the miners in the United States lived in company-owned houses in the period from 1922-23 [citing the United States Coal Commission Report, 1925, Part III, pp. 1467, 1469 summarized in Morris, The Plight of the Coal Miner, Philadelphia 1934, Ch. vi, p. 86]." 326 U.S. at 508 n.5.

[159] *Id.* at 502.

[160] Like the "affected with a public interest" approach during the *Lochner* era, discussed at note 138 *supra*, the "public function" test has been straitjacketed by the Court to the present time. This is best seen in the series of cases which eventually withheld fourteenth amendment protection from the exercise of individual rights in private shopping malls. *See* Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); Hudgens v. NLRB, 424 U.S. 507 (1976). In *Logan Valley Plaza* the Court concluded that "the shopping center here is clearly the functional equivalent of the business district of Chickasaw involved in *Marsh.*" 391 U.S. at 318. In *Lloyd*, the Court also considered a public function argument concerning the property opened to the public, but disposed of the issue by saying: "It is noteworthy that respondent's argument based on the [Shopping] Center's being "open to the public" would apply in varying degrees to most retail stores and service establishments across the country. . . . In terms of being open to the public, there are differences only of degrees — *not of principle* — between a free-standing store and one located in a shopping center, between a small store and a large one, between a single store with some malls and open areas designed to attract customers and Lloyd Center with its elaborate malls. . . ." 407 U.S. 565-66 (emphasis added). Justice Stewart's argument that there is "only a question of degree, not of principle" in the openness of a store in a shopping mall and a free-standing mall is one which the Court could afford to make only because it decided to forego the clarification of *Shelley*. The 1948 decision had indicated that there *was* a difference in principle between a person acting in an individual capacity and a covenantor,

Nevertheless, *Marsh* is recognized as a watershed in state action decisionmaking,[161] and it offers important insights into the thinking of the Court two years before it decided *Shelley*.

There was in *Marsh* a subtle but definite shift in the Court's view of the source of the property owner's power, evidenced in this passage from the opinion:

> We do not think it makes any significant constitutional difference as to the relationship between the rights of the owner and those of the public that here the State, instead of *permitting* the corporation to operate a highway [as in an illustration used earlier], permitted it to use its property as a town. . . .[162]

The Court also spoke of the "acquiescence" by a state in such operation of property.[163] It was now understood to be clearly within the power of the state to determine how private property would be operated; the power to "permit" such operation was also the power to prohibit. As a more realistic view of the state's role in the exercise of private power emerged, the private - public distinction faded:

> In our view the circumstances that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is 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.[164]

---

and further explication would have identified the difference: the coercive power the body of covenantors could bring to bear on those exercising protected rights. Similarly, there would seem to be a principled difference between a free-standing store and a shopping center. In most primitive terms, the free-standing store does not own the sidewalk in front of it, and the owner therefore is not as free to use state power to keep people from exercising rights in front of his store. More importantly, the mall opens itself up to the public as a place to transact general commercial business and thereby becomes far more vital to the community, sometimes coming to be a substitute for a business district. It is the nature and extent of the property which must be examined. *Cf.* FTC v. Sears, Roebuck, TRADE REG. REP. (CCH) ¶21, 218 (Oct. 28, 1976) (consent order bars Sears from depriving public of competitive benefits through Sears' imposition of contract limitations on shopping mall developer in order to limit other tenants).

[161] *See, e.g.*, GUNTHER, *supra* note 74, at 918.

[162] 326 U.S. at 507 (emphasis added).

[163] *Id.*

[164] *Id.* at 509. *See also* pp. 307-12 *supra* for a discussion of the public-private distinction.

The Court recognized that a wholesale deprivation of individual rights and serious injury to the interests of the state were the inevitable outcome of failing to restrict this conduct of a private party. To act as good citizens, the Court observed, the residents of company towns needed to be informed.[165] It was true, of course, that dwellers in a company town could have journeyed outside the town or onto the highway to more fully exercise their rights.[166] These were the fictive options which liberty of contract[167] and Justice Bradley's state action theory might have urged.

---

[165] "In order to enable them to be properly informed their information must be uncensored. There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen." *Id.* at 508.

[166] This point was made by Justice Reed, in his *Marsh* dissent in which he was joined by Chief Justice Stone and Justice Burton. Stating that the sidewalk which the appellant had been asked to leave was some thirty feet from a public highway, Reed stated that he and his dissenting brethren "do not understand from the record that there was objection to appellant's use of the nearby public highway and under our decisions she could rightfully have continued her activities a few feet from the spot she insisted upon using." *Id.* at 514 (Reed, J., dissenting). It is interesting to compare Justice Reed's position to that of the majority in Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), a modern state action case which upheld the right of a shopping mall owner to prohibit distribution of handbills. Noting that the mall in *Lloyd* was surrounded by a parking lot, the Court argued that "[a]ll persons who enter or leave the private areas within the complex must cross public streets and sidewalks, either on foot or in automobiles. When moving to and from the privately owned parking lots, automobiles are required by law to come to a complete stop. Handbills may be distributed conveniently to pedestrians, and also to occupants of automobiles, from these public sidewalks and streets. . . . It would be an unwarranted infringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist. . . . In ordering this accommodation [to the exercise of first amendment rights] the courts below erred in their interpretation of this Court's decisions in *Marsh* and [Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) (upholding right to picket in a shopping mall)]." 407 U.S. at 566-67.

[167] Justice Reed's dissent in *Marsh*, discussed at note 166 *supra*, was clearly based on a liberty of contract approach. In defending the prerogatives of the owner of the company town, Justice Reed observed that "[t]he restrictions imposed by the owners upon the occupants are sometimes galling to the employees [who must live in the towns] and may appear unreasonable to outsiders. Unless they fall under the prohibition of a legal rule, however, *they are a matter for adjustment between owner and licensee*, or by appropriate legislation." *Id.* at 513 (Reed, J., dissenting) (emphasis added). He is clearly envisioning some form of contractual bargaining, with the employer-owner enjoying an advantage similar to that guaranteed him in such *Lochner* era decisions as *Coppage*. Justice Reed's reference to "appropriate legislation" is a seeming acknowledgement that Congress could enact legislation under some part of the Constitution other than the fourteenth amendment, as it had used the commerce power to enact the National Labor Relations Act.

