



6-2018

## Things Invisible To See: State Action & Private Property

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### Recommended Citation

Joseph William Singer & Isaac Saidel-Goley, *Things Invisible To See: State Action & Private Property*, 5 Tex. A&M L. Rev. 439 (2018).

Available at: <https://doi.org/10.37419/LR.V5.I3.1>

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# ARTICLE

## THINGS INVISIBLE TO SEE: STATE ACTION & PRIVATE PROPERTY<sup>©</sup>

by: Isaac Saidel-Goley\* & Joseph William Singer†

### ABSTRACT

*This Article revisits the state action doctrine, a judicial invention that shields “private” or “non-governmental” discrimination from constitutional scrutiny. Traditionally, this doctrine has applied to discrimination even in places of public accommodation, like restaurants, hotels, and grocery stores. Born of overt racial discrimination, the doctrine has inflicted substantial injustice throughout its inglorious history, and courts have continuously struggled in vain to coherently apply the doctrine. Yet, the United States Supreme Court has not fully insulated “private” or “horizontal” relations among persons from constitutional scrutiny. The cases in which it has applied constitutional norms to non-governmental actors should be celebrated rather than shunned. This Article proposes reinterpreting the state action doctrine to mitigate its historical and contemporary harms. Ultimately, the Authors draw from property law theory to contend that the doctrine should be fundamentally reformed in favor of a more egalitarian conception of the state’s role in ensuring equal protection of law. The insights of property law theory lead the Authors to conclude that: (1) equal protection depends on law, not action; (2) common law is law and, whether it is coercive or permissive, it must comply with the Equal Protection Clause; and (3) common law that allows discriminatory exclusion from the marketplace violates the Equal Protection Clause. What matters, for the purposes of constitutional protection, is not “state action” but whether the law violates the norms of liberty, equality, and dignity recognized by free and democratic societies.*

### TABLE OF CONTENTS

I. INTRODUCTION.....	441
II. HISTORY OF THE STATE ACTION DOCTRINE.....	445
A. <i>Origins of the State Action Doctrine (1860–1883)</i> ...	447
B. <i>Formalistic Application of the State Action Doctrine (1883–1940s)</i> .....	450
1. Unequal Access to Public Accommodations ....	450

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© 2018 Isaac Saidel-Goley & Joseph William Singer. The Authors’ title comes from the second verse of John Donne’s poem *Song* that begins with the phrase “go and catch a falling star.” <http://www.bartleby.com/101/196.html>.

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† Bussey Professor of Law, Harvard Law School. Thanks and affection go to Martha Minow, Mira Singer, Tim Mulvaney, Doug NeJaime, Rashmi Dyal-Chand, and Sabeel Rahman. This project was supported in part by funding provided through the research program at Harvard Law School. This Article was presented at the Faculty Workshop at Southwestern Law School in October 2017. A shorter version was given as the Keynote Address at the Real Property Schmooze at Texas A&M University School of Law in February 2018. The Authors would like to thank the participants in those conferences for their suggestions and comments.

DOI: <https://doi.org/10.37419/LR.V5.I3.1>

- 2. Impaired Voting Rights ..... 452
- 3. Decreased Access to Housing and Increased Residential Segregation ..... 455
- C. *New and Expanding Conceptions of When the State is Acting (1940s–Present)* ..... 456
  - 1. Public Function Cases ..... 456
  - 2. Entanglement Cases ..... 464
- D. *Contemporary Harms of the State Action Doctrine*.. 473
- III. RESTATING THE STATE ACTION DOCTRINE ..... 475
  - A. *Precedent & Principle* ..... 475
  - B. *Restatement of State Action* ..... 476
    - 1. State Action is Present When Someone is Arrested or Prosecuted ..... 476
    - 2. State Action is Present When a Court Issues an Order ..... 479
    - 3. State Action is Present When the Government Enforces or Encourages a Custom ..... 481
    - 4. State Action is Present When the Government Makes an Allocative Decision ..... 483
- IV. FROM “STATE ACTION” TO EQUAL PROTECTION OF LAW ..... 484
  - A. *State Action Through the Lens of Property Law* .... 485
    - 1. Recognizing Valid and Invalid Property Rights . 485
    - 2. Allocating Rights Among Persons ..... 487
    - 3. Authorizing and Prohibiting Property Rights and Freedoms..... 488
    - 4. Regulating Externalities ..... 492
    - 5. Correcting Injustice Through Equitable Principles ..... 493
  - B. *Equal Protection of Law* ..... 494
    - 1. Equal Protection Depends on Law, Not Action ..... 494
    - 2. Common Law Is Law, Which Must Comply with the Equal Protection Clause ..... 495
    - 3. Common Law that Allows Discriminatory Exclusion from the Marketplace Violates the Equal Protection Clause ..... 496
- V. CONCLUSION ..... 503

*“Negro citizens, North and South, who saw in the Thirteenth Amendment a promise of freedom—freedom to ‘go and come at pleasure’ and to ‘buy and sell when they please’—would be left with ‘a mere paper guarantee’ if Congress were powerless to assure that a dollar in*

*the hands of a Negro will purchase the same thing as a dollar in the hands of a white man.”*

—Justice Potter Stewart, 1968<sup>1</sup>

*“[W]hile Lawrence confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.”*

—Justice Anthony Kennedy, 2015<sup>2</sup>

*“And it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment.”*

—Chief Justice Fred Vinson, 1948<sup>3</sup>

## I. INTRODUCTION

What rights give us the means to live from day to day? What legal entitlements empower us to move freely, to buy what we need, to live where we like? What laws must be in place to ensure that we—each of us—are equally free to pursue happiness? What laws enable us to acquire and enjoy property? What kinds of property rights are compatible with the values and norms of a free and democratic society?

To answer these questions, think about someone who moves from a state that prohibits sexual orientation discrimination in public accommodations to a state where the law empowers public accommodations to deny service on that basis. Imagine a small town in Alabama where a man named Dorian just relocated from Massachusetts. Dorian lives with his husband Henry. Dorian and Henry have been married for several years, and they have two young children. One evening they get a babysitter and go out to enjoy a meal at a new restaurant in town. The restaurant owner sees the two men, concludes that they are gay, and denies them service, ordering them off the premises. Dorian refuses to leave. The police arrive several minutes later, and arrest Dorian for criminal trespass. He is later prosecuted and convicted. Dorian appeals his conviction to the Alabama Supreme Court.

From a legal perspective, Dorian is in a tough spot. No federal statute prohibits public accommodations—like restaurants, hotels, grocery stores, or theaters—from denying service on the basis of sexual orientation.<sup>4</sup> Alabama is one of twenty-nine states without a state stat-

1. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443 (1968) (footnotes omitted).

2. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015).

3. *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

4. Title II of the Civil Rights Act of 1964 prohibits discrimination in “any place of public accommodation, as defined in this section, without discrimination on the ground of race, color, religion, or national origin.” Neither sex nor sexual orientation is included in the list of protected classes. See 42 U.S.C. § 2000a (2012).

ute prohibiting sexual orientation discrimination in public accommodations.<sup>5</sup> The common law of Alabama is also unhelpful.<sup>6</sup> No law gives Dorian the right to eat at a restaurant if the owner refuses to serve gay customers. Owners are free to exclude him because of his sexual orientation, and he could face criminal punishment if he resists exclusion.

The absence of a law regulating the restaurant does not mean that we are in a state of nature where no law exists. In fact, the law is palpably present in the form of the law enforcement officers who arrested and punished Dorian for exercising the same right to eat in a restaurant as is customarily enjoyed by straight people. The law is evident in granting the restaurant owner the right to exclude someone because of their sexual orientation. Both the recognition of discriminatory exclusion from a public place as a valid property right and the enforcement of that right by coercive state action would seem to involve government choices about the allocation of rights in land and the legitimacy of competing claims. And while such a law may seem permissive to the restaurant owner, Dorian experienced that law as coercive as he sat in his jail cell.

When Dorian gets his day in court, he will argue that his discriminatory exclusion, arrest, prosecution, conviction, and punishment violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. He will argue that the state violated the Equal Protection Clause by authorizing places of public accommodation to exclude LGBTQ patrons and by enforcing the discriminatory demands of the restaurant owner. He will argue that the state cannot authorize public accommodations to engage in invidious discrimination without denying him equal protection of the law.

Under current law, the Alabama Supreme Court would likely affirm Dorian's conviction, holding that the state action doctrine precludes Dorian's Equal Protection Clause claim. Specifically, the Alabama Supreme Court would explain that governmental authorization and enforcement of the restaurant owner's right to exclude Dorian from the restaurant owner's property does not constitute state

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5. See Isaac Saidel-Goley, Article, *The Right Side Of History: Prohibiting Sexual Orientation Discrimination In Public Accommodations, Housing, and Employment*, 31 WIS. J. L. GENDER & SOC'Y 2, 117, 121 & n.25 (2016).

6. *Id.* at 122. Compare *Florence Hotel Co. v. Bumpas*, 60 So. Ala. 566, 568 (Ala. 1915) (holding that innkeepers—unlike other businesses—hold themselves out as able and willing to entertain guests for hire and have an obligation to do so and such guests have a right to “insist upon . . . respectful and decent treatment at the hands of the innkeeper and his servants”) with *Banks v. State*, 170 So. 2d 417 (Ala. Ct. App. 1964) (state court enforcement of Ala. Code § 426 (1940), allowing a privately owned pharmacy to discriminate against customers because of their race did not violate the Equal Protection Clause because there was no state action); *Messer v. S. Airways Sales Co.*, 17 So. 2d 679, 681–682 (Ala. 1944) (holding that the common law duty to serve applies only to those owners exercising a “public calling” like a transportation facility or public utility).

action. Imagine that Dorian appeals that decision to the United States Supreme Court. He will argue that the state acted—through its common law, police, prosecutors, and courts—and that the state denied him equal protection of the law.

Dorian should win that argument. The government violates the Equal Protection Clause if it grants places of public accommodation the authority to engage in invidious discrimination. Any common law rule that denies access to the public marketplace in a way that treats some people as second-class citizens—authorizing discrimination without valid justification—violates the constitutional guarantee of equal protection of the law.

This may seem like a startling result. To be sure, it does require reinterpreting or reforming the state action doctrine, at least as applied to discriminatory exclusion from public accommodations. At the same time, the existing doctrine can be interpreted to support (1) the idea that the common law is subject to constitutional constraints; and (2) the idea that fundamental, constitutional equality-norms prohibit the recognition and enforcement of property rights which prevent people from acquiring property for discriminatory reasons.

The Authors' approach to the state action doctrine and the Equal Protection Clause rests on insights from property law theory. Ultimately, the Authors propose reforming the state action doctrine and endorsing a more progressive approach to equal protection—one that is informed by contemporary principles of property and equality that are foundational to a free and democratic society. The Authors want to preserve a private sphere where people are free to make individualized decisions about their associations with others while defining a public sphere where the state cannot recognize property rights or enforce rules that deny equal access to the marketplace.

The Constitution protects freedom of association and privacy, and allows people the room to choose their intimate relations and their friends in the private sphere of the home, the church, mosque, or synagogue. That does not mean that places open to the public have similar capacious powers to exclude whomever they wish. Public accommodations are part of the public world to which free and democratic societies grant equal opportunity and access. One does not have to belong to a privileged class or caste to enter the world of the market or to obtain private property. In order to be qualified to eat at a restaurant one does not need to have a particular skin color, ancestry, sex, or sexual orientation. Free and democratic societies do not recognize ascribed statuses. This means that such societies cannot delegate power to public accommodation owners to establish such castes by means of their private property rights.

In Section II, the Authors provide a history of the state action doctrine. First, the Authors discuss the origins of the doctrine, which was developed soon after the ratification of the Fourteenth Amendment.

The Authors pay particular attention to early cases in which the Supreme Court invented the state action doctrine. Second, the Authors discuss a period of time spanning the late nineteenth and early twentieth centuries, during which the Court applied a formalistic and inegalitarian version of the state action doctrine. Third, the Authors discuss contemporary state action doctrine cases, from the mid-twentieth century to the present day, in which the Court often, but not always, applied a functional and more egalitarian version of the state action doctrine. The Authors also highlight the substantial harms of the state action doctrine. The Authors summarize early cases, in which the doctrine's application caused significant harm to African Americans. Then the Authors discuss the contemporary harms of the doctrine, focusing on LGBTQ discrimination in access to places of public accommodation.

In Section III, the Authors outline several proposals for reinterpreting the state action doctrine to mitigate the historical and contemporary harms caused by the doctrine. Relying on several key state action cases, the Authors argue that precedent supports the conclusion that courts should find state action in at least the following situations: (1) when someone is arrested or prosecuted; (2) when a court issues an order; (3) when the government enforces or encourages a custom; and (4) when the government makes an allocative decision.

In Part IV, the Authors go a step further and argue that the state action doctrine should be fundamentally reformed. To ensure equal protection of law, the analysis must refocus on a more progressive conception of equal protection informed by contemporary understandings of equality and dignity foundational to a free and democratic society. This new understanding of the state action doctrine emerges from the Authors' analysis of property law theory. Private property cannot exist without state action, including state laws that: (1) distinguish between valid and invalid property rights; (2) allocate rights among persons; (3) authorize or prohibit particular property rights and freedoms; (4) regulate externalities; and (5) correct injustices through equitable principles.

The insights of property law theory lead the Authors to argue that: (1) equal protection depends on *law*, not *action*; (2) common law is law that must comply with the Equal Protection Clause, whether it is coercive or permissive; and (3) common law that allows discriminatory exclusion from the marketplace violates the Equal Protection Clause.

The Authors conclude by arguing that what matters is not state action but whether the law violates the norms of liberty, equality, and dignity recognized by free and democratic societies that ensure each

human being the Constitution's "full promise of liberty."<sup>7</sup> Traditional doctrine asks "whether there is state action," and if the answer is no then the constitutional inquiry is at an end. The Authors argue, instead, that the state is *always* involved when it recognizes, promotes, or enforces a common law rule that regulates relationships, whether those relationships are vertical (between persons and the state) or horizontal (among persons). In essence, the Authors contend that the Equal Protection Clause infuses the common law with an equality principle requiring equal access to places of public accommodation. Recognition that state common law must comply with the Fourteenth Amendment does not entail any particular conclusion about whether the common law rule in question is an unconstitutional deprivation of equal protection of law. But, the Constitution requires the laws of the states (including property laws) to protect civil rights. The right to purchase property or services without regard to sexual orientation is such a right. Rules that permit a person to refuse to contract with someone else are as much rules of law as those that compel that service be provided. Forcing people to call ahead to see if they are welcome in places that serve the general public is a violation of civil rights. A common law rule that validates and enables discrimination denies equal protection of the law.