The Court, however, was basing its decision on reality,[168] recognizing that the citizen of a company town had little power to resist the conditions of existence set by its owner.[169] The company had opened its property to use by the public, and the Court contended that "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 statutory and constitutional rights of those who use it."[170] By opening up its property for use by the public as a town, the company in *Marsh* had, in the most literal sense, made what it owned "necessary to the life of its neighbors," giving the company the power to make those living within the town do "what it wanted." The Court now stressed, as if in response to Cohen, that property ownership "does not always mean absolute dominion." At this critical juncture, however, the Court portrayed its discussion as resting within the bounds of traditional state policy toward private property, drawing an analogy to "bridges, ferries, turnpikes and railroads." "[S]ince their operation is essentially a public function," the Court continued, "it is subject to state regulation."[171] This appeal to tradition

---

[168] "As to the suppression of civil liberties in company towns and the need of those who live there for Constitutional protection, see the summary of facts aired before the Senate Committee on Education and Labor, *Violations of Free Speech and Rights of Labor* . . . summarized in Bowden, *Freedom for Wage Earners, Annals of the American Academy of Political and Social Science*. . .; Z. Chafee, *The Inquiring Mind*. . ., Pamphlet published in 1923 by the Bituminous Operators' Special Committee under the title *The Company Town;* U.S. Coal Commission, Report. . . ." *Id.* at 509 n.6. The reality was a massive deprivation of freedom through the private action of a company town.

[169] The Court was not impressed by the argument that because the owner might have entirely closed the property comprising the company town to public use he should be able to close the property to some. It noted that, while it had no reason to question the state court's determination that the company in *Marsh* had not irrevocably dedicated its property to public use, and that such a determination was conclusive as to the company's right to reclaim possession and close the property, "the issue of 'dedication' does not decide the question under the Federal Constitution. . . ." *Id.* at 505 n.2.

[170] *Id.* at 506. The Court suggested that this conclusion be compared to Republic Aviation Corp v. NLRB, 324 U.S. 793 (1945), a landmark decision balancing the rights of the employer to maintain discipline in his plant against the rights of employees effectively to organize under the National Labor Relations Act, 29 U.S.C. §§ 141-188 (1970). *Republic Aviation* upheld the NLRB's determination that enforcement of an employer's "no solicitation" rule so as to bar employees from wearing union organization buttons was an unfair labor practice in violation of § 7 of the Act, and that dismissal of employees for wearing the buttons was a violation of §§ 8(1) and 8(3) of the Act. That decision was the very antithesis of *Coppage*, where dismissal of an employee for union involvement was viewed as a basic right of the property owner — just as *Marsh* was antithetical to the Civil Rights Cases. State action had entered the post-*Lochner* era.

[171] *Id.* at 506.

provided an inadequate theoretical basis for the Court's decision to bring private property within the scope of federal civil rights protection, though it may have provided a desired veneer of continuity.[172]

The public function analogy stressed the extraordinary aspects of a company town as if to deny more general applicability of the constitutional restraints employed in *Marsh*. The Court's careful avoidance of any mention of state action indicated that it was not ready to overrule the *Civil Rights Cases*, yet that decision had itself declared the inapplicability of the fourteenth amendment to railroads, one of the "public functions" to which *Marsh* pointed.

The Court provided a more thoughtful insight when it recognized the significance of the power wielded by modern corporations: "[o]peration of these facilities [public functions], even by privately owned companies, [may] unconstitutionally [interfere] with . . . interstate commerce."[173] "And certainly," the Court continued, "the corporation can no more deprive people of freedom of press and religion than it can discriminate against commerce."[174]

As Charles Black has noted, "the concept of interference with national government functions shades off into the concept of interference with the rights created and protected by the national government."[175] In the *Civil Rights Cases*, Justice Bradley had sought to leave the impression that only states could interfere with national functions, though he left open the fascinating possibility that Congress could extend federal civil rights protection under the commerce clause in certain instances.[176] The

---

[172] The "public function" discussion was, in fact, little more than a restatement of the "affected with a public interest" approach developed with Justice Bradley's assistance in Munn v. Illinois, 94 U.S. 113 (1877), discussed at note 142 *supra*.

[173] 326 U.S. at 506. *See generally* A. BERLE, THE MODERN CORPORATION AND PRIVATE PROPERTY (1933).

[174] *Id.* at 506 n.4.

[175] C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 57 (1969). *See also* United States v. Brand Jewelers, Inc., 318 F. Supp. 1293 (S.D.N.Y. 1970), *discussed in* Comment, *Sewer Service and Confessed Judgments: New Protections for Low-Income Consumers*, 6 HARV. C.R.-C.L.L. REV. 414, 427-32 (1971) (United States given standing in consumer fraud matters because of its claim that the large scale fraud was state action interfering with interstate commerce).

[176] In the Civil Rights Cases opinion itself Justice Bradley refused to reach the question of legislation under the commerce clause, though the plaintiffs had urged him to do so: "[W]hether Congress, in exercise of its power to regulate commerce amongst the several States, might or might not pass a law regulating rights in public conveyances passing from one State to another, is also a question which is not now before us, as the sections [of the Act of 1875] in question are not conceived in any such view." 109 U.S. at 19. In 1878, only five years before the *Civil Rights* decision, Justice Bradley indicated that he believed Congress had the power to pass a law directly protecting civil rights under its commerce

development of the New Deal, however, had been based on an understanding that private power could interfere with national functions, with effects no less devastating than those resulting from direct action by the state.[177] This understanding now informed Supreme Court decisionmaking as it dealt with the questions of private power and individual rights which involved private action.[178]

---

clause powers. The Court, with Justice Bradley joining in the majority opinion, struck down a state law having the effect of requiring the commingling of blacks and whites in railroad cars, declaring it an unconstitutional burden on interstate commerce. Hall v. De Cuir, 95 U.S. 485 (1877). However, in 1890 the Court refused to find that a state law requiring separate accommodations for blacks and whites on railroad cars was similarly a burden on interstate commerce. Louisville N.O. & T. Ry. v. Mississippi, 133 U.S. 587 (1890). The Court's seeming inconsistency as to what burdened interstate commerce might best be explained by the common effect of the decisions — both maintained segregation. Professor Woodward has pointed to this duet of cases as a prime example of the Supreme Court's contribution to post-Reconstruction sectional reconciliation, "reconciliation . . . achieved at the Negro's expense." WOODWARD, *supra* note 25, at 71. In *Louisville*, Justice Harlan, dissenting, noted that Justice Bradley had authorized him to say that Justice Bradley also dissented on the grounds that the law was "void as a regulation of interstate commerce." 133 U.S. at 594 (Harlan, J., dissenting). The Justices who had gone separate ways in the Civil Rights Cases were now back together, with Bradley joining Harlan's expansive view of direct federal power.

[177] Note this observation by Richard Hofstadter in his critical analysis of Franklin Roosevelt and the New Deal: "Roosevelt viewed the structure of economic and social power in broad social perspective. 'Private power,' he declared, was [becoming] 'stronger than the democratic state itself. . . .' The power of the few to manage the economic life of the Nation must be diffused among the many or be transferred to the public and its democratically responsible government." R. HOFSTADTER, THE AMERICAN POLITICAL TRADITION 341 (1960).

[178] Justice Frankfurter, in his concurring opinion in *Marsh*, 326 U.S. at 511, took issue with the use of an interstate commerce analogy — not the last time the commerce analogy to civil rights protection would be found disturbing. *See* GUNTHER, *supra* note 74, at 208-29. *See also* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), and Katzenbach v. McClung, 379 U.S. 294 (1964), where the Court upheld the 1964 Act under the Commerce Clause. The concurring opinions by Justices Black, Douglas, and Goldberg in these cases discuss their dissatisfaction with the failure to rest the decisions on the fourteenth amendment as well as the commerce clause. *See* 379 U.S. at 268 (Black, J., concurring); *id.* at 279 (Douglas, J., concurring); *id.* at 291, (Goldberg, J., concurring).

Interstate commerce, Justice Frankfurter contended in *Marsh*, "involves an accommodation between National and State powers operating in the same field. Where the First Amendment applies, [however,] it is a denial of all governmental power in our Federal system." 326 U.S. at 511. Yet the interstate commerce analogy was apt precisely because as long as private action could seriously infringe rights the first amendment was *not* a denial of all governmental power in the federal system. Before the fourteenth amendment it had only been a denial of federal power; after the passage of the amendment it had been a denial of what Justice Bradley called "state action." This left a great residuum of power, "private action" enforced by state power, as a potential clog on the federal system. The majority spoke of the public's interest in "the functioning of the community in such manner that the

The Court, however, underestimated the ability of the private sector to circumvent such a rule through common law and contract devices.[179] What was not considered was that the townspeople could have signed *covenants* barring distribution of religious literature, as property owners in towns all over the country were then signing covenants to bar the residence of black people. The "public function" test either had to be expanded to take in individual agreements or the Court had to confront the fact that the cumulative actions of private individuals in enforcing private rules could be just as devastating as those of a company in its wholly-owned town.

Marsh did not touch on the concerns of racial discrimination, but it signalled a willingness on the part of the Court to pierce the veil of private action. In doing so, it provided doctrinal support to the growing legal movement[180] to gain the rights black people had been promised and

---

channels of communication remain free," whether the community is publicly or privately owned. 326 U.S. at 507. Those "channels" were like so many avenues of interstate commerce, and "private action" was closing them in a manner not unlike private action in obstructing an interstate highway. *Id.* at 506.

It might also be said that private action was closing those channels in a manner similar to that used by states when they imposed "unconstitutional conditions." *See* p. 345 *supra.* But to restrict only the operation of the unique phenomenon of company towns — and to do so under the rubric of "public function" rather than state action — was to leave nearly all private action untouched.

[179] "[I]t is clear," said the Court, "that had the people of [the company town] owned all the homes, and all the stores, and all the streets, and all the sidewalks, all those owners together could not have set up a municipal government with sufficient power to pass an ordinance completely barring the distribution of religious literature." 326 U.S. at 505.

[180] In 1947, the year that separated the decision in *Marsh* from the decision in *Shelley*, Robert Hale addressed a conference on "Federal Power to Protect Civil Rights," convened by the National Lawyers Guild, the National Bar Association, and the National Legal Committee of the NAACP. In that paper, published as *Rights Under the Fourteenth and Fifteenth Amendments Against Injuries Inflicted By Private Individuals*, 6 LAWYERS GUILD REV. 627 (1946), he undertook a wide-ranging analysis of the legal basis for job discrimination. Hale noted that absent such statutory involvement as the Railway Labor Act, 45 U.S.C. §§ 151-188 (1970), which could lead the Court to find state action, *see* Railway Employees' Dep't v. Hanson, 351 U.S. 225 (1956); Steele v. Louisville N. R., 323 U.S. 192 (1944), unions were free to force employers to bar blacks from employment.