## II. HISTORY OF THE STATE ACTION DOCTRINE

The state action doctrine is the principle that the scope of the United States Constitution is limited to governmental conduct and does not extend to the behavior of private persons.<sup>8</sup> In other words, the Constitution applies to vertical relationships between the government and private individuals, but not to horizontal relationships between or among private parties.<sup>9</sup> The state action doctrine governs most of the Constitution, including the Fourteenth Amendment<sup>10</sup> and the Fifteenth Amendment,<sup>11</sup> although the Thirteenth Amendment is a striking exception to the doctrine.<sup>12</sup>

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7. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015); See Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16 (2015).

8. See Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 507–08 (1985).

9. See Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387, 388 (2003).

10. See *The Civil Rights Cases*, 109 U.S. 3, 11 (1883) ("It is [S]tate action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the [Fourteenth] [A]mendment.").

11. See *Smith v. Allwright*, 321 U.S. 649, 661 (1944) ("The question as to whether the exclusionary action of the party was the action of the State persists as the determinative factor.").

12. See *The Civil Rights Cases*, 109 U.S. at 20 ("[T]he [Thirteenth] [A]mendment is not a mere prohibition of [S]tate laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.").



The state action doctrine can be clearly and simply defined as follows: “[T]he Constitution applies only to governmental conduct, usually referred to as ‘state action.’ The behavior of private citizens and corporations is not controlled by the Constitution.”<sup>13</sup> But, the doctrine’s clarity and simplicity begins and ends with its definition. Its application has been anything but clear and simple. In reality, the doctrine, as invented and applied by the Supreme Court over the last 140 years, has proven notoriously incoherent.<sup>14</sup> Its incoherence stems *both* from the difficulty of defining the difference between state action and private action *and* because the distinction is not a sufficient or coherent way to determine when constitutional norms should or should not apply.

The result of the mismatch between the doctrine and its normative meaning is both a blurry and incoherent line between state and private action. Many cases have applied a formalistic and inegalitarian interpretation of the state action doctrine, attempting to establish a bright-line between state action and private action. Many other cases have applied a more functional and egalitarian version of the doctrine, recognizing the inherent overlap between state action and private action. Navigating these cases and attempting to uncover consistent trends within the doctrine has proven extremely difficult for scholars and judges alike.

Professor Black and Judge Friendly both called the doctrine “a conceptual disaster area[.]”<sup>15</sup> while Professor Stone called the doctrine “a shambles.”<sup>16</sup> Professor Chemerinsky noted that “scholars [have] persuasively argued that the concept of state action never [can] be rationally or consistently applied”<sup>17</sup> and concluded that “[t]here still are no clear principles for determining whether state action exists.”<sup>18</sup> Professors Glennon and Nowak similarly concluded that “there are no generally accepted formulas for determining when a sufficient amount of government action is present in a practice to justify subjecting it to constitutional restraints.”<sup>19</sup>

The Supreme Court itself conceded that the “cases deciding when private action might be deemed that of the state have not been a

13. Chemerinsky, *supra* note 8, at 507 (footnote omitted).

14. See Kenneth W. Mack, *Civil Disobedience, State Action, and Lawmaking Outside the Courts: Robert Bell’s Encounter with American Law*, 39 J. SUP. CT. HIST. 347, 349 (2014) (arguing that the doctrine was incoherent from the very beginning).

15. Charles Black, Jr., *Foreword: “State Action,” Equal Protection, and California’s Proposition 14*, 81 HARV. L. REV. 69, 95 (1967); Henry J. Friendly, *The Public-Private Penumbra—Fourteen Years Later*, 130 U. PA. L. REV. 1289, 1290 (1982) (quoting Charles Black).

16. Christopher D. Stone, *Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?*, 130 U. PA. L. REV. 1441, 1484 n.156 (1982).

17. Chemerinsky, *supra* note 8, at 505.

18. *Id.* at 503–04 (1985).

19. Robert J. Glennon & John E. Nowak, *A Functional Analysis of the Fourteenth Amendment “State Action” Requirement*, 1976 SUP. CT. REV. 221, 221 (1976).

model of consistency[.]”<sup>20</sup> and that “to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an ‘impossible task’ which ‘[t]his Court has never attempted.’”<sup>21</sup> It is necessary to understand the history of the state action doctrine in order to see how and why the Court has not been able to distinguish between state and private action.

In this Section, the Authors outline the history of the state action doctrine. The Authors begin with the ratification of the Thirteenth and Fourteenth Amendments, and then discuss the Supreme Court’s invention of the state action doctrine in the late nineteenth century. Next, the Authors discuss several decades during which the Court applied a formalistic and inegalitarian version of the state action doctrine. Last, the Authors discuss contemporary (post-1940) state action cases, in which the Court sometimes applied a more functional and egalitarian conception of the doctrine. The Authors pay particular attention to “public function” and “entanglement” cases, which exemplify the Court’s gradual reformulation of the doctrine. The Authors also show how this functional excursion was curtailed when a conservative Court entered the picture. Understanding changing conceptions of state action can help situate the doctrine in historical context as the Court shifted from trying to protect discriminatory practices to intervening to restrict or prohibit them—and back again.

### A. *Origins of the State Action Doctrine (1860–1883)*

Congress passed the Thirteenth Amendment to the Constitution in 1865, and the states ratified the Amendment the same year.<sup>22</sup> The Amendment formally abolished slavery throughout the United States.<sup>23</sup> In direct response to the ratification of the Thirteenth Amendment, states across the South enacted the infamous Black Codes.<sup>24</sup> The Black Codes blatantly circumvented the Thirteenth Amendment by attempting to restore slavery in all but name. Congress responded to the Black Codes by enacting the Civil Rights Act of 1866, which granted racial equality in areas like property ownership, access to courts, and protection of the law.<sup>25</sup> Congress’s purported constitutional authority for the Civil Rights Act of 1866 was

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20. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 632 (1991) (O’Connor, J., dissenting).

21. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961) (quoting *Kotch v. Bd. of River Port Pilot Comm’rs*, 330 U.S. 552, 556 (1947)).

22. *13th Amendment to the U.S. Constitution: Abolition of Slavery*, NAT’L ARCHIVES, <https://www.archives.gov/historical-docs/13th-amendment> (last visited Apr. 24, 2018) [<https://perma.cc/LPA7-5GWW>].

23. *Id.*

24. *Black Codes*, HISTORY, <https://www.history.com/topics/black-history/black-codes> (last visited Apr. 24, 2018) [<https://perma.cc/377Z-Z9R4>].

25. Barry Sullivan, *Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981*, 98 YALE L.J. 451, 549–50 (1989).

Section 2 of the Thirteenth Amendment.<sup>26</sup> Facing doubt as to whether the Thirteenth Amendment was a sufficient source of constitutional authority for the Civil Rights Act of 1866, Congress passed the Fourteenth Amendment in 1866, which the states ratified in 1868.<sup>27</sup> In 1870, Congress, pursuant to its authority under Section 5 of the Fourteenth Amendment, reenacted the Civil Rights Act of 1866 as Section 18 of the Enforcement Act of 1870.<sup>28</sup>

The United States Supreme Court invented the state action doctrine shortly after the enactment of the Fourteenth Amendment. The key constitutional text underlying the state action doctrine is Section 1 of the Fourteenth Amendment:

No State shall make or enforce any law 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 to any person within its jurisdiction the equal protection of the laws.<sup>29</sup>

In 1875, the Court in *United States v. Cruikshank* interpreted this language to limit the scope of the Fourteenth Amendment to state action.<sup>30</sup> In *Cruikshank*, the Court reversed the convictions of several white supremacists involved in the Colfax massacre in which over a hundred African Americans were slaughtered.<sup>31</sup> The Court applied the state action doctrine for the first time, holding that “[t]he fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but the provision does not . . . add any thing to the rights which one citizen has under the Constitution against another.”<sup>32</sup>

In 1879, the Court in *Commonwealth of Virginia v. Rives* denied an appeal from a black defendant arguing that an all-white jury violated the Equal Protection Clause.<sup>33</sup> In part of the opinion, the Court reaffirmed its application of the state action doctrine, noting that “[t]he provisions of the Fourteenth Amendment of the Constitution . . . all have reference to State action exclusively, and not to any action of private individuals.”<sup>34</sup>

26. Jennifer Mason McAward, *The Scope of Congress's Thirteenth Amendment Enforcement Power After City of Boerne v. Flores*, 88 WASH. L. REV. 77, 82–83 (2010).

27. *Id.*

28. See Kevin Maher, *Like a Phoenix From the Ashes: Saenz v. Roe, the Right to Travel, and the Resurrection of the Privileges or Immunities Clause of the Fourteenth Amendment*, Comment, 33 TEX. TECH L. REV. 105, 106 & n.3 (2001).

29. U.S. CONST. amend. XIV, § 1.

30. *United States v. Cruikshank*, 92 U.S. 542 (1875).

31. *Id.* at 568.

32. *Id.* at 554–55.

33. *Virginia v. Rives*, 100 U.S. 313, 322–23 (1879). *Contra*, *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding the Equal Protection Clause prohibits prosecutors from excluding jurors solely because of their race).

34. *Id.* at 318.

In 1883, the Court engaged in its first searching judicial inquiry into the state action doctrine in the seminal *Civil Rights Cases*.<sup>35</sup> In the *Civil Rights Cases*, the Court considered the constitutionality of the Civil Rights Act of 1875, which prohibited private racial discrimination in places of public accommodation.<sup>36</sup> The Court held that Congress lacked the constitutional authority to enact the statute.

First, the Court held that the purpose of the Fourteenth Amendment was to limit the action of the *states*, not *private* action.<sup>37</sup> Thus, the Court held that the scope of congressional authority pursuant to the Fourteenth Amendment was limited to “state action.”<sup>38</sup> Therefore, the Court held that Congress exceeded its authority under Section 5 of the Fourteenth Amendment by enacting the Civil Rights Act of 1875.<sup>39</sup> Second, the Court held that, although the Thirteenth Amendment was *not* confined to state action,<sup>40</sup> it only abolished slavery and empowered “Congress . . . to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.”<sup>41</sup> Reasoning that private racial discrimination in public accommodations did *not* constitute a “badge” or “incident” of slavery, the Court held that the Civil Rights Act of 1875 was beyond Congress’s authority under the Thirteenth Amendment.<sup>42</sup> Although the Supreme Court has since abandoned this narrow interpretation of the Thirteenth Amendment,<sup>43</sup> its application of the state action doctrine has persisted since the *Civil Rights Cases*.<sup>44</sup>

35. *The Civil Rights Cases*, 109 U.S. 3 (1883).

36. *Id.* at 4.

37. *Id.* at 11 (“It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment.”).

38. *Id.* *Cf.* Mack, *supra* note 14, at 361 (arguing that the ruling was not focused on state action but whether the right of access to public accommodations was a “municipal right” or one that had been “federalized by the Civil War Amendments”).

39. *The Civil Rights Cases*, 109 U.S. at 13 (“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, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity.”).

40. *Id.* at 20. (“The [Thirteenth] [A]mendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.”).

41. *Id.*

42. *Id.* at 25. (“Mere discriminations on account of race or color were not regarded as badges of slavery.”).

43. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968) (“Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.”).

44. *See* Chemerinsky, *supra* note 8, at 508 (“These holdings remain undisturbed: the Constitution does not prohibit private deprivations of constitutional rights.”).

B. *Formalistic Application of the State Action Doctrine*  
(1883–1940s)

The state action doctrine has substantially harmed individuals and groups since its inception in the late nineteenth century. Minority populations—particularly African Americans—have been especially vulnerable to the collateral damage of the state action doctrine. As Professor Charles Black eloquently observed: “‘Separate but equal’ and ‘no state action’—these fraternal twins have been the Medusan caryatids upholding racial injustice.”<sup>45</sup> The doctrine has undermined the rights and liberties of African Americans and hindered civil rights reform in myriad ways, particularly within the realms of public accommodations, voting rights, and housing. In this Section, the Authors summarize early cases that highlight some of the historical harms, which were a direct result of the Court’s formalistic and inegalitarian application of the state action doctrine from its inception through the mid-twentieth century.

1. Unequal Access to Public Accommodations

First, the state action doctrine has seriously undermined the liberty of African Americans to access places of public accommodation—including restaurants, grocery stores, retail stores, and theaters. The state action doctrine facilitated this deprivation at three levels of influence. At the first level of influence, the Court’s invention of the state action doctrine in early cases like the *Civil Rights Cases* insulated private racial discrimination from constitutional scrutiny. Private racial discrimination has harmed, and continues to harm, African Americans in profoundly damaging ways and has done so throughout American history. One particularly visible and destructive method of private racial discrimination has taken the form of discrimination in places of public accommodation. When the owner or manager of a restaurant, hotel, or grocery store orders African American patrons off the premises or subjects them to second-class or offensive treatment because of their race, the state action doctrine has traditionally placed this discriminatory action beyond the scope of the Constitution.<sup>46</sup> Even when the private owner relies on law—e.g., trespass law—to carry out their

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45. Black, *supra* note 15, at 70. *See also id.* at 97 (“The Civil Rights Cases are cut off the same bolt of historical cloth as *Plessy v. Ferguson*.”); *id.* at 107 (“The racism problem, in law, is now principally the ‘state action’ problem; to be slow to recognize state action, to complicate the concept with unwarranted limiting technicalities, is to confirm racism pro tanto.”).

46. *See, e.g., Peterson v. Greenville*, 373 U.S. 244, 247 (1963) (“It cannot be disputed that under our decisions ‘private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it.’”) (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961)).

racially discriminatory scheme, the state action doctrine has traditionally shielded the discrimination from constitutional scrutiny.<sup>47</sup>

At the second level of influence, the Court's formalistic application of the state action doctrine directly thwarted congressional prohibition of private racial discrimination for almost a century. Just seven years after the ratification of the Fourteenth Amendment, Congress passed the Civil Rights Act of 1875. This statute prohibited private racial discrimination in places of public accommodation.<sup>48</sup> This statute, passed under authority granted Congress by Section 5 of the Fourteenth Amendment, dramatically increased the liberty of African Americans by granting them equal access to public accommodations across the United States. Less than a decade later, the Court relied on the state action doctrine to invalidate the statute, abruptly wrenching the newfound federal rights out from under millions of African Americans across the nation.<sup>49</sup> African Americans would not enjoy federally protected equal access to public accommodations until almost a century later, when Congress enacted the Civil Rights Act of 1964.<sup>50</sup> Congress avoided the state action problem because it relied on the Interstate Commerce Clause instead of Section 5 of the Fourteenth Amendment.<sup>51</sup>

At the third level of influence, the Court's formalistic application of the state action doctrine shielded private racial discrimination from constitutional scrutiny and invalidated the statutory prohibition of private racial discrimination. This application likely encouraged state legislatures and courts to remove the last layers of protection granting African Americans access to public accommodations, i.e., state statutes and state common law. Prior to the Civil War, state common law "required all businesses that held themselves out as open to the public to serve anyone who sought service."<sup>52</sup> The earliest cases exempting places of public accommodation from the general common law duty to serve were a reaction to the post-Civil War extension of legal rights to African Americans.<sup>53</sup> The extension of legal rights meant that public accommodations suddenly had the common law duty to allow equal

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47. *Id.* at 249 ("In deciding these cases the Court . . . does not suggest that such action, denying equal protection, may be found in the mere enforcement of trespass laws in relation to private business establishments from which the management, of its own free will, has chosen to exclude persons of the Negro race.") (internal citations omitted) (Harlan, J., concurring).

48. *See* 18 Stat. 335–337 (1875).

49. *See* The Civil Rights Cases, 109 U.S. 3, 11 (1883).

50. *See* Civil Rights Act of 1964, Pub. L. 88-352, 75 Stat. 241 (Title II).

51. *Heart of Atlanta Motel Inc. v. U.S.*, 379 U.S. 241, 261 (1964) ("[T]he action of the Congress in the adoption of the Act as applied here to a motel which concededly serves interstate travelers is within the power granted it by the Commerce Clause of the Constitution.")

52. Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. REV. 1283, 1292 (1996).

53. *Id.* at 1331–45.

access to African Americans. In fact, this common law duty was foundational to the Supreme Court's invention of the state action doctrine in the *Civil Rights Cases*. As Professor Erwin Chemerinsky noted, "in announcing the state action doctrine, the Court assumed that the common law protected against private discrimination and private violations of rights."<sup>54</sup> Despite the Court's reliance on this "assumption of effective common-law protection against private discrimination,"<sup>55</sup> after the *Civil Rights Cases*, state courts across the nation quickly changed the common law rule to one that dramatically restricted the duty to serve and authorized most public accommodations to choose their customers at will—i.e., to engage in racial discrimination.<sup>56</sup> This retrogressive change in common law was accompanied by a widespread repeal of state public accommodations statutes passed throughout the South during the height of Reconstruction and their replacement with Jim Crow laws, explicitly *requiring* segregation throughout the South.<sup>57</sup>

After the reversal of state common law, the promulgation of state statutes granting nondiscriminatory access to public accommodations, and the invention of the state action doctrine, private discrimination against African Americans—even in places of *public* accommodation—was insulated from constitutional, statutory, and common law challenge in every state that interpreted its common law to allow such discrimination. The Supreme Court effectively placed the coercive power of the state in the hands of private parties who sought to create a racial caste system that systemically prevented previously enslaved persons from exercising liberties taken for granted by the rest of the population. The state action doctrine allowed states to adopt common law rules that severely limited African Americans' access to the marketplace. The doctrine gave places of public accommodation the authority to defer to the discriminatory wishes of their white customers. In sum, the Court's invention of the state action doctrine played a fundamental role in the maintenance of private racial discrimination, undermining the rights and liberties of millions of African Americans for almost a century between the enactment of the Civil Rights Act of 1875 and the Civil Rights Act of 1964.

## 2. Impaired Voting Rights

Second, the Court's formalistic application of the state action doctrine seriously undermined the voting rights of African Americans from the ratification of the Fifteenth Amendment in 1870 until the mid-twentieth century. After the enactment of the Fifteenth Amendment, southern states responded with a striking degree of mass resis-

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54. See Chemerinsky, *supra* note 8, at 515.

55. *Id.* at 516.

56. See Singer, *supra* note 52.

57. See *id.*

tance, culminating in the effective nullification of the Amendment.<sup>58</sup> Their primary weapons of suppression included bribery and violent intimidation of African American voters.<sup>59</sup> This disfranchisement of African Americans had disastrous and enduring consequences for millions of African Americans and for the advancement of the civil rights movement.<sup>60</sup>

Congress responded to the southern nullification of African Americans' newly extended voting rights by passing the Enforcement Act of 1870.<sup>61</sup> The Act was enacted pursuant to Section 2 of the Fifteenth Amendment the very year of its ratification and it prohibited private parties from using bribery or violent intimidation to suppress African American voters.<sup>62</sup> In 1903, the United States Supreme Court in *James v. Bowman* invoked the state action doctrine to invalidate key provisions of the Enforcement Act.<sup>63</sup> Specifically, the Court granted a writ of habeas corpus filed by Henry Bowman, who was indicted for bribing and intimidating African American voters in violation of the Enforcement Act of 1870.<sup>64</sup> The Court held that the state action doctrine prevented Congress from regulating such private behavior under Section 2 of the Fifteenth Amendment.<sup>65</sup>

This formalistic application of the state action doctrine had disastrous consequences for black suffrage. It effectively condoned the southern nullification of the Fifteenth Amendment and directly contributed to the violent disfranchisement of African Americans throughout the South. It eliminated federal protections against private

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58. See MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 38–39 (2004) (“By 1900, most white southerners were determined to eliminate black suffrage, even if doing so required violence and murder. . . . [T]he Fifteenth Amendment, though still part of the Constitution ‘in the technical sense,’ was ‘already in process of repeal . . . as a . . . rule of conduct.’”).

59. *Id.* at 29 (“Through fraud, intimidation, and violence whites eventually succeeded in suppressing black voting, which enabled Democrats to ‘redeem’ the South.”).

60. *Id.* at 32–33 (“Disfranchisement had calamitous consequences for southern blacks. When blacks could not vote, neither could they be elected to office. No blacks sat in the Mississippi legislature after 1895, down from a high of 64 in 1873. In South Carolina’s lower house, which had a black majority during Reconstruction, [only] a single black [congressman] remained in 1896. The last southern black congressman until the 1970s, George White of North Carolina, relinquished his seat in 1901. More important, disfranchisement meant that almost no blacks held local offices. In the late nineteenth century, sheriffs, justices of the peace, jurors, county commissioners, and school board members were the most important governmental actors. . . . [T]he preferred method of denying constitutional rights to blacks was to vest discretion in local officials and trust them to preserve white supremacy. Disfranchisement was essential to this strategy . . . facilitat[ing] the exclusion of blacks from juries and diversion of their share of public school funds.”).

61. Enforcement Act of 1870, 41st Cong. 114, 116 Stat. 140.

62. See *James v. Bowman*, 190 U.S. 127, 127 (1903).

63. *Id.* at 139.

64. *Id.* at 127.

65. *Id.* at 139.



voter suppression and transferred the policing of private voter suppression to states that fundamentally lacked both the capacity and inclination to protect voting rights. This transfer of power to the states free from federal supervision prevented the passage of state civil rights statutes and establishment of state governments reflecting the will of all residents—including African Americans. In sum, African Americans were left without any meaningful federal or state voter protection laws, and the fundamental purpose of the Fifteenth Amendment was effectively nullified throughout the South.

In 1935, three decades after deciding *James v. Bowman*, the Court again applied the state action doctrine in a manner that substantially undermined black suffrage. In *Grovey v. Townsend*, the Court held that the Texas Democratic Party's exclusion of African Americans from primary elections was insulated from constitutional challenge by the state action doctrine.<sup>66</sup> *Grovey* followed a series of cases in which the Texas legislature repeatedly invoked the state action doctrine as a shield against black suffrage.

In *Nixon v. Herndon*, the Court struck down the statutory exclusion of African Americans from participating in Democratic primaries.<sup>67</sup> Texas invoked the state action doctrine and shifted the authority to prohibit African Americans from voting in primaries to the Democratic Party's State Executive Committee. In *Nixon v. Condon*, the Court invalidated Texas' response to *Herndon*.<sup>68</sup> The Texas Legislature responded by further "privatizing" political parties. The Legislature authorized the Democratic Party to establish primary participation guidelines, again attempting to use the state action doctrine as a shield to insulate voting discrimination from the strictures of the Constitution.<sup>69</sup> This time, Texas succeeded. In *Grovey*, the Court determined that state action was no longer present, and that the voting discrimination scheme did not violate the Fifteenth Amendment.<sup>70</sup> This formalistic, inegalitarian, and avoidable<sup>71</sup> application of the state action doctrine effectively disfranchised black southerners, as the power of the Democratic Party in the South rendered Democratic primaries the only meaningful voting opportunity. It was not until the mid-twentieth century that the Court was finally willing to reform the

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66. *Grovey v. Townsend*, 295 U.S. 45, 55 (1935).

67. *Nixon v. Herndon*, 273 U.S. 536, 541 (1927).

68. *Nixon v. Condon*, 286 U.S. 73, 82–89 (1932).

69. *See Smith v. Allwright*, 321 U.S. 649, 659 (1944).

70. *Grovey v. Townsend*, 295 U.S. 45, 55 (1935).

71. *See, e.g., KLARMAN supra* note 58, at 140 (“[T]he justices might easily have found state action in *Grovey* without ruling that inaction was tantamount to action. . . . Given changing general attitudes toward government responsibility for nonregulation and the numerous ways in which Texas did regulate political parties, the justices' determination that Texas Democrats' exclusion of blacks was not state action must indicate a relative indifference toward race discrimination in the political process.”).

state action doctrine and prevent the flagrant nullification of the Fifteenth Amendment.<sup>72</sup>

### 3. Decreased Access to Housing and Increased Residential Segregation

Third, the Court's formalistic application of the state action doctrine contributed to the maintenance of residential segregation and the limitation of African Americans' access to housing. Specifically, the state action doctrine, as formalistically applied by the Court, insulated the enforcement of racially restrictive housing covenants from constitutional scrutiny until the mid-twentieth century.

Residential segregation followed the migration of African Americans' from the South to the North and from rural to urban areas.<sup>73</sup> Applied in a patently separate and *unequal* manner, residential segregation relegated African American migrants to the slums of society.<sup>74</sup> State and local laws initially established and maintained residential segregation.<sup>75</sup> These laws obviously involved state action, and the Supreme Court invalidated the laws in *Buchanan v. Warley*.<sup>76</sup> After the invalidation of *de jure* residential segregation, enforcement of private racially restrictive covenants maintained the discriminatory system.<sup>77</sup>

The Supreme Court faced a challenge to the constitutionality of private racially restrictive covenants in 1926 in *Corrigan v. Buckley*.<sup>78</sup> In *Corrigan*, John Buckley, a white landowner, sued to prevent Irene Corrigan, another white landowner, who had previously signed a racially restrictive covenant agreeing not to sell property to African Americans, from selling land to Arthur and Helen Curtis, an African American couple. Ms. Corrigan and Mr. and Mrs. Curtis argued that the racially restrictive covenant violated the Equal Protection Clause.<sup>79</sup> The Court applied the state action doctrine to avoid ruling on the constitutionality of private racially restrictive covenants, holding that the Equal Protection Clause did not prohibit "private individuals from entering into contracts respecting the control and disposition of their own property; and there is no color whatever for

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72. *Smith v. Allwright*, 321 U.S. 649, 664 (1944). The Authors discuss this case in more detail later in this essay.

73. KLARMAN, *supra* note 58 ("As rural blacks flocked to cities in search of better economic opportunities, education, and physical security, whites began insisting on residential segregation.").

74. *Id.* ("Black migrants were shunted into low-lying areas on city peripheries, often near railroad tracks or dumps.").

75. *Id.* ("Baltimore enacted the first such ordinance in 1910, and similar laws proliferated over the decade.").

76. *Buchanan v. Warley*, 245 U.S. 60, 76 (1917).

77. See KLARMAN, *supra* note 58, at 144 ("Racial covenants were the private alternative to residential segregation ordinances, and it could be argued that they were immune from constitutional attack because state action was absent.").

78. *Corrigan v. Buckley*, 271 U.S. 323, 330 (1926).

79. *Id.* at 328–29.

the contention that [the Equal Protection Clause] rendered the [restrictive covenant] void.”<sup>80</sup> The Court further indicated, in dicta, that judicial enforcement of racially restrictive covenants would not constitute state action.<sup>81</sup> In so noting, the Court indirectly maintained residential segregation and limited African Americans’ access to housing for another two decades. It was not until the mid-twentieth century that the Court finally applied a more functional and egalitarian formulation of the state action doctrine and prevented courts from enforcing private residential segregation through racially restrictive covenants.<sup>82</sup>

### C. *New and Expanding Conceptions of When the State is Acting (1940s–Present)*

Following a prolonged period spanning the invention of the state action doctrine until the 1940s—throughout which the Supreme Court consistently applied a formalistic and inegalitarian formulation of the state action doctrine—the Court introduced a period of relative (although concededly inconsistent) relaxation of the state action doctrine. In this Section, the Authors summarize several lines of cases illustrating the Court’s progressive reformulation of the state action doctrine. A number of these cases directly overrule prior cases in which the Court applied an inegalitarian formulation of the state action doctrine. The Authors focus primarily on “public function cases” and “entanglement” cases. Since 1940, the Court often—although by no means always—found state action in these two broad categories of cases. That functional approach was followed by a revived formalistic approach as a more conservative Supreme Court in the 1970s sought to restore a narrow conception of state action focused on tradition rather than substance.

#### 1. Public Function Cases

Public function cases involve private entities performing a function that the government traditionally performed.<sup>83</sup> The principal public function cases involve voting, managing a town, and managing public parks. In these cases, all of which occurred after 1940, the Supreme Court endorsed a functional conception of the state action doctrine. This approach was less inclined to avoid the merits of important civil rights cases and more attuned to racial and social justice, social reality,

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80. *Id.* at 330.