This occurred, Professor Hale observed, only because the employer had the power to exclude blacks from his property: "The employer has that power, but only because the state law assigns to him the ownership of his property, and stands ready to enforce his property right to keep anyone from working in his plant without the owner's consent." Hale, *supra*, at 631. Hale also examined how a black might challenge a union "closed shop" agreement which called upon the employer to exclude blacks. At the very least, he suggested, a fourteenth amendment challenge to enforcement of the agreement "by judicial action" ought to succeed. *Id.* Yet, he noted, one large obstacle stood in the way: the dictum in *Corrigan*. *Id. See* pp. 332-34 *supra*.

denied more than six decades earlier. Social and political pressure[181] was added to legal demands confronting the Court. The assault on the racially restrictive covenant was of paramount importance from a legal standpoint.[182] The situation facing blacks with regard to private action depriving them of housing made suppression of civil liberties in a company town seem trivial by comparison.[183] The *Yale Law Journal* noted in 1948, just prior to the decision in *Shelley*, that in all but one of the twenty-one jurisdictions in which the issue had come before the courts, racially restrictive covenants were upheld, the "general rationale" being "that the law should enforce private agreements where there is no contrary policy."[184] The *Harvard Law Review*, discussing *Shelley*, neatly understated the matter: "The willingness of the state courts to serve as instruments to effectuate the discrimination contained in the restrictive covenants had been a material factor in producing a situation wherein major portions of many urban centers were effectively barred to Negro occupation."[185] On October 29, 1947, Truman's Committee on Civil Rights issued its now celebrated report "To Secure These Rights"[186]

---

[181] President Truman addressed the NAACP in 1947 and declared that "[t]he extension of civil rights today means not protection of the people against the government, but protection of the people by the government. We must make the government a friendly, vigilant defender of the rights and equalities of all Americans. And again I mean all Americans." *Quoted in* R. KLUGER, SIMPLE JUSTICE 250-51 (1975). Kluger's excellent discussion of the events leading up to the decision in *Shelley* is an extraordinary synthesis.

[182] *See generally* C. VOSE, CAUCASIANS ONLY (1959).

[183] Migration of blacks to urban centers in the 1940's had "swollen to a flood." L. MILLER, THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO 321 (1966). After using up the available housing stock in "black" neighborhoods, blacks sought to enter other communities. As Professor Miller notes, "the courts turned them back by issuing injunctions forbidding them to violate race restrictive covenants that said quite openly and simply, 'This property shall not be used or occupied by any person or persons except those of the Caucasian race.' *Id* at 321. The Federal Housing Administration had never insured a non-segregated project. In fact, the FHA issued a model restrictive covenant for use by home owners and declared in its underwriting manual that "[i]f a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same social and racial classes." *See* KLUGER, *supra* note 181, at 246. In California implementation of a regime of restrictive covenants was no longer left to volunteers, or even property owners or associations or realty boards. In October of 1947 a public relations firm was formed under the aegis of the San Fernando Chambers of Commerce, "engaging in the business of 'promoting' segregation, using a technique of blanketing large areas with a single, expandable [restrictive] agreement." Brief for California as Amicus Curiae at 5, Shelley v. Kraemer, 334 U.S. 1 (1948).

[184] Note, *Race Discrimination in Housing*, 57 YALE L.J. 426, 446-47 (1948).

[185] 61 HARV. L. REV. 1450, 1452 (1948).

[186] *Quoted in* KLUGER, *supra* note 181, at 252.

and urged, *inter alia*, that the Justice Department enter, as *amicus curiae*, cases challenging restrictive covenants. The legal adviser for the Department of State announced that the United States had been "embarrassed" by the racial discrimination taking place in the country.[187] In sum, "private action," far from being a "mere private invasion" as Justice Bradley had characterized it, in this instance amounted to a takeover of the national housing market.

With one quick blow *Shelley v. Kraemer*,[188] by voiding enforcement of racially restrictive covenants, cut the Gordian knot of contractual and property arrangements which the Court had previously portrayed as tying its hands. While the Court in *Shelley* could have cited studies, statistics, and government reports to dramatize the impact of the private action problem there presented, as it had in *Marsh* a year before, it did not choose to do so. Instead it muffled the social and economic implications of the case in attempting to place it in line with conventional state action doctrine. *Shelley*, nonetheless, was the ultimate breakdown of a doctrine under pressure. The key integrative element of Justice Bradley's scheme, the sanctity of contract, had been frontally attacked. The argument with which "private action" had fought off judicial control — that the Courts could not void contractual arrangements or refuse demands for enforcement of common law rights by private parties — had been dealt what should have been a mortal blow.[189] The Supreme Court

---

[187] *Id.* The government's brief as *amicus curiae* indicated that several government agencies — including the Housing and Home Finance Agency, the United States Public Health Service, and the Interior Department's Indian Service — agreed that racially restrictive covenants were not in the national interest. Brief for the Unites States as Amicus Curiae 5-25, Shelley v. Kraemer, 334 U.S. 1 (1948).

[188] 334 U.S. 1 (1948).

[189] That *Shelley* did not have a greater influence on national discussion of the issues of civil rights and private property relations may have been due, at least in part, to the fact that the case was handed down at a time of increasing tensions within the profession and society at large. The American Bar Association was, in the post-New Deal era, clinging to its general policy of excluding blacks. J. AUERBACH, UNEQUAL JUSTICE 216 (1976). At the same time, it was vigorously attacking the National Lawyers Guild as a communist-leaning group. The Guild had been particularly active in the cause of black civil rights. *See* note 180 *supra*. Members of the Guild were barred from ABA membership in 1948. *Id.* at 233-34.

Note also that the covenanting group in the *Shelley* case argued in its briefs to the Supreme Court that "the entire reasoning of the petitioners in support of their 'State action' argument is predicated upon the subtle and subversive fallacy that the right of control of private property is in the State, not in the individual, and that individuals derive their rights from the State." Respondents' Brief at 31, Shelley v. Kraemer, 334 U.S. 1 (1948). The next year, Benjamin J. Davis, Jr., a lawyer who had participated in the defense of the Scottsboro boys, was one of 11 Communist Party members convicted under the Smith Act. AUERBACH, *supra*, at 216.

had proven that it could overcome Justice Bradley's attempt in the *Civil Rights Cases* to render the federal government powerless under the fourteenth amendment. It had breached the wall between state and "private" action.