81. *Id.* at 330–32; see also KLARMAN *supra* note 58, at 144 (“*Corrigan’s* dicta had plainly sustained judicial enforcement of restrictive covenants, and many state courts so interpreted it.”).

82. See *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948). This is a remarkable case, which the Authors discuss in detail later in this Article.

83. See Martha Minow, *Alternatives to the State Action Doctrine in the Era of Privatization, Mandatory Arbitration, and the Internet: Directing Law to Service Human Needs*, 52 HARV. C.R.–C.L. L. REV. 145, 152–54 (2017).

power, and relations of domination and oppression. After 1970, the Court revived more formalistic reasoning to narrow the scope of these public function cases.

The post-1940 voting rights cases diverge markedly from the previously discussed line of cases culminating in *Grove v. Townsend*. In 1944, just a decade after deciding *Grove*, the Court reversed course and finally began to loosen the state action doctrine's chokehold on the Fifteenth Amendment. In *Smith v. Allwright*, the Court faced essentially the same facts as *Grove*.<sup>84</sup> The state invoked the state action doctrine shield by delegating voter regulation authority to "private" political parties.<sup>85</sup> But, this time the Court applied a functional formulation of the state action doctrine. The Court reached the opposite conclusion from *Grove* and held that the inherent overlap between state governments and political parties and the status of voter regulation as a fundamentally public function was sufficient to constitute state action.<sup>86</sup>

The Court reaffirmed *Smith's* functional formulation of the state action doctrine to protect the voting rights of African Americans in subsequent "white primaries" cases. In the most notable of these subsequent cases, *Terry v. Adams*, the Court extended *Smith's* reasoning to invalidate white-only *pre-primary* elections (conducted by a private club called the Jaybird Democratic Association) as an unconstitutional state action that violated the Fifteenth Amendment.<sup>87</sup> In so holding, the *Terry* Court demonstrated a remarkable willingness to elevate racial justice over formal adherence to an egalitarian conception of the state action doctrine.

In 1946, the Court decided *Marsh v. Alabama*, another key case.<sup>88</sup> *Marsh* involved Chickasaw, a company-owned town in Alabama that had "all the characteristics of any other American town . . . [including] residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated."<sup>89</sup> A company rule prohibited the dissemination of leaflets throughout

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84. *Smith v. Allwright*, 321 U.S. 649, 659 (1944).

85. *Id.* at 654–56.

86. *Id.* at 664.

87. *Terry v. Adams*, 345 U.S. 461, 469–70 (1953) ("The Democratic primary and the general election have become no more than the perfunctory ratifiers of the choice that has already been made in Jaybird elections from which Negroes have been excluded. It is immaterial that the state does not control that part of this elective process which it leaves for the Jaybirds to manage. The Jaybird primary has become an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern in the county. The effect of the whole procedure, Jaybird primary plus Democratic primary plus general election, is to do precisely that which the Fifteenth Amendment forbids—strip Negroes of every vestige of influence in selecting the officials who control the local county matters that intimately touch the daily lives of citizens.").

88. *Marsh v. Alabama*, 326 U.S. 501 (1946).

89. *Id.* at 502.

the limits of the town, and the state police enforced this rule through the law of criminal trespass.<sup>90</sup> An appellant convicted of criminal trespass challenged the constitutionality of the state's enforcement of the company rule. The Court applied a functional formulation of the state action doctrine and concluded that state action was present despite the "private" status of the company town.<sup>91</sup> Despite the company's private property rights, the Court held that the governmental enforcement of the company rule violated the Constitution.<sup>92</sup>

In so holding, the Court applied a balancing test, which weighed the property rights of the company against the constitutional rights of the appellant.<sup>93</sup> Crucially, the Court emphasized that "[o]wnership does not always mean absolute dominion. 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."<sup>94</sup> This test meant that not all property rights are the same. The property's uses and the social context in which property rights are exercised—as well as the effects those rights have on others with similar or different legal rights—all matter in determining whether an owner is exercising powers that should be subject to constitutional equality norms.

In sum, the functional approach to the question of state action allowed the Court to focus on the more difficult and important issue of balancing competing constitutional rights and protecting a private sphere of liberty while ensuring equal access to the public marketplace. Significantly, the Court found that the Equal Protection Clause required a normative choice between competing property rights: the right to exclude and the right of access. Just as public accommodation common law always granted the public rights to enter private property that was generally open to the public for the provision of goods or services, the Court found that the Constitution privileged rights of access for free speech purposes over the right to exclude when a private owner controls property that is and should be open to the public.<sup>95</sup>

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90. *Id.* at 503–04.

91. *Id.* at 507–09.

92. *Id.* at 508 ("The managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees, and a state statute, as the one here involved, which enforces such action by criminally punishing those who attempt to distribute religious literature clearly violates the First and Fourteenth Amendments to the Constitution.").

93. *Id.* at 509.

94. *Id.* at 506.

95. *See also* *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980) (holding that the California Constitution's requirement that privately owned shopping centers allow access to non-owners for leafletting purposes did not constitute a taking of the shopping center owner's property without just compensation, despite limitation of its right to exclude, given that the speech activities did not "impair the value or use" of the property).

In 1966, the Court decided *Evans v. Newton*, another landmark public function case.<sup>96</sup> In *Newton*, Augustus Bacon, a United States Senator, bequeathed a tract of property in a charitable trust to the City of Macon, Georgia “to be used as ‘a park and pleasure ground’ for white people only.”<sup>97</sup> The city was named trustee and, in accordance with the will, the city named a board of managers who operated and maintained the park in a segregated fashion.<sup>98</sup> After some years, the city acknowledged that the park was a public facility “which it could not constitutionally manage and maintain on a segregated basis.”<sup>99</sup> The board of managers sued the city and asked that title be transferred from the city to new private trustees so that the park could continue to exclude African Americans.<sup>100</sup> Georgia citizens intervened to challenge the segregation of the park, arguing that it violated the Equal Protection Clause.<sup>101</sup> The city resigned as trustee, and the Georgia state courts accepted the resignation and appointed new private trustees who would manage the park as Senator Bacon wanted—for the benefit of white people only.<sup>102</sup>

The Supreme Court held that the state court’s transfer of title from the city to private trustees did not turn state action into private action.<sup>103</sup> The Court applied a functional formulation of the state action doctrine, and held that state action was present despite the fact that the property was bequeathed by a private individual and managed by private entities.<sup>104</sup> In so holding, the Court acknowledged that “[w]hat is ‘private’ action and what is ‘state’ action is not always easy to determine,”<sup>105</sup> and it emphasized that “[c]onduct that is formally ‘private’ may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action.”<sup>106</sup>

The Court explained that “[i]f a testator wanted to leave a school or center for the use of one race only and in no way implicated the State in the supervision, control, or management of the facility, we assume arguendo that no constitutional difficulty would be encountered.”<sup>107</sup> But that did not happen here. The original transfer of title was to the

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96. *Evans v. Newton*, 382 U.S. 296, 298 (1966).

97. *Id.* at 297.

98. *Id.*

99. *Id.*

100. *Id.* at 297–98.

101. *Id.* at 298.

102. *Id.*

103. *Id.* at 302.

104. *Id.* (“[T]he public character of this park requires that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law.”).

105. *Id.* at 299.

106. *Id.*

107. *Id.* at 300 (emphasis omitted).

city as trustee, and the park was managed by the city for years.<sup>108</sup> Even after the transfer from the city to private trustees, the city still paid for maintenance of the park.<sup>109</sup>

Moreover, the Court concluded that parks “serve a public function” when they are open to the general public, making them “more like a fire department or police department that traditionally serves the community[,]”<sup>110</sup> than a private social club that is selective in nature.<sup>111</sup> The Court reasoned that “the use of parks is plainly in the public domain[,]”<sup>112</sup> and “when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations.”<sup>113</sup> Thus, the transfer of formal title to private trustees could not change the underlying facts that title was originally in the hands of the city and the property was operated as a public park open to all white persons. After finding state action, the Court concluded that segregating the park—consistent with the wishes of Senator Bacon—would violate the Equal Protection Clause, and the Court remanded for state courts to consider the appropriate treatment of the bequest.<sup>114</sup>

Following the Court’s decision in *Newton*, the state courts determined that the Senator would have preferred the entire bequest to fail rather than allowing African Americans equal access to the park.<sup>115</sup> Applying Georgia common law, the Georgia Supreme Court refused to apply the *cy pres* doctrine and allow the trust to continue under new conditions.<sup>116</sup> Because the trust was premised on a very specific use (as a racially segregated park) and that purpose could no longer be fulfilled, the trust failed and title to the land reverted to Senator Bacon’s heirs.

The Georgia Supreme Court faced a contradiction in Senator Bacon’s will. He wanted the park to be owned by the city and open to the public, but he also wanted it to be closed to African Americans. Those two wishes could not be fulfilled because doing so would violate the Equal Protection Clause. State trust law provides that if a donor’s wish can no longer be fulfilled, the courts must determine if his grant was specific or general. For example, if someone wants to

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108. *Id.* at 297.

109. *Id.* at 301 (“So far as this record shows, there has been no change in municipal maintenance and concern over this facility [since the transfer to private trustees].”).

110. *Id.* (“This conclusion is buttressed by the nature of the service rendered the community by a park. The service rendered even by a private park of this character is municipal in nature. It is open to every white person, there being no selective element other than race.”).

111. *Id.* at 302.

112. *Id.*

113. *Id.* at 299.

114. *Id.* at 302.

115. *See Evans v. Abney*, 396 U.S. 435, 436 (1970).

116. *Id.* at 439.

benefit the Boston Symphony Orchestra (“BSO”) alone and the BSO folds, the trust will fail and the property will revert to the donor’s heirs. But, if the donor wanted to benefit the classical music scene in Boston, the courts could reform the trust and transfer the income to another entity, such as the Handel and Haydn Society.

That means the Georgia Supreme Court faced two questions. First, was Senator Bacon’s desire to create a public park more important to him than his desire to refuse to participate in creating an integrated facility? His intent to exclude African Americans was clear, but so was his desire to create a public park. Second, should the Court assume that Senator Bacon would want the courts to ask what he wanted at the time of his death or what he would have wanted the courts to do at the time they made the decision whether to open the park on an integrated basis? Consider that many persons changed their views over time. George Wallace, for example, was a firm champion of segregation but eventually changed his mind and was elected Governor of Alabama with the support—and votes—of many African Americans. Ultimately, the Georgia Supreme Court decided that the Senator’s racist views would have been more important to him than his charitable inclinations. The Court decided as a matter of state property law the trust should fail, that the property revert to Senator Bacon’s heirs, and that the park be closed.

Upon reviewing the case a second time, in *Evans v. Abney*, the United States Supreme Court held that closing the park to fulfill Senator Bacon’s discriminatory intent did not constitute state action denying equal protection of the law.<sup>117</sup> The Court reasoned that, after the park was closed, there could be no denial of equality, because neither black nor white persons would have access to the park.<sup>118</sup> Nor did it matter, the Court reasoned, that the motivation for the reversion was discriminatory because the motivation was that of the private donor rather than the city.<sup>119</sup>

Justice Brennan dissented.<sup>120</sup> He argued that there was ample evidence that Georgia acted to deny African Americans equal protection of the law. Justice Brennan noted that the clear and uncontested reason for closing the park was Senator Bacon’s discriminatory intent.<sup>121</sup> He emphasized that “state involvement in discrimination is unconstitutional, however short-lived.”<sup>122</sup> He highlighted the many ways in which the “discriminatory closing [was] permeated with state action.”<sup>123</sup> Specifically, he outlined three elements of state action pre-

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117. *Id.* at 444.

118. *Id.* at 445.

119. *Id.* at 447.

120. *Id.* at 450.

121. *Id.* at 452–53 (Brennan, J., dissenting).

122. *Id.* at 454.

123. *Id.*



sent in the closing of the park. Tellingly, he focused on the ways that state law (both common law and statutory law) constructed property rights.

First, Justice Brennan argued that “there is state action whenever a State enters into an arrangement that creates a private right to compel or enforce the reversion of a public facility. Whether the right is a possibility of reverter, a right of entry, an executory interest, or a contractual right, it can be created only with the consent of a public body or official.”<sup>124</sup> Georgia, acting through the city of Macon, accepted transfer of title from Senator Bacon to the city together with the racial restriction and, according to state law, the possibility that the retained future interest in the donor’s heirs would activate if it became impossible to operate the park as Senator Bacon would have wished. State action was present because (1) the city accepted title to the property (it could have refused the gift); and (2) state action in the form of a lawsuit and judicial order would be necessary to transfer clear title from the city to private trustees even if state law provided that title would automatically shift upon violation of the racial condition.

Further, Georgia abdicated its responsibility to manage the public park in a constitutional (nondiscriminatory) fashion in order to effectuate discriminatory private interests. In effect, the state transferred control of the park to persons it knew would engage in the discriminatory actions that the state had no power to do itself. It was as if a landlord disclaimed responsibility for discriminatory refusal to rent apartments to African American customers by hiring an apartment manager who exercised their discretion to engage in such discriminatory denials of housing opportunities. Such delegation of discretion to a manager cannot insulate the landlord from responsibility under the Fair Housing Act, for example, because the landlord’s failure to intervene to stop the discriminatory denial of access to property counts as a ratification of the discrimination and makes the landlord directly responsible for the discriminatory acts.<sup>125</sup> Thus, in the same way, the state should not be able to delegate its discretion to another, knowing that the other would engage in discriminatory actions that the state itself is prohibited from engaging in.

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124. *Id.* at 455.

125. *See* *Asbury v. Brougham*, 866 F.2d 1276 (10th Cir. 1989) (landlord held to have ratified his manager’s discriminatory denial of housing by refusing to intervene to correct the discrimination). *Accord*, *MHANY Mgmt., Inc. v. Cty. of Nassau*, 319 F.3d 581 (2d Cir. 2016) (city liable for discriminatory treatment when village governing council changes a zoning designation in response to discriminatory demands of city residents). The fact that Georgia was implementing private discriminatory purposes distinguishes the case from *Village of Arlington Heights v. Metropolitan Hous. Dev.* where the Supreme Court held that the equal protection clause requires intentional discrimination on the part of the government. Rather than a neutral policy that has a disparate impact, deferring to private discrimination directly achieves the discriminatory purpose. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

Second, Justice Brennan argued that *Shelley v. Kraemer* “stands at least for the proposition that where parties of different races are willing to deal with one another a state court cannot keep them from doing so by enforcing a privately devised racial restriction.”<sup>126</sup> According to Justice Brennan, the record did not demonstrate that the city, white beneficiaries, or African American citizens were unwilling to continue using the park on an integrated basis. Therefore, Justice Brennan concluded that “so far as the record shows, this is a case of a state court’s enforcement of a racial restriction to prevent willing parties from dealing with one another. The decision of the Georgia courts thus, under *Shelley v. Kraemer*, constitutes state action denying equal protection.”<sup>127</sup>

Finally, Justice Brennan argued that *Reitman v. Mulkey* “announced the basic principle that a State acts in violation of the Equal Protection Clause when it singles out racial discrimination for particular encouragement, and thereby gives it a special preferred status in the law, even though the State does not itself impose or compel segregation.”<sup>128</sup> According to Justice Brennan, Georgia violated this principle by enacting a statute that authorized creation of charitable trusts for one race only.<sup>129</sup> In so doing, Georgia

expressly permit[ted] dedication of land to the public for use as a park open to one race only. Thereby Georgia undertook to facilitate racial restrictions as distinguished from all other kinds of restriction on access to a public park. *Reitman* compels the conclusion that in doing so Georgia violated the Equal Protection Clause.”<sup>130</sup>

Drawing from these three elements of state action, Justice Brennan concluded that “[t]his, then, is not a case of private discrimination. It is rather discrimination in which the State of Georgia is ‘significantly involved,’ and enforcement of the reverter is therefore unconstitutional.”<sup>131</sup>

Justice Brennan’s dissent focused on explaining why state action was present in *Evan v. Abney*. The majority opinion focused on explaining why no denial of equality was present even if state action was present. Justice Brennan’s opinion could have responded to paragraphs in the majority opinion that were deleted from the published opinion where the majority found that state action was present. If that is what happened, then it would seem that the majority was not confident in believing that no state action was present in the case and preferred to treat that question as unnecessary to the result. In any event, the failure of the majority to vigorously defend the idea that

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126. *Evans*, 396 U.S. at 456 (Brennan, J., dissenting).

127. *Id.* at 457 (Brennan, J., dissenting).

128. *Id.*

129. *Id.* at 457–458.

130. *Id.* at 458 (citing *Reitman v. Mulkey*, 387 U.S. 369 (1967)).

131. *Id.* at 459 (Brennan, J., dissenting).

there was no state action present suggests that the Court was reluctant to allow private owners of property to engage in discrimination when their property is functionally “public” in nature.

These public function cases illustrate the Court’s post-1940 functional reformulation of the state action doctrine. Under this more egalitarian formulation, the Court found state action in situations nearly identical to pre-1940 cases in which it failed to find state action.<sup>132</sup> This trend demonstrates the flexibility of the state action doctrine and the capacity of the Court to bend the doctrine to reach the merits of important cases when it chooses.

Later, as new Justices joined the Supreme Court and political winds changed, a more conservative Supreme Court sought to narrow the public function doctrine to encompass only those activities “that have been *traditionally and exclusively* the responsibility of the state.”<sup>133</sup> Thus, in *Jackson v. Metropolitan Edison Co.*,<sup>134</sup> Justice Rehnquist wrote an opinion for the Court that refused to treat a public utility company that was the sole provider of electricity to an area in Pennsylvania as a state actor in a case involving wrongful discharge because “the supplying of utility service is not traditionally the *exclusive* prerogative of the State.”<sup>135</sup> Justices Douglas, Brennan, and Marshall dissented. They worried that “the majority’s analysis would seemingly apply . . . to a company that refused to extend service to Negroes, welfare recipients, or any other group that the company preferred.”<sup>136</sup> The dissent suggested that what is relevant is not whether the company was or was not a “state actor,” but the relative pertinence, relevance, and strength of interests in economic choice and private freedom versus equal protection under law,<sup>137</sup> a normative choice rendered invisible by diverting attention to the task of defining what is and is not “state action” or whether a function has been “traditionally” or “exclusively” performed by a state actor.

## 2. Entanglement Cases

Entanglement cases involve situations in which government authorizes, encourages, facilitates, or becomes significantly involved with

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132. See, e.g., *Smith v. Allwright*, 321 U.S. 649 (1944) (*overruling* *Grove v. Townsend*, 295 U.S. 45 (1935)).

133. Christopher W. Schmidt, *On Doctrinal Confusion: The Case of the State Action Doctrine*, 2016 *BYU L. REV.* 575, 588 (emphasis added) (citing *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974)) (emphasis added).

134. *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974).

135. *Id.* at 353 (emphasis added).

136. *Id.* at 374 (Marshall, J., dissenting).

137. See Schmidt, *supra* note 133, at 598 (“The complexity of the state action doctrine is thus the product of the particular task the courts have chosen to assign the doctrine: limiting the boundaries between state responsibility and private initiative.”).

private discrimination.<sup>138</sup> In several important post-1940 cases, the Court held that there was sufficient entanglement between governmental and private conduct to constitute state action. These cases, in addition to the previously discussed public function cases, illustrate a more egalitarian and less formalistic application of the state action doctrine.

The most famous entanglement case, and perhaps the most famous state action case, is *Shelley v. Kraemer*.<sup>139</sup> In *Shelley*, the Court held that judicial enforcement of private racially restrictive covenants constituted state action in violation of the Equal Protection Clause. *Shelley* was an appeal of two cases, one from the state of Missouri and the other from the state of Michigan.<sup>140</sup>

In the Missouri case, the majority of residents in a neighborhood in St. Louis signed a private racially restrictive covenant prohibiting the sale of property to non-white individuals.<sup>141</sup> Several landowners sold parcels of land to African American individuals and families who then moved into their new homes.<sup>142</sup> After that, several neighbors sued to enforce the racially restrictive covenants, demanding that the new African American residents be removed from their new homes.<sup>143</sup> The Missouri Supreme Court upheld the racially restrictive covenant, ruling against the Shelley family and the other African American residents.<sup>144</sup> In so doing, it interpreted and applied several doctrines of state property law.<sup>145</sup>

First, the Missouri Supreme Court interpreted the drafter's intent to be that the covenants would be enforceable despite the fact that a quarter of owners in the neighborhood did not agree to sign.<sup>146</sup> In so doing, the Missouri Supreme Court reversed the trial court's factual finding that the drafters intended to restrict the whole neighborhood—an intent that could not be fulfilled if all the owners did not sign.<sup>147</sup>

Second, the Missouri Supreme Court held that the covenant did not violate state public policy even though it imposed a partial restraint on alienation of fee simple interests—a restraint that could easily have been determined to violate the common law rule against unreasonable

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138. See generally *Evans v. Abney*, 396 U.S. 435, 455–56, 459 (1970) (noting that Justice Brennan's dissenting opinion states that he would have analyzed the case as involving both a public function and entanglement with government). Note that Justice Brennan's dissenting opinion in *Evans v. Abney* would have analyzed that case as involving both a public function and entanglement with government.

139. *Shelley v. Kramer*, 334 U.S. 1 (1948).

140. *Id.* at 4, 6.

141. *Id.* at 4–5.

142. *Id.* at 5.

143. *Id.* at 6.

144. *Id.*

145. *Kraemer v. Shelley*, 198 S.W.2d 679, 681–83 (Mo. 1946).

146. *Id.* at 681–82.

147. *Id.* at 683.

restraints on alienation.<sup>148</sup> In previous cases, the court had struck down restraints on alienation of fee simple interests as violations of public policy.<sup>149</sup>

Third, the Missouri Supreme Court held that the documents could be accepted by the official recorder of deeds, effectively placing subsequent buyers on constructive notice of the restrictions, and ensuring that the restrictions would run with the land as equitable servitudes binding future owners of the property.<sup>150</sup> That meant that it was consistent with state property law to create restricted fee interests that would bind future owners who did not personally agree to the restrictions. The Michigan Supreme Court made similar findings in *Sipes v. McGhee*.<sup>151</sup>

The petitioners appealed the decisions to the U.S. Supreme Court, and argued that the judicial enforcement of racially restrictive covenants constituted discriminatory state action in violation of the Equal Protection Clause.<sup>152</sup> The respondents countered that the racially restrictive covenant was merely a private contractual agreement beyond the strictures of the Constitution, and that judicial enforcement of the agreement did not constitute state action.<sup>153</sup> The Court sided with the petitioners, holding that the judicial enforcement of the covenants was state action and that the state action violated the Equal Protection Clause.<sup>154</sup>

Specifically, the Court concluded that the “action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment.”<sup>155</sup> In so holding, the Court emphasized language from several early state action cases indicating that state action includes “state authority in the shape of laws, customs, or judicial or executive proceedings.”<sup>156</sup> The Court forcefully concluded with the following statement:

It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint. . . . We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the

148. *Id.* at 682–83.

149. *Triplett v. Triplett*, 60 S.W.2d 13, 16 (Mo. 1933); *Clark v. Ferguson*, 144 S.W. 2d 116, 118 (Mo. 1940).

150. *Kraemer*, 198 S.W.2d at 683.

151. *Sipes et. al v. McGhee*, 25 N.W.2d 638, 640–41, 645 (Mich. 1947), *rev'd sub. nom.* *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that a racially restrictive covenant was enforceable when signed by owners of more than 80% of the property covered by the restraint and it did not violate public policy).

152. *Shelley*, 334 U.S. at 8–9, 18.

153. *Id.* at 20.

154. *Id.* at 14.

155. *Id.* at 14.

156. *The Civil Rights Cases*, 109 U.S. 3, 25 (1883).

equal protection of the laws and that, therefore, the action of the state courts cannot stand.<sup>157</sup>

It is important to note that, at the time the Supreme Court decided *Shelley v. Kraemer*, the Shelley family was living in the house.<sup>158</sup> If the Court found no state action, and the Shelley family refused to leave, the sheriff would have enforced the covenant by physically removing the family and their possessions from the property. The state courts would have divested the Shelley family of title to the land and chosen to whom to transfer that title. It is evident that describing this scenario as devoid of “state action” is, at best, obfuscatory, and at worst, dishonest. There may be an issue of whether the covenanting neighbors’ property rights or the Shelley’s property rights should prevail, and there may also be an issue of whether enforcement of the covenant denies equal access to the housing market. It is hard to see why it is sensible to characterize the state as uninvolved in the definition, allocation, and enforcement of property rights. This is especially true when we recall the normative decisions that the state supreme courts had to make to come to the conclusion that the restriction did not constitute an invalid restraint on alienation repugnant to the fee simple estate owned by the Shelley family.

Another important entanglement case is *New York Times v. Sullivan*.<sup>159</sup> In *Sullivan*, the Supreme Court held that the application of common law is state action that must comply with the strictures of the Constitution.<sup>160</sup> In *Sullivan*, a City Commissioner for Montgomery, Alabama, sued the New York Times for common law libel.<sup>161</sup> The New York Times countered that enforcement of the common law libel rule violated the First and Fourteenth Amendments of the Constitution.<sup>162</sup> The Alabama Supreme Court affirmed a damage award for \$500,000, and dismissed the New York Times’ constitutional claim on the grounds that “[t]he Fourteenth Amendment is directed against State action and not private action.”<sup>163</sup> The U.S. Supreme Court reversed and held that the state’s enforcement of its common law libel rule constituted state action that violated the First and Fourteenth Amendments.<sup>164</sup>

Specifically, the Court concluded that:

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157. *Shelley*, 334 U.S. at 19–20.

158. *Id.* at 6 (“At the time the [Missouri Supreme Court] rendered its decision, [the Shelley family was] occupying the property in question.”).

159. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964). *See also* *Matal v. Tam*, 2017 WL 2621315 (U.S. June 19, 2017) (First Amendment applies to federal Lanham Act regulating trademarks).

160. *Sullivan*, 376 U.S. at 283–84.

161. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964).

162. *Id.* at 265.

163. *N.Y. Times Co. v. Sullivan*, 144 So.2d 25, 28, 40 (Ala. 1962), *rev’d*, 376 U.S. 254 (1964).

164. *Sullivan*, 376 U.S. at 264.

[a]lthough this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is 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.<sup>165</sup>

After *Sullivan*, it is clear that the governmental application of common law—to the same degree as statutory law—is subject to constitutional scrutiny.

A third influential entanglement case is *Adickes v. S.H. Kress Co.*<sup>166</sup> In *Adickes*, the Court held that—like common law or statutory law—state-enforced custom constitutes state action.<sup>167</sup> Sandra Adickes, a white schoolteacher, was arrested and convicted of vagrancy after she entered a restaurant in Mississippi with several African American students.<sup>168</sup> Ms. Adickes appealed her conviction to the U.S. Supreme Court, arguing that her arrest and conviction violated the Equal Protection Clause.<sup>169</sup> The Court held that a state-enforced custom of segregation, fostered by the conduct of state officials (i.e., police), could constitute state action to the same degree as a statute mandating segregation.<sup>170</sup>

The Court noted that “[t]he involvement of a state official in such a conspiracy [to exclude Ms. Adickes from the restaurant based solely on the race of her students] plainly provides the state action essential to show a direct violation of petitioner’s Fourteenth Amendment equal protection rights, whether or not the actions of the police were officially authorized, or lawful.”<sup>171</sup> The Court went on to note that “settled practices of state officials may, by imposing sanctions or withholding benefits, transform private predilections into compulsory rules of behavior no less than legislative pronouncements.”<sup>172</sup> Relying on this reasoning, the Court held that “[f]or state action purposes it makes no difference of course whether the racially discriminatory act by the private party is compelled by a statutory provision or by a custom having the force of law—in either case it is the State that has commanded the result by its law.”<sup>173</sup>

165. *Id.* at 265.

166. *Adickes v. S.H. Kress Co.*, 398 U.S. 144 (1970).

167. *Id.* at 170–71.

168. *Id.* at 200.

169. *Id.* at 144.

170. *Id.* at 170–71.

171. *Id.* at 151.

172. *Id.* at 168.

173. *Id.* at 171.