In *Shelley*, the Court declared the enforcement of racially restrictive covenants to be state action prohibited by the fourteenth amendment. Chief Justice Vinson, speaking for all six judges sitting on the case,[190] attempted to place *Shelley* within the broad tradition established by Justice Bradley, but only succeeded in emphasizing how radically the case departed from past conceptions. "Since the decision of this Court in The Civil Rights Cases," wrote the Chief Justice, "the principle has become firmly embedded in our constitutional law that . . . [the fourteenth amendment] erects no shield against merely private conduct, however discriminatory or wrongful."[191] The covenants standing alone, he reasoned, were beyond the reach of the fourteenth amendment, but where a state court enforced the covenant "there was more."[192]

There was, however, no more than there had been in *Corrigan*, where the Court had seen only private action of the clearest sort. Chief Justice Vinson rather surprisingly declared that *Corrigan* presented none of the issues faced by the Court in *Shelley*.[193] The earlier case, he argued, had upheld only the validity of making the covenants *per se; Shelley's* prohibition of enforcement did not challenge this conclusion. This attempt to avoid the implications of clearly overruling *Corrigan* while reaching an antithetical conclusion probably accounts for one of the most peculiar and troubling parts of the *Shelley* decision: the Court's contention that racially restrictive covenants "standing alone" were not unconstitutional.[194]

---

[190] Justices Reed, Jackson, and Rutledge disqualified themselves from sitting on the case, the "inference most widely drawn" being that these judges had signed racially restrictive covenants. *See* KLUGER, *supra* note 181, at 254.

[191] 334 U.S. at 13.

[192] *Id.*

[193] Evidence of confusion on this point can be seen in Henkin, Shelley v. Kraemer: *Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 487-88 (1962). Professpr Henkin observes that there "might be another claim with some constitutional title competing with the claim of equality not mentioned in Shelley," and adds that not very many years before *Shelley* "one may guess, the countervailing claim would have appeared obvious, perhaps even obviously superior." *Id.* There was indeed a competing constitutional claim which appeared obviously superior: the liberty of contract claim, especially as asserted in *Corrigan*. *See* p. 335 *supra*.

[194] 334 U.S. at 13. It is quite likely that the *Shelley* opinion suffered because Chief Justice Vinson wrote it. The contradiction between the implications of the decision and the language in it which denies those implications may reflect the fact that, as one commentator

Chief Justice Vinson's position was not without irony. In prohibiting state court enforcement of agreements which had the effect of denying blacks their rights, the *Shelley* Court arguably had adopted the "corrective" posture which Justice Bradley had maintained would be an appropriate federal response under the fourteenth amendment.[195] Yet in doing so it overruled the principle that "private action" was invulnerable to constitutional attack, which the Chief Justice contended was "firmly embedded" in constitutional law since the *Civil Rights Cases*.

Private action had come to be viewed as an area of individual freedom to act without regard to constitutional prohibitions, if one so wished; an area perversely protected from governmental interference by the restraint government had imposed on itself through the fourteenth amendment. In *Shelley*, the state court was seen to be simply fulfilling its normal role of lending enforcement power to a purely private ordering: holding a covenantor, who had agreed to be bound at one time to a rule against selling his property to blacks, to the terms of his agreement. The problem with the Supreme Court decision, as Professor Herbert Wechsler argued in making his famous attack on the Court for failing to employ "neutral principles" of decisionmaking, was that if the state court only judicially enforced racially discriminatory covenants its action could have been viewed as no more

---

has noted, Chief Justice Vinson was "a Justice for whom 'racial equality' occupied a lower position on the hierarchy of values than 'judicial self-restraint.' " Lefberg, *Chief Justice Vinson and the Politics of Desegregation*, 24 EMORY L.J. 243, 266 (1975). In Barrows v. Jackson, 346 U.S. 249 (1953), where the Court struck down damage actions against white sellers for selling to blacks in violation of racial covenants, the majority recognized that to have allowed such actions would have emasculated *Shelley* and reinstated the regime of racially restrictive covenants backed by state power. Chief Justice Vinson dissented, professing himself unable to see how individual black buyers would be hurt by a damage action against a white seller. 346 U.S. at 262. In 1952 the Court had been faced with a challenge to a scheme in which a railway union forced the employer to fire all blacks and hire whites in their places as porters. Brotherhood of Trainmen v. Howard, 343 U.S. 768 (1952). While the case was decided on the grounds that unions availing themselves of federal statutory protection through the federal Railway Labor Act, 45 U.S.C. §§ 151-188 (1970), had a duty not to discriminate, the majority cited *Shelley* and seemed aware of the close analogy between restrictive covenants and discriminatory labor agreements. The Chief Justice, however, joined in a dissenting opinion by Justice Minton.

Chief Justice Vinson's record on civil liberties was generally poor. KLUGER, *supra* note 181, at 246, asserts that the Chief Justice "supported state governments in preference to individual rights 80 percent of the time; the federal government he supported 90 percent." While sitting on the United States Court of Appeals for the District of Columbia, Judge Vinson had voted to uphold racial covenants. National Fed'n of Ry. Workers v. National Mediation Bd., 110 F.2d 529 (D.C. Cir.), *cert. denied*, 310 U.S. 628 (1940).

[195] 109 U.S. 3 (1883).