A fourth key entanglement case is *Reitman v. Mulkey*,<sup>174</sup> which held that a state constitutional amendment that repealed the state fair housing statute allowing property owners to discriminate in real estate practices constituted discriminatory state action in violation of the Equal Protection Clause. In *Reitman*, California citizens adopted an amendment to the California Constitution in response to the enactment of a state statute that prohibited private landowners from discriminating in the sale and rental of housing.<sup>175</sup> The California Supreme Court determined that the “immediate design and intent”<sup>176</sup> of the constitutional amendment was “to overturn state laws that bore on the right of private sellers and lessors to discriminate . . . [and] to forestall future state action that might circumscribe this right.”<sup>177</sup>

After the California Supreme Court analyzed the legislative history and context of the amendment, the Court held that “the State [through the amendment] had taken affirmative action designed to make private discriminations legally possible” and had thus violated the Equal Protection Clause.<sup>178</sup> The U.S. Supreme Court affirmed, and held that:

Section 26 was intended to authorize, and does authorize, racial discrimination in the housing market. The right to discriminate is now one of the basic policies of the State. The California Supreme Court believes that the section will significantly encourage and involve the State in private discriminations. We have been presented with no persuasive considerations indicating that these judgments should be overturned.<sup>179</sup>

This case is a powerful egalitarian reformation of the state action doctrine, as it establishes the principle that *deregulation*—even when implemented through popular referendum—may still constitute state action denying the equal protection of the law.<sup>180</sup>

As a matter of property law, in *Reitman* the California constitutional amendment transferred a property right from one set of owners to another set of owners. After passage of the state’s fair housing law, land owners no longer had the power to refuse to sell or rent to prospective buyers or renters based on race;<sup>181</sup> that right belonged to the general public which had the power to go to court for a remedy if a housing provider refused to sell or lease on the ground of the buyer’s race. The constitutional amendment stripped the public of their right

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174. *Reitman v. Mulkey*, 387 U.S. 369, 378–79 (1967).

175. *Id.* at 371.

176. *Id.* at 374.

177. *Id.* Cf. *Romer v. Evans*, 517 U.S. 620, 635–36 (1996) (holding that state constitutional amendment prohibiting any legislative, executive, or judicial action to protect LGBTQ persons from discrimination violated the Equal Protection clause).

178. *Reitman*, 387 U.S. at 375.

179. *Id.* at 381.

180. *Id.* at 380–81.

181. *Id.* at 374.



to purchase or lease property without regard to race and granted property owners the power to engage in discriminatory practices.<sup>182</sup> While the fair housing law promoted equality, the constitutional amendment denied it.<sup>183</sup>

In *Shelley v. Kraemer*, the Court found state action when the government enforced a restrictive covenant.<sup>184</sup> In *Reitman v. Mulkey*, the Court found state action when the government allowed owners the freedom to refuse to sell on the basis of the race.<sup>185</sup> State action was present whether the law imposed a duty on an owner that was enforceable by neighboring right holders (*Shelley*) or the law gave owners the privilege to refuse to deal with buyers because of their race (*Reitman*).<sup>186</sup> Moreover, the *Shelley* Court not only found state action but a deprivation of equal protection of law.<sup>187</sup> This occurred despite the fact that the Missouri and Michigan courts would have enforced a racial covenant prohibiting sale to white persons and despite the fact that the California constitutional amendment did not require any action, and only allowed discriminatory refusals to sell.<sup>188</sup> In both *Shelley* and *Reitman*, the Court found a denial of equal protection because the laws (whether coercive or permissive) promoted white supremacy by making it difficult or impossible for African Americans to enter the real estate market to acquire property on an equal and nondiscriminatory basis.<sup>189</sup>

Three more important entanglement cases that specifically involve access to places of public accommodation are *Robinson v. Florida*,<sup>190</sup> *Lombard v. Louisiana*,<sup>191</sup> and *Bell v. Maryland*.<sup>192</sup> In *Robinson*, a racially-segregated restaurant denied a group of African Americans service.<sup>193</sup> The restaurant manager called the police after the group refused to leave, and the group was arrested and convicted of trespass.<sup>194</sup> The defendants challenged their conviction as a violation of the Equal Protection Clause.<sup>195</sup> The government contended that state action was not present because a private business carried out the discriminatory conduct, not the state.<sup>196</sup>

182. *Id.* at 380–81.

183. *Id.* at 374.

184. *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948).

185. *Reitman*, 387 U.S. at 380–81.

186. *Shelley*, 334 U.S. at 20; *Reitman*, 387 U.S. at 380–81.

187. *Shelley*, 334 U.S. at 13.

188. *Id.* at 19–20.

189. *Id.*

190. *Robinson v. Florida*, 378 U.S. 153 (1964).

191. *Lombard v. Louisiana*, 373 U.S. 267 (1963).

192. *Bell v. Maryland*, 378 U.S. 226 (1964). See Mack, *supra* note 14 (analyzing whether Robert Mack Bell was violating any law when he “sat in” at Hooper’s restaurant in downtown Baltimore).

193. *Robinson*, 378 U.S. at 153–54.

194. *Id.*

195. *Id.* at 154.

196. *Id.*

The Supreme Court found state action under a theory of government entanglement.<sup>197</sup> Specifically, the Court highlighted a government regulation requiring restaurants to maintain racially segregated restrooms.<sup>198</sup> The Court reasoned that “[w]hile these Florida regulations do not directly and expressly forbid restaurants to serve both white and colored people together, they certainly embody a state policy putting burdens upon any restaurant which serves both races, burdens bound to discourage the serving of the two races together.”<sup>199</sup> The Court concluded that this government entanglement—although indirect—constituted discriminatory state action in violation of the Equal Protection Clause.<sup>200</sup> Despite the Court’s willingness to apply an egalitarian formulation of the state action doctrine, it refused to reach the question of whether the arrest, prosecution, and conviction of defendants—independent of the restroom segregation—constituted discriminatory state action.<sup>201</sup>

The *Lombard* Court faced facts similar to *Robinson* and extended its holding to find state action on a theory of government entanglement.<sup>202</sup> In *Lombard*, African American patrons were denied service at an all-white restaurant.<sup>203</sup> The restaurant manager summoned the police after the group refused to leave.<sup>204</sup> After several police officers consulted with the restaurant manager, the police officers, including a captain and major, arrested the patrons. The patrons were later convicted of trespass.<sup>205</sup> Unlike the *Robinson* Court, the *Lombard* Court located no government ordinance condoning or encouraging segregation.<sup>206</sup> Yet, the Court still found state action in public statements made by the New Orleans mayor and superintendent of police condemning sit-ins and denouncing racially integrated service at lunch counters.<sup>207</sup> The Court reasoned that the public statements “direct[ed] continuance of segregated service in restaurants,”<sup>208</sup> and concluded that “the city must be treated exactly as if it had an ordinance prohibiting such conduct.”<sup>209</sup> The Court held that the state action violated the Equal Protection Clause.<sup>210</sup> Even though there was no specific law

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197. *Id.* at 156–57.

198. *Id.* at 156.

199. *Id.*

200. *Id.* at 157.

201. *Id.* at 155. (“In this case we do not reach the broad question whether the Fourteenth Amendment of its own force forbids a State to arrest and prosecute those who, having been asked to leave a restaurant because of their color, refuse to do so.”).

202. *See Lombard v. Louisiana*, 373 U.S. 267, 267 (1963).

203. *Id.* at 268.

204. *Id.*

205. *Id.* at 269.

206. *See id.* at 267.

207. *Id.* at 273.

208. *Id.*

209. *Id.*

210. *Id.* at 273, 276.

that required segregation, public officials encouraged private discriminatory practices, and thus participated in establishing segregated public accommodations.

*Bell* involved facts quite similar to *Robinson* and *Lombard*.<sup>211</sup> A segregated restaurant denied service to African American patrons. The patrons were arrested and convicted of trespass after they refused to leave.<sup>212</sup> The only substantial difference was that *Bell* did not involve discriminatory laws, like *Robinson*, or explicitly discriminatory executive action, like *Lombard*.<sup>213</sup> In *Bell*, the Court faced a question that it has yet to answer: does the governmental enforcement (e.g., through police and prosecutors) of trespass laws constitute state action denying access to public accommodations, despite an absence of discriminatory laws or executive statements encouraging or requiring racial exclusion from places of public accommodation?<sup>214</sup> The Court avoided answering this question and reasoned that “the supervening enactment of the city and state public accommodations laws” compelled reconsideration of the convictions by the lower court.<sup>215</sup>

However, Justices Douglas and Goldberg wrote a concurrence that reached the state action question. The concurrence argued that governmental enforcement—through police, prosecutors, and courts—of trespass laws constitutes state action, at least when the party pursuing discriminatory exclusion is a place of public accommodation.<sup>216</sup> In reaching this conclusion, Justices Douglas and Goldberg emphasized the quasi-public nature of privately owned restaurants and other places of public accommodation, as well as the involvement of several layers of government in enforcing discriminatory exclusion through trespass laws.<sup>217</sup> As in *Shelley* and *Reitman*, Justices Douglas and Goldberg would have found that enforced racial segregation in public accommodations denies equal protection of the law even if public officials merely deferred to private discriminatory motives.<sup>218</sup> The concurrence is discussed in detail in Part III of this Article.

The final, most recent entanglement case is *Brentwood Academy v. Tennessee Secondary School Athletic Association*.<sup>219</sup> In *Brentwood Academy*, the Supreme Court arguably broadened the entanglement standard to a more permissive “entwinement” standard. This standard

211. See *Bell v. Maryland*, 378 U.S. 226, 227–28 (1964).

212. *Id.*

213. See *id.* at 228; see also *Robinson v. Florida*, 378 U.S. 153, 153–54 & n.1 (1964); see also *Lombard v. Louisiana*, 373 U.S. 267, 273 (1963).

214. *Bell*, 378 U.S. at 228.

215. *Id.* at 239. Cf. Mack, *supra* note 14, at 363–64 (arguing that it was unclear what state law actually was at the time of *Bell*’s arrest, suggesting that state action was needed to answer that question one way or the other).

216. *Bell*, 378 U.S. at 260 (Douglas, J., concurring).

217. *Id.* at 252, 257, 259–60.

218. *Id.* at 259–60.

219. *Brentwood Acad. v. Tenn. Secondary School Athletic Ass’n*, 531 U.S. 288 (2001).

requires government involvement but does not require any level of government *encouragement* for state action to be present.<sup>220</sup> The Court found a private association charged with regulating high school athletics to be a state actor because of its “entwinement” with governmental activities.<sup>221</sup> As Professor Chemerinsky noted:

Entanglement. . . had been found to require government encouragement of constitutional violations by private actors. But no encouragement was found in *Brentwood Academy*. Instead, the Court found that significant government involvement with the private entity was sufficient for a finding of state action. This seems to be a much more expansive exception to the state action doctrine than [ ] found in prior cases.<sup>222</sup>

In these entanglement cases—to an even greater degree than the public function cases—the Court applied a functional conception of the state action doctrine. The Court found state action in situations nearly identical to pre-1940 cases where no state action had been found.<sup>223</sup> This trend highlights the Court’s evolving understanding of the significant overlap between the public and private spheres, as well as its (occasional) willingness in the late twentieth and early twenty-first centuries to apply a more egalitarian doctrine and to reach the merits of important civil rights cases.

#### D. *Contemporary Harms of the State Action Doctrine*

The state action doctrine continues to harm individuals and groups—particularly groups that face discrimination in daily life—to this day. The contemporary harms of the state action doctrine cut across a wide array of constitutional norms and individual rights. As Professor Chemerinsky noted, “the courts have tolerated the violation of virtually every constitutional value, dismissing challenges to alleged infringements because of the absence of state action.”<sup>224</sup> One especially salient contemporary ramification of the state action doctrine involves LGBTQ discrimination in access to public accommodations.

Laws granting LGBTQ persons equal access to places of public accommodation are strikingly deficient. Although federal law has, since 1964, prohibited a small number of public accommodations from discriminating “on the ground of race, color, religion, or national origin,”<sup>225</sup> currently there is no federal law prohibiting public

220. *Brentwood*, 531 U.S. 288, 303 (2001).

221. *Id.* at 302 (“Entwinement will support a conclusion that an ostensibly private organization ought to be charged with a public character and judged by constitutional standards; entwinement to the degree shown here requires it.”).

222. See Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 MICH. L. REV. 2008, 2024–25 (2002).

223. See, e.g., *Shelley v. Kraemer*, 334 U.S. 1, 8 (1948) (comparing *Corrigan v. Buckley*, 271 U.S. 323 (1926)).

224. See Chemerinsky, *supra* note 8, at 510.

225. 42 U.S.C. § 2000a (2012).

accommodations generally from discriminating on the basis of sex, sexual orientation, or gender identity.<sup>226</sup> Only twenty-one states—and the District of Columbia—have enacted state statutes prohibiting businesses from denying access to public accommodations on the basis of sexual orientation.<sup>227</sup> There are even fewer state statutes prohibiting businesses from denying access to public accommodations on the basis of gender identity.<sup>228</sup> While forty-five states prohibit discrimination based on sex in public accommodations,<sup>229</sup> so far very few courts have suggested that sexual orientation discrimination is a form of sex discrimination.<sup>230</sup> Only one state, New Jersey, has a common law rule mandating equal access to places of public accommodation.<sup>231</sup> Mississippi is the only state that expressly grants public accommodations the power to refuse to serve customers for any reason.<sup>232</sup>

The state action doctrine exacerbates this scant sub-constitutional protection for LGBTQ individuals within places of public accommodation. It does so by shielding private LGBTQ discrimination from constitutional scrutiny in a manner similar to the historical immunization of private racial discrimination from constitutional scrutiny.<sup>233</sup> The combination of inadequate sub-constitutional protection and a formalistic application of the state action doctrine means that LGBTQ persons—like Dorian, introduced at the beginning of this Article—can legally be denied access to places of public accommodation in twenty-nine states to this very day on the basis of their sexual orientation. Dorian—and others like him—can never take for granted that

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226. See *supra* note 4 and accompanying text.

227. See Isaac Saidel-Goley, *The Right Side Of History: Prohibiting Sexual Orientation Discrimination In Public Accommodations, Housing, And Employment*, 31 WIS. J.L. GENDER & SOC'Y 117, 121–22 (2016).