> than a legal recognition of the freedom of the individual [to make such an agreement]. 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 the individual involved is, by hypothesis, entirely free to make.[196]

If judicial enforcement here were state action, asked Wechsler, would not enforcement of trespass laws, invoked by a homeowner to exclude blacks from his property, also be prohibited? No form of private action seemed invulnerable to the threat implicit in the opinion.[197]

A doctrine which had been so carefully contained from its inception was now seemingly out of control, and the Court had not explained what had happened. Fourteen years after *Shelley* had been decided, when the Court's failure to follow up the case made clear that it was to become an anomaly,[198] Professor Henkin lamented that a case which "jumped with my preconceptions and hopes" had become "a citation for inadequacy in the exercise of the judicial function in constitutional cases." "We are challenged," he observed, "to show that sturdier foundations for the opinion can be laid."[199]

---

[196] Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 29 (1959). Wechsler's view was echoed by many. *See, e.g.*, FRIENDLY, *supra* note 20, at 14, 15: "[W]hat the demonstration [that court action was state action] failed to demonstrate was the only point at issue: namely, that the Court had ever so held with respect to action of a state court that simply enforced a private agreement which the opinion, perhaps in error, conceded to be valid."

[197] *But see* Justice Black's discussion in Bell v. Maryland, 378 U.S. 226, 318 (1964) (Black, J., dissenting). In *Bell*, six justices attempted to apply *Shelley* to the sit-in problem, but divided three-to-three on the question of state action. In Justice Black's view, *Shelley* dealt with the narrow question of the right to convey property, and thus had no implications for the problems raised by the sit-in cases. This led him to conclude that, absent legislation, the Court was powerless to effect solutions to private action involving race discrimination through the fourteenth amendment. Justice Black's inability to go beyond the conventional state action approach to the fourteenth amendment isolated *Shelley* from the major issues of the day, but only at the cost of isolating the amendment itself. *Id.* at 330-331 (Black, J., dissenting). For a discussion of the general relationship between *Shelley* and the sit-in cases of the 1960's, see GUNTHER, *supra* note 74, at 936-38.

[198] KLUGER, *supra* note 181, at 588, quotes Anthony Lewis of the *New York Times* referring to *Shelley* as "a piece of lawyer's law, a sort of crooked case, that had no lasting impact on its time."

[199] Henkin, *supra* note 193, at 474.

Shelley rather inadvertently pulled the keystone from the doctrinal arch which had supported state action since the *Civil Rights Cases;* Justice Bradley's careful construction was left in ruins. The Court has attempted to reconstruct a theory of the fourteenth amendment from these ruins, but the result has been what Charles Black aptly labelled a "conceptual disaster area."[200] Sturdier foundations for fourteenth amendment theory can be constructed once there is a greater understanding of how changes in social conditions and political and legal thought led to the result in *Shelley*, how the sundering of the contract connections which had held state action together as a coherent doctrine legitimizing the frustration of constitutional rights protections by private action destroyed in turn the rational underpinnings of the doctrine.

III. SUGGESTIONS FOR A DOCTRINE RESPONSIVE TO THE PROBLEM OF PRIVATE POWER

A. Exposing the Current Misunderstandings

The genius of Justice Bradley's *Civil Rights Cases* opinion was its recognition of the intrinsic relationship between private power and private activity abridging civil rights and civil liberties and the skillful linkage of the two phenomena through a doctrine which denied the state's interest in how such power was used or abused. The breakthrough represented by *Shelley* was its direct confrontation of these contract doctrine connections; it severed the links to the discredited *laissez-faire* philosophy of private power's immunity to governmental control in the public interest. Shortly after the decision in *Shelley* one observer noted that both *Shelley* and *Marsh* were "cases involving situations where if the Fourteenth Amendment was to have any practical meaning the action in question had to be prohibited."[201] The action in question was private action, and the message of *Shelley* was that, if the fourteenth amendment were to have "practical meaning," private power, power every bit as much the state's as that exercised in traditional state action situations, had to be brought within the scope of the amendment and thus within the scope of the state's growing concern for the civil rights and civil liberties of its citizens. The challenge remaining for the Court was to understand more fully the relationship between private power and abridgment of rights and to begin the difficult task of developing a coherent doctrinal

[200] Black, *supra* note 4, at 95.

[201] Note, *State Action Reconsidered in Light of* Shelley v. Kraemer, 48 COLUM. L. REV. 1241, 1245 (1948).

framework in which to determine when fourteenth amendment concerns for rights and liberties would lead the state to withhold power from the private sector.

The Court, then, was challenged to define standards of *private* responsibility for the civil rights and civil liberties of others where private power was exercised. The complexity of this question cannot be overestimated; *Shelley* said that it could not be ignored. The history of state action decisionmaking after *Shelley*, however, is a history of flawed attempts to evade the question, to maintain in the face of a world where simple lines between public and private power were increasingly untenable that the distinctions between private and state action created in the *Civil Rights Cases* could still be given meaning. This unexamined loyalty to the *Civil Rights Cases* decision is indirectly responsible for the anxiety which *Shelley* has caused. Underlying the *Civil Rights Cases* decision was an implicit threat: if the contract connections were broken, if the state were seen to be involved in all private orderings, the fourteenth amendment would go out of control, everything would be constitutionalized. *Shelley* finally admitted that the state was involved in all private orderings, even contracts. An irrational fear lingers, however, that unless we cling to the fiction which *Shelley* destroyed, the fourteenth amendment will run away from us. This is no more true than the idea that once the Court allowed state regulation of such economic activity as labor contracts the total loss of freedom in private decisionmaking would inevitably follow. When the Court left the *Lochner* era in *West Coast Hotel v. Parrish*,[202] it did not reject the idea that the state allows liberty of contract, but only insisted that this was a "liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people."[203] Similarly, to emerge fully from the *Civil Rights Cases* era of fourteenth amendment adjudication is not to deny the notion of private action but only to insist that this must be seen as action within a larger social organization, demanding legal protection of the civil rights and civil liberties of its people.

Ripped from its historical context, *Shelley* seems a decision without limits, a decision which could not mean what it seemed to say. As a result, *Shelley* is treated as having an almost Delphic significance.[204]

---

[202] 300 U.S. 379 (1937).

[203] *Id.* at 391.

[204] *See, e.g.*, Reitman v. Mulkey, 387 U.S. 369, at 384-85 (1967) (Douglas, J., concurring) (leaving the zoning function to state-licensed private groups which practice racial discrimination is state action in the narrowest sense in which *Shelley* can be con-

Yet when viewed in light of national history, and particularly the history of state action decisionmaking, the meaning of *Shelley* is clear and untroubling: how private power is used in our society, insofar as it affects the rights of citizens, had finally been recognized as amenable to constitutional and judicial remedy.[205]

Judge Bazelon recenty observed that "[t]raditionally, we have guarded civil liberties with a 'thou shalt not' strategy, seeking to foster freedom by protecting citizens from the state." "Sooner or later," he continued,

> we will have to consider whether that strategy alone can make freedom meaningful. Several factors suggest that if it was enough in the rural, open society of 1776 — and perhaps it was not enough even then — it is woefully inadequate today.
>
> The first factor is the increased power of private groups. With the advent of huge corporations, powerful unions and sophisticated technology, government no longer holds a monopoly on the power to invade liberty on a massive scale. . . . A single television network can limit free speech by denying air time to outsiders or by censoring its own reporters. Unless private power is exercised responsibly, we will either have to suffer private abuse or countenance increased public regulation.[206]

Yet so far as the fourteenth amendment is concerned, students and judges, taking their lead from the Court, continue to maintain that the proper area of inquiry is the pursuit of chimerical state involvement on the grounds that only the state is to be held responsible. Consequently,

---

strued); Evans v. Abney, 396 U.S. 435, 450 (1970) (Brennan, J., dissenting) (*Shelley* at least stands for the proposition that a state court cannot stop parties of different races from dealing with one another by enforcing a private racial restriction).

[205] *See* R. WOLFF, THE POVERTY OF LIBERALISM 90-92 (1968). Professor Wolff's general discussion of historical moments when certain phenomena become "appropriate objects of decision" (*i.e.* are no longer viewed as uncontrollable) is very helpful in analyzing the importance of *Shelley*. "[T]here is something like a law of . . . development," Wolff noted, "to the effect that once a matter of major social importance becomes an object of decision, it never reverts to the status of fact of nature or unintended consequence. . . . Irreversible historical progress, as opposed to historical alteration, takes place when some matter of major importance first becomes an object of someone's decision within society. . . . [W]hat was initially a fact of society becomes a subject of policy deliberation." *Id.*

[206] Bazelon, *Civil Liberties — Protecting Old Values in the New Century*, 51 N.Y.U.L. REV. 505, 512-13 (1976).

problems of the irresponsible use of private power escape constitutional scrutiny.[207]

If Judge Bazelon is right, and the history of state action decision-making in the last three decades would seem to bear him out, sooner or later the Court will have to deal directly with the question of the responsible use of private power if civil rights and civil liberties are to be preserved. The New Deal saw the government directly confront the problem of private power as it affected our economic lives. Nor has the decision by the Court to remain tied to the meaningless 19th century approaches of the *Civil Rights Cases* stopped Congress,[208] or the Court itself where necessary, from moving against flagrant abuses of private power exercised in a manner seriously infringing on civil rights or liberties. Yet until the Court overturns the *Civil Rights Cases* and directly confronts the idea that private power is indeed responsible for the effects it has on individual rights, its contributions to the creation of norms in this area will remain at a standstill.

B. Understanding The Private Rule-Binding Mechanism

What follows is meant as no more than a suggested framework which may help reorient discussion of questions of private action by focusing directly on the system by which private power abridges civil rights and civil liberties. The central organizing principle for such an analysis in fact has been offered by the Court in a situation where the Court was so intent on reaching the problem of private action directly that it took for granted what it has denied in state action cases generally. In *New York Times v. Sullivan,*[209] the Court declared:

> We may dispose at the outset of . . . the proposition relied on by the State Supreme Court — that "the Fourteenth Amendment is directed against State action and not private action." That proposition has no application to this case. Although this is a civil lawsuit between private parties, the Alabama Court has applied a state rule of law which petitioners claim to impose an invalid restriction on their constitutional freedoms. . . . It matters not that law has been applied in a civil action, and that

---

[207] *See* pp. 297-303 *supra*.

[208] *See, e.g.,* Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1970) (discrimination in employment); Title VII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3619 (1970) (discrimination in housing).

[209] 376 U.S. 254 (1964).

> it is a common law only, though supplemented by statute. . . . The test is not the form in which state power has been applied, but, whatever the form, whether such power has, in fact, been exercised.[210]

Primary focus should be on the "state rule of law" to which the wielder of private power, here called the "binder," seeks to bind a party, the "bindee," who claims that the rule so imposed creates an invalid restriction on constitutional freedoms.[211] In *New York Times v. Sullivan*[212] a state official (the "binder") sought to bind a newspaper (the "bindee") to a rule of libel, while the newspaper claimed that the enforcement of such a rule would frustrate the exercise of its first amendment rights. The defendants in *Shelley* sought to bind resisting parties to a rule of contract which excluded blacks from property. The railroad owner in the *Civil Rights Cases* sought to bind blacks to a rule of trespass, and the company town in *Marsh* similarly sought to bind the Jehovah's Witness to a trespass rule which would exclude her from the company town. In each case, the "rule binding" is coupled with a *condition:*[213] the state official in *New York Times* placed himself into the public arena by virtue of being a public official, but he sought to condition such discussion on not being seriously criticized; in *Shelley* the condition for use or sale of the property was that the white owner should not sell to blacks.

The next step in the analysis would focus on the nature and extent of the binder's power. For example, the seller in *Shelley* who was being bound to a rule that he could not sell to blacks was not simply a property owner, but rather an owner who had involved his property in a network of power relations through covenants. Thus the Court's concern in *Shelley* was not simply in the two contracting parties before the court — the covenantors who sought enforcement of the discriminating condition and the resisting seller — but the larger social organism which the covenantors represented. Similarly, in a case like *Jackson v. Metropolitan Edison Co.*[214] a search for state involvement would be supplanted by an analysis of the nature and extent of private property operated as a utility supplying a necessary service to its community. The utility in *Jackson*

---

[210] *Id.* at 265.