228. New Hampshire and Wisconsin prohibit businesses from denying access to public accommodations on the basis of sexual orientation, but gender identity is not protected. See N.H. REV. STAT. ANN. § 354-A:17 (2009); WIS. STAT. § 106.52 (West Supp. 2017); WIS. STAT. § 106.52 (2014).

229. Saidel-Goley, *supra* note 5, at 148–50; Elizabeth Sepper, *The Role of Religion in State Public Accommodations Laws*, 60 ST. LOUIS U.L.J. 631, 637 (2016).

230. While the West Virginia Supreme Court recently adopted the traditional view that discrimination because of sexual orientation is not a form of sex discrimination, *State v. Butler*, 799 S.E.2d 718, 728 (W.Va. 2017) (hate crime against two gay men did not constitute criminal civil rights violation willfully injuring a person “because of such other person’s . . . sex”), the Seventh Circuit came to the opposite view in *Hively v. Ivy Tech Cmty. College of Ind.*, 853 F.3d 339, 349–52 (7th Cir. 2017) on the ground that such discrimination is based on requiring conformity to a particular gender idea of masculinity or femininity and because the sex of one’s romantic or sexual partner or that of the person to whom one is attracted or oriented is the deciding factor in the discriminatory treatment. See also *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 200–01 (2d Cir. 2017) (although bound by precedent to hold the opposite, the court argued that sexual orientation discrimination is a form of sex discrimination).

231. See Saidel-Goley, *supra* note 227, at 122.

232. MISS. CODE ANN. § 97-23-17 (2014).

233. See *The Civil Rights Cases*, 109 U.S. 3, 11 (1883).

they will be welcome and provided service in a restaurant, hotel, store, or doctor's office.

### III. RESTATING THE STATE ACTION DOCTRINE

#### A. *Precedent & Principle*

The preceding Sections of this Article outlined the history and harms of the state action doctrine. This Section offers analysis by the way of a restatement. It seeks both to accurately reflect existing doctrine and to reconcile conflicting precedents. The cases outlined above are contradictory in the sense that there are both competing lines of precedent and holdings that cannot easily be reconciled. How should we deal with case law that cannot easily be described in a coherent manner? Two different approaches exist.

The first way to restate and reconcile incoherent lines of cases is to limit some of the cases to their facts, making them inapplicable to situations not exactly "on point." That way of restating the law eschews formally overruling any cases while depriving some of them of force in the future. It is a way to avoid the consequences of unwelcome precedents by marginalizing them without developing a full-fledged theory about why they cannot be reconciled with the mainstream cases.

The second way to reconcile conflicting precedents is to explicate the norms and values underlying the cases, and to reinterpret the precedents to reflect those underlying, often competing principles. This method may require broadening the scope or holding of some cases and narrowing, or even overruling, the holdings of others. This approach will almost always acknowledge that the field is incoherent either (1) because of historical change over time in normative thinking or social conditions; or (2) because the precedents implicate conflicting norms, values, and principles, and drawing a defensible line between the competing considerations is difficult and cannot be accomplished in a crisp, mechanical fashion. At the same time, this approach seeks to give reasons to privilege some norms over others in particular social or legal contexts.<sup>234</sup>

The Authors take the second approach because it more honestly recognizes the role the state plays in regulating relationships, and because it is more compatible with rule of law norms that seek to create reflective equilibrium between principles and cases and seeks to draw lines that can be publicly justified to all affected by them.

Either approach requires a substantive judgment that details which cases to foreground and make salient and which cases to place in the background or even discard. A court could, for example, limit to their facts cases like *Shelley v. Kraemer*, *New York Times v. Sullivan*, *Evans*

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234. See also Schmidt, *supra* note 133, at 579 ("What scholars lament as a failure of principled reasoning or legal craft may create valuable opportunities for those who seek to use the law to effect social change.").

*v. Newton*, and *Reitman v. Mulkey*. A court could say that those cases, if interpreted broadly, could have the effect of eliminating the state action doctrine all together. This would subject all private decisions to public norms in violation of principles of individual liberty. Thus, those cases cannot be core examples of what constitutes state action. Such a choice would insulate common law rules, including rules that confer freedom of action from constitutional scrutiny. It would also promote social hierarchy and relationships of domination. Or a court could choose the opposite path. This path seriously considers the reasons those cases applied constitutional norms to relationships that might, at first glance, seem to be in the private sphere but which, on second glance, implicate public norms because they concern matters of public interest and activity that takes place in the public sphere.

Taking the second approach, the Authors find that existing law holds that “state action” is present at least when (1) someone is arrested or prosecuted; (2) a court issues an order; (3) the government enforces or encourages a custom; or (4) the government makes an allocative decision. A state action finding does not automatically mean that someone’s constitutional rights have been violated. A substantive determination must be made regarding what constitutional rights are, or are not, implicated in the context in question. At the same time, at least in these cases, courts should not short-circuit the substantive analysis by employing the fiction that the state has not “acted.” State involvement in such cases can no longer remain invisible. That means that the state’s choice of law must be consistent with constitutional norms, including norms of equality and norms of free association and privacy.

## B. *Restatement of State Action*

### 1. State Action is Present When Someone is Arrested or Prosecuted

Courts should find state action when the government arrests or prosecutes any person. That means that when the government uses the criminal justice system to enforce discriminatory exclusion from places of public accommodation, courts should find state action. That action *also* denies equal protection of law, at least when no competing rights to association or privacy hold sway. Discriminatory exclusion from public accommodations unconstitutionally denies access to the market without a legitimate government interest in doing so.

The government’s use of the criminal justice system to restrain the liberty of a person is perhaps the most obvious instance of “state action.” This is especially clear within the context of using the criminal justice system to enforce discriminatory exclusion from places of public accommodation. Yet, the U.S. Supreme Court has never held that arrest and prosecution, even within the context of discriminatory ex-

clusion from places of public accommodation, constitutes state action for the purposes of an equal protection challenge. The previously discussed line of cases culminating in *Bell v. Maryland* came very close to deciding this question but ultimately failed to do so.<sup>235</sup> Courts should embrace the reasoning of the Douglas and Goldberg concurrence in *Bell v. Maryland* and hold that arrest and prosecution *always* constitute state action.<sup>236</sup>

The cases that refused to hold that arrest and prosecution constitute state action have erroneously conflated two parts of the Equal Protection Clause test: (1) state action; and (2) denial of equal protection of law. By conflating these two prongs, the cases used the state action doctrine to summarily dismiss equal protection claims without even reaching the substantive question of whether arrest and prosecution constitute *discriminatory* state action in violation of the Equal Protection Clause.

For example, Justice Harlan in *Peterson v. Greenville* noted that the Court's holding "does not suggest that [state] action, denying equal protection, may be found in the mere enforcement of trespass laws in relation to private business establishments from which the management, of its own free will, has chosen to exclude persons of the Negro race."<sup>237</sup> This confuses the question of whether the state is acting with whether the action is unconstitutional. Courts should not conflate state action with discriminatory denial of equal protection. In other words, courts should not determine that there is no state action when what the court actually believes is that there is not a denial of constitutional equality. Courts should, at the very least, acknowledge that arrest and prosecution constitute state action under the Constitution, regardless of whether that action rises to the level of denial of equal protection of the law.

The Douglas and Goldberg concurrence in *Bell v. Maryland* provides a framework for the Court to follow in establishing the principle that arrest and prosecution *always* constitute state action under the Equal Protection Clause. The concurrence can also provide a framework for the principle that arrest and prosecution enforcing discriminatory exclusion from public accommodations constitute discriminatory state action in violation of the Equal Protection Clause.<sup>238</sup> At the beginning of their concurrence, Justices Douglas and Goldberg chastised the Court for "studiously avoid[ing] decision of

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235. See *Bell*, 378 U.S. at 239 (1964) (holding that "the supervening enactment of the city and state public accommodations laws" compelled reconsideration of the convictions by the lower court, rendering the constitutional question moot).

236. *Id.* at 242–60 (Douglas, J., concurring).

237. *Peterson*, 373 U.S. at 249 (Harlan, J., concurring) (internal citations omitted).

238. *Bell*, 378 U.S. at 242–60 (Douglas, J., concurring).



the basic issue of the right of public accommodation under the Fourteenth Amendment."<sup>239</sup>

They framed the basic issue as follows: "The clash between Negro customers and white restaurant owners is clear; each group claims protection by the Constitution and tenders the Fourteenth Amendment as justification for its action."<sup>240</sup> Then, Justices Douglas and Goldberg emphasized the fundamentally public nature of places of public accommodation as "facilities whose only claim to existence is serving the public."<sup>241</sup> Specifically, they emphasized that "[t]he property involved is not. . . a man's home or his yard or even his fields. Private property is involved, but it is property that is serving the public."<sup>242</sup> They then distinguished places of public accommodation from private property not open to the general public. This provided a limiting principle to protect a sphere of privacy from constitutional scrutiny: "The problem with which we deal has no relation to opening or closing the door of one's home. The home of course is the essence of privacy, in no way dedicated to public use, in no way extending an invitation to the public."<sup>243</sup>

The issue was not whether the state was acting; the state is always acting when it enforces trespass law.<sup>244</sup> The issue was whether the Constitution's equality provisions ensure equal access to public accommodations.<sup>245</sup> Finding state action would not automatically mean that every exclusion from property violates someone's constitutional rights.<sup>246</sup> Only property open to the public or open for sale or rental in the real estate market raises issues of denial of equality.<sup>247</sup>

They then highlighted the obvious existence of state action in the several layers of government enforcing discriminatory exclusion through trespass laws.

Maryland's action against these Negroes was as authoritative as any case where the State in one way or another puts its full force behind a policy. The policy here was segregation in places of public accommodation; and Maryland enforced that policy with her police, her prosecutors, and her courts.<sup>248</sup>

Finally, Justices Douglas and Goldberg invoked *Shelley v. Kraemer*, and analogized the state action inherent in arrest and prosecution to the state action inherent in judicial orders. The Justices concluded that enforcement of discriminatory exclusion through arrest, prosecution,

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239. *Id.* at 242.

240. *Id.* at 243.

241. *Id.* at 247.

242. *Id.* at 252.

243. *Id.* at 253.

244. *Id.*

245. *Id.*

246. *Id.* at 252.

247. See *Jones v. Mayer*, 392 U.S. 409 (1968).

248. *Bell*, 378 U.S. at 257 (1964) (Douglas, J., concurring).

and conviction constitutes state action that denies equal protection of law.

We should put these restaurant cases in line with *Shelley v. Kraemer*, holding that what the Fourteenth Amendment requires in restrictive covenant cases it also requires from restaurants. . . . *When the state police, the state prosecutor, and the state courts unite to convict Negroes for renouncing that relic of slavery, the 'State' violates the Fourteenth Amendment.*<sup>249</sup>

Courts should adopt the approach endorsed decades ago by Justices Douglas and Goldberg. They should disentangle the question of state action from discriminatory denial of equality and should acknowledge that arrest and prosecution—like a court order—is *always* state action under the Constitution.<sup>250</sup> Of course, this conclusion (that the state is acting) does not settle the question of whether the state action violates the Equal Protection Clause. Courts must still analyze the particular context, the rule in question, the parties' relationships, and substantive constitutional norms (such as equality and freedom of association). Then, courts must determine whether the state action creates a denial of equal protection in the context in question.

Governmental enforcement of discriminatory exclusion at places of public accommodation—through common law authorization and criminal trespass statutes, followed by arrest and prosecution for trespass—categorically effects a denial of equal protection in violation of the Equal Protection Clause. It does so because it denies individuals the right to contract and to acquire property and to exercise liberties for discriminatory reasons that cannot be indulged in a free and democratic society that refuses to establish or enforce a social caste system that relegates a minority group to the fringes of society. This determination is consistent with the principle established several decades ago in *Shelley v. Kraemer*, and it is consistent with contemporary understandings of equality and dignity.<sup>251</sup>

## 2. State Action is Present When a Court Issues an Order

Courts should also find state action when a court issues an order.<sup>252</sup> This principle, mandated by *Shelley v. Kraemer*, would remove the shield of state action from cases in which the state enforced discriminatory exclusion through the court system.<sup>253</sup> In *Shelley v. Kraemer* the Court unambiguously held that courts are state actors and that court orders are state action for the purposes of the Fourteenth

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249. *Id.* at 259–60 (Douglas, J., concurring) (emphasis added).

250. *Id.*

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

252. *See id.* at 14.

253. *Id.* at 16.

Amendment.<sup>254</sup> *New York Times v. Sullivan* is consistent with that rule of law.<sup>255</sup> The *Shelley* Court further held that the judicial enforcement of private racially restrictive covenants constituted discriminatory state action in violation of the Equal Protection Clause.<sup>256</sup> This revolutionary case, properly understood, effected a fundamental reformulation of the state action doctrine by removing the shield of state action whenever state court orders are enforced.<sup>257</sup> After *Shelley*, even if a case initially lacked state action as traditionally understood by the Court, it would acquire state action the moment a state court decided the case and ordered someone to do something—like vacating and selling their home.<sup>258</sup>

Consider the introductory scenario involving Dorian as an application of this principle. A place of public accommodation excluded Dorian because of his sexual orientation. That discriminatory exclusion would be shielded from constitutional scrutiny under the Court's traditional, formalistic formulation of the state action doctrine. The use of police, prosecutors, and state judges to enforce the discriminatory exclusion involves state action. But, the Court has not yet embraced such a broad formulation of the state action doctrine. Clearly, under *Shelley*, state action is unquestionably present the moment the state court upheld Dorian's conviction and enforced it.<sup>259</sup> Rather than magically rendering the state action invisible, the U.S. Supreme Court, applying *Shelley*, should have no trouble locating state action in the state court order.<sup>260</sup> Moreover, the Court should hold that the state court orders (finding Dorian to have committed a crime and then affirming his conviction) constitute discriminatory state action that violates the Equal Protection Clause to the same degree as the court order upholding the racially restrictive covenant in *Shelley*.<sup>261</sup>

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254. *Id.* at 14 (holding that the "action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment").

255. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964).

256. *See Shelley*, 334 U.S. at 20. ("We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand.").