[211] Normally, the binder and bindee are the defendant and plaintiff, respectively, in state action cases.

[212] 376 U.S. 254 (1964).

[213] *Compare* discussion at note 152 *supra*.

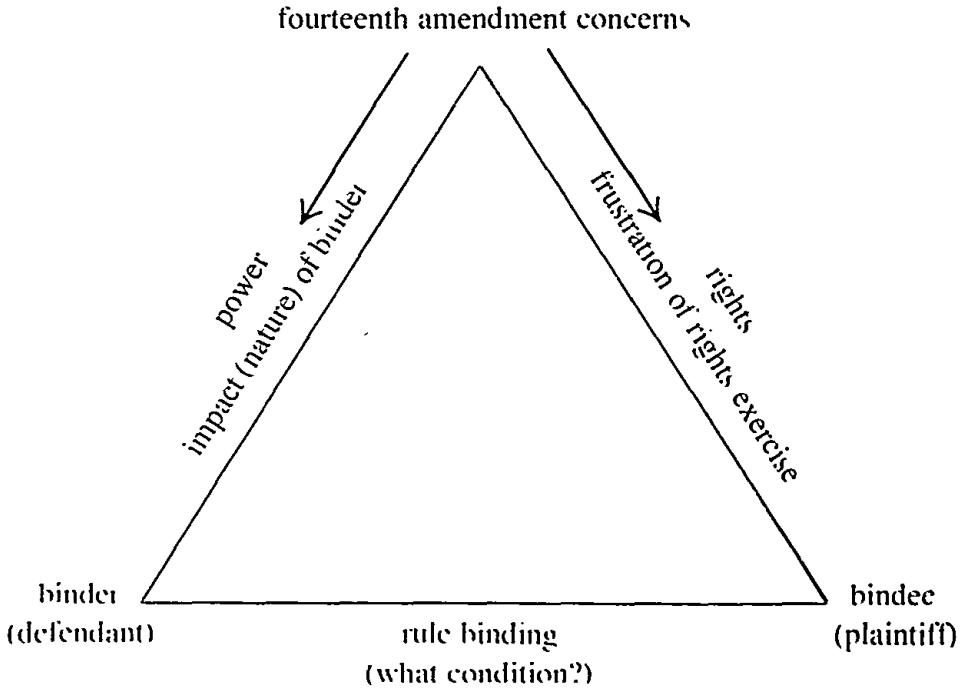
[214] 419 U.S. 345 (1974). *See* p. 299 *supra*.

sought to bind the customer to a rule which allowed the customer to use the utility's property, the electricity, only on the condition that the customer acquiesce in the utility's determination that service should be terminated, regardless of whether any elemental notions of due process were accorded the customer in determining that payment was in fact overdue. In the case of shopping malls,[215] we might end the futile discussion of whether or not shopping malls are a "public function" by recognizing that, because malls have become centers of commercial activity, the mall which seeks to expel a political protester has the power to guarantee that a large part of the community will have no other opportunity to benefit from such exercise of rights.

The nature of the binder's power cannot be fully appreciated until the final step of the analysis is completed: review of the real options of the bindee.[216] To the extent the bindee has alternatives which allow him to achieve his goal without submitting to the conditions set by the binder, the binder's power diminishes. Without alternatives, the bindee is caught in a trap of the binder's making. The black buyer in *Shelley* had only a fictive option, that of buying a home in an area from which he was not

[215] *See* note 160 *supra*.

[216] Solely to organize one's thinking about a particular private action problem, I have found it useful to triangulate state action situations within the following scheme:



excluded by covenant. The options available to the black plaintiffs in the *Civil Rights Cases* were similarly ephemeral. In cases where the Court fails to recognize the power of the binder it forecloses the plaintiffs' exercise of their rights.[217]

CONCLUSION

This Article has analyzed the development of state action theory and suggested that the state action-private action approach to the fourteenth amendment is based on the now-discredited theory of liberty of contract. Justice Bradley's *Civil Rights Cases* opinion has been scrutinized to expose the liberty of contract bases which through the decision have been imposed on fourteenth amendment decisionmaking. The analysis has demonstrated that the difficulties which have been experienced in protecting civil rights and civil liberties under the fourteenth amendment are largely due to a failure to recognize and reject a doctrine which derives its force from judicial theories which have been in disrepute since the *Lochner* era. The second part of the Article focused on the legal, intellectual, and social developments of the post-New Deal era which culminated in *Shelley v. Kraemer;* it argued that *Shelley* represented the unrealized but undeniable break with the Lochnerian view of private property and individual rights.

This Article does not presume to propose answers to the problem of the expansion of judicial protection of individual rights from private power. Rather, it suggests that overcoming the inertia of contemporary fourteenth amendment decisionmaking begins by considering the question the state action theory was constructed to avoid: the nature and extent of the power exercised by private owners of property.

---

[217] Taking a somewhat more difficult case, what of the person who signs a conditional sale contract, and finds that — due to alleged failure to pay — his home is invaded by a "self-help" repossessor? The binder-bindee analysis would suggest that due process protections are required whether the remedy be statutory or at common law. Judge Kaufman, dissenting in Shirley v. State Nat'l Bank, 493 F.2d 739, 747 (2d Cir. 1974) (Kaufman, J., dissenting), suggested that "where, as here, the creditor is empowered, whether by common law or by statute, to unilaterally resolve a conflict, he is acting within a sphere reserved for the state alone and, therefore, his power, like state power, must be fettered by the restraints of due process." Whether one agrees with Judge Kaufman's conclusion, it would seem clear that rational discussion is advanced by his focus on the power of the "binder."

Self-help repossession has been a particularly difficult area for state action analysis. *See generally* Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment* (pts. 1 & 2), 46 S. CAL. L. REV. 1003 and 47 S. CAL. L. REV. 1 (1973).