257. *See id.*

258. Professor Laurence Tribe discusses this application of *Shelley* in his book "Constitutional Choices." *See* LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 246–66 (1985). *See also* Louis Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 486 (1962) ("*the state is responsible when its courts act to render discrimination effective.*") (italics in original).

259. *See Shelley*, 334 U.S. at 1.

260. *See id.*

261. *See id.*

### 3. State Action is Present When the Government Enforces or Encourages a Custom

Courts should also find state action when the government enforces or encourages a custom. Further, when the government encourages or enforces a custom of discriminatory exclusion from places of public accommodation, courts should find that that state action denies equal protection of law. The presence or absence of state action should not turn on whether the government explicitly encourages discrimination through written law. Implicit encouragement through unwritten custom that is publicized, favored, encouraged, or advocated by state actors implicates the state in the discrimination it promotes.

*Adickes v. S.H. Kress Co.* supports this principle.<sup>262</sup> In *Adickes*, the Supreme Court concluded that “settled practices of state officials may, by imposing sanctions or withholding benefits, transform private predilections into compulsory rules of behavior no less than legislative pronouncements.”<sup>263</sup> Noting that “a state official might act to give a custom the force of law in a variety of ways,”<sup>264</sup> the Court highlighted two examples. First, the government might encourage a custom of discrimination through the use of “false arrest for vagrancy for the purpose of harassing and punishing” those who violate the custom.<sup>265</sup> Second, the government might “intentionally tolerate violence or threats of violence directed toward those who violated the [custom].”<sup>266</sup> Building on these examples, the Court held that “[f]or state action purposes it makes no difference of course whether the racially discriminatory act by the private party is compelled by a statutory provision or by a custom having the force of law—in either case it is the State that has commanded the result by its law.”<sup>267</sup> In other words, the Court reasoned that governmental practices (e.g., practices in policing, prosecution, or administrative benefits) that encourage or enforce a custom of discrimination are instances of state action, and that state action can effect a denial of equality in violation of the Equal Protection Clause.<sup>268</sup>

*Lombard v. Louisiana* further supports this principle.<sup>269</sup> In *Lombard*, the Supreme Court found state action in public statements made by the New Orleans mayor and the superintendent of police that condemned sit-ins and denounced racially integrated service at lunch counters.<sup>270</sup> As the Court noted in *Adickes*, “the statements of the

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262. *Adickes v. S.H. Kress Co.*, 398 U.S. 144 (1970).

263. *Id.* at 168.

264. *Id.* at 172.

265. *Id.*

266. *Id.*

267. *Id.* at 171.

268. *See id.*

269. *Lombard v. Louisiana*, 373 U.S. 267 (1963).

270. *Id.* at 270–71.

chief of police and mayor of New Orleans, as interpreted by the Court in *Lombard v. Louisiana* . . . could well have been taken by restaurant proprietors as articulating a custom having the force of law.”<sup>271</sup> In other words, the practice of state officials could be interpreted as having encouraged a custom of discrimination, thereby violating the Equal Protection Clause.<sup>272</sup>

Even the *Civil Rights Cases* support this principle.<sup>273</sup> The Court in the *Civil Rights Cases* repeatedly discussed “customs having the force of law” together with other—more explicit—state actions like “law, statute, ordinance, [and] regulation.”<sup>274</sup> The Court concluded that state action might take “the shape of laws, *customs*, or judicial or executive proceedings.”<sup>275</sup>

Courts should follow the reasoning of *Adickes* and *Lombard*.<sup>276</sup> Courts should find state action whenever the government encourages or enforces a custom, and they should find state action denying equal protection when the government encourages or enforces a custom of discriminatory exclusion from places of public accommodation.<sup>277</sup>

What might this form of state action mean for gay rights? It turns out to mean quite a lot. Until 2003, only fifteen years ago, many states criminalized same-sex sexual contact. That only stopped with the decision in *Lawrence v. Texas*.<sup>278</sup> That was the same year that same-sex marriage was recognized for the first time in U.S. history in *Goodridge v. Department of Public Health*.<sup>279</sup> It was not until 2015, just three years ago, in *Obergefell v. Hodges*,<sup>280</sup> that same-sex marriage became the law of the land. Until quite recently, many states not only encouraged but demanded discriminatory treatment of LGBTQ persons.

Recent laws and bills that seek to create religious exemptions from public accommodation laws should be understood in a similar light. Such laws are not neutral; they are intended to encourage those who do not believe LGBTQ persons should have civil rights to act on their beliefs. In the light of centuries of laws and customs pushing LGBTQ persons into the closet and the jails of this nation, laws that promote exclusion because of sexual orientation should be understood as state-enforced customs designed to make it impossible for LGBTQ persons to enter public accommodations without worrying about whether they are welcome.

271. *Adickes*, 398 U.S. 144 at 168–69.

272. *See id.*

273. *The Civil Rights Cases*, 109 U.S. 3 (1883).

274. *Adickes*, 398 U.S. at 168–69 (quoting *The Civil Rights Cases*, 109 U.S. 3 (1883)).

275. *The Civil Rights Cases*, 109 U.S. at 17.

276. *See Adickes*, 398 U.S. at 144; *see Lombard v. Louisiana*, 373 U.S. 267 (1963).

277. *See Adickes*, 398 U.S. at 144; *see Lombard*, 373 U.S. at 267.

278. *Lawrence v. Texas*, 539 U.S. 558 (2003).

279. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

280. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015).

#### 4. State Action is Present When the Government Makes an Allocative Decision

This last category is the hardest to restate. In *Reitman v. Mulkey*, the Supreme Court held that state action was present when California repealed a fair housing law.<sup>281</sup> California citizens amended the state constitution to repeal the state fair housing statute, which prohibited private parties from discriminating in the sale or rental of housing.<sup>282</sup> The Court held that this amendment constituted state action with the purpose of both condoning and encouraging discrimination and, therefore, it violated the Equal Protection Clause.<sup>283</sup>

One way to understand this case is that the state acted to rescind a previously protected right that guaranteed nondiscriminatory access to the marketplace. When the government rescinds a previously protected right prohibiting discriminatory exclusion from places of public accommodation, courts should find state action denying equal protection. The *repeal* of legislative or regulatory protection should constitute discriminatory state action to the same degree as the *enactment* of discriminatory legislation or regulation.

Even if further argument is needed to explain why the discrimination itself violates constitutionally-protected equality norms, we should not short-circuit that analysis by pretending that the state is not involved. A law that enables land owners to deny access to the housing market because of a potential customer's race, thereby stripping that customer of the right to purchase housing, is an act of state. Indeed, there is no actor other than state that has the power to rescind a fair housing law. *Reitman* supports the principle that governmental repeal of legislation or regulation, even when enacted directly by the citizenry in a statewide referendum, is state action for the purposes of the Equal Protection Clause.<sup>284</sup>

There is another way to understand *Reitman*.<sup>285</sup> Prior fair housing law granted the public rights of access to housing without regard to race, prohibiting racially-motivated denials of housing opportunities. That right can be understood as a public easement of access to the housing market without regard to race. The constitutional amendment stripped the public of that easement and, instead, granted housing owners the power to refuse service because of race—a right prior law denied them. Both the prior law and the new law allocated property rights. The laws were allocative in nature because the two rights could not exist together. Either there is a duty not to discriminate in the housing market on the basis of race or there is no duty. Either one has a right of access to the market without regard to race or one is vulner-

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281. *Reitman v. Mulkey*, 387 U.S. 369 (1967).

282. *Id.* at 372, 374.

283. *Id.* at 376, 381.

284. *See id.* at 376.

285. *See id.* at 369–81.

able to exclusion for racially discriminatory reasons. The state must allocate the entitlement one way or the other. It must, in other words, act. Inaction is not possible.<sup>286</sup>

State action is always present when the state acts through the legal system to allocate property rights, and the state violates the Constitution when it allocates property rights in a discriminatory manner. The reallocation of property rights in *Reitman* meant that African Americans lost their right to buy property without regard to race, and existing owners gained a right to refuse to sell or rent because of the race of the potential buyer or renter. The constitutional amendment took property from A and transferred it to B.

Professor Mack has made a similar observation about *Bell v. Maryland*.<sup>287</sup> It is generally assumed that owners can exclude as they wish unless they are common carriers, innkeepers, or are subject to a civil rights statute that limits their prerogatives.<sup>288</sup> But, the line between those entities that have the obligations of public accommodations and those that are sufficiently “private” to be free to engage in racial discrimination is a line that has changed over the course of U.S. history. Those changes have occurred because of *both* statutes and common law developments.<sup>289</sup>

When a patron claims a common law right to be served in a place of public accommodation, common law courts must decide whether the patron has, or does not have, such a common law right. A ruling *either way* is a ruling of law; a ruling *either way* is state action. The state must allocate a property right whether it upholds or overrules precedent; the state must allocate a property right when it determines whether to apply or distinguish a prior case. The state assigns the entitlement even if the case is one of first impression whether it gives the owner a right to exclude or the patron a right to enter. Either way, the state must act. Either way, the state must make law. Either way, property rights must be allocated. This observation suggests a way to reconceptualize the state action doctrine by using the insights of property law theory. That is where the Authors turn next.

#### IV. FROM “STATE ACTION” TO EQUAL PROTECTION OF LAW

The previous Section proposed several methods for restating the state action doctrine as developed in case law over time. Here, the Authors argue that those approaches do not go far enough in re-

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286. See *id.* (explaining this view); Louis Michael Seidman, *State Action and the Constitution's Middle Band*, at 11–14 (2017) (unpublished manuscript), <http://ssrn.com/abstract=2962076> [<https://perma.cc/D6S6-2GAU>] (original intent of Fourteenth Amendment applied to state inaction that allowed private discriminatory acts to be inflicted).

287. *Bell v. Maryland*, 378 U.S. 226 (1964); Mack, *supra* note 14, at 365–366.

288. Seidman, *supra* note 286, at 13.

289. See generally Singer, *No Right to Exclude*, *supra* note 52.

forming the state action doctrine. To ensure equal protection of law, the analysis must be refocused on a more progressive conception of equal protection informed by contemporary understandings of equality and dignity foundational to a free and democratic society.

The Authors' argument proceeds as follows. First, the Authors analyze the insights that can be gleaned from thinking about the common law governing private property. Second, the Authors argue that those insights, when combined with established "state action" precedents, teach that (1) equal protection depends on *law*, not *action*; (2) common law is law that must comply with the Equal Protection Clause; and (3) common law that allows discriminatory exclusion from the marketplace violates the Equal Protection Clause.

### A. *State Action through the Lens of Property Law*

It is commonplace to imagine the world as an unregulated state of nature into which the government intervened after it was created through a social contract. We have inherited this historical picture from Hobbes and Locke. The consequence of this fictional construct is the view that individuals act freely as they desire unless the state steps in to regulate their conduct. State and society appear separate and distinct; where the state is, society is not and where society is, the state is not. The problem with this picture of the relation between state and society is that it cannot accurately reflect the institution of private property. The Authors will argue that this is so for five reasons: (1) the state must decide which property rights it will recognize as valid and which it will prohibit; (2) property law allocates rights among persons; (3) property law authorizes as well as prohibits particular property entitlements; (4) property law regulates externalities by determining when to protect third parties from the consequences of exercising a property right and when to leave those parties unprotected; and (5) property law promotes justice through applying equitable principles to avoid unjust implications of property law rules.

#### 1. Recognizing Valid and Invalid Property Rights

One of the primary functions of property law is to define property rights that the legal system will and will not recognize as valid. In contrast to contract law, which focuses on formation rules, interpretation doctrines, and enforcement regimes, property law starts by defining the "estates" that are valid and those that are unlawful.

To understand why this is so, one need only remember the history of English and American property law. New York, for example, passed an act in 1787 abolishing feudal estates. New Jersey similarly divested the "lords of New Jersey" ("the lords") of their noble titles



and their lordly prerogatives.<sup>290</sup> Every state abolished primogeniture, the fee tail, and any hereditary rights to public offices. England previously introduced multiple waves of law reform to protect the property rights of the lords from dispossession by the Crown while limiting the lords' powers over their tenants. A nation of small farm owners emerged in the United States because the law transferred property rights from lords to the tenants living on the land and abolished feudal contractual relationships. To do that, the law prohibited most restraints on alienation and imposed a strict restraint on alienation for land owned by Indian nations.

In addition, the estates system, through the *numerus clausus* principle, limits which property rights will be recognized by the legal system. When a seller or donor conveys a property right, the courts are interested in what set of rights the seller sought to convey. The court will also fit that set of rights into an established set, such as fee simple, life estate, joint tenancy, or trust. The courts do this partly to promote efficient utilization of land and partly to decentralize power over valued resources, thereby promoting liberty, equality, and democracy.

Anyone who tries to create a fee tail today will be unsuccessful. State property law will convert those interests into a fee simple. Anyone who tries to impose a restraint on alienation of a fee simple interest is likely to be successful in only a narrow set of cases. Anyone who tries to create a homeowners' association that has the power to divest an owner of their rights without compensation will be unsuccessful. State law protects unit owners from unfair retroactive changes in their property rights.<sup>291</sup> Anyone who tries to create a tenancy by the entirety that gives the husband the power to manage the property and denies any such powers to the wife will be unsuccessful. Such property rights have been held to violate the Equal Protection Clause.<sup>292</sup> Anyone who wants to create a racially segregated restaurant will be unsuccessful because federal law and (most) state laws prohibit this. Anyone who wants to own a slave will be unsuccessful because the Thirteenth Amendment intervenes. Anyone who wants to rent residential housing without complying with the housing code will be unsuccessful; the law requires landlords to provide basic services and habitable housing. Any landlord who wants to prevent a residential tenant from getting married will be out of luck; the landlord's rights do not reach so far.

There is no need to belabor the point. Democracies do not allow for the creation and enjoyment of all types of property rights no matter their scope and content. Because free and democratic societies recog-

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290. See JOSEPH WILLIAM SINGER, NO FREEDOM WITHOUT REGULATION: THE HIDDEN LESSON OF THE SUBPRIME CRISIS 26–58 (2015).

291. See *Kirchberg v. Feenstra*, 450 U.S. 455, 456 (1981).

292. See *id.*

nize free and equal persons, many possible property arrangements are off the table; they are not part of the menu of available options.

This means that private property systems require the state to define the property rights that it will recognize and the types of human relationships it will allow. There is no room for the state to step aside and just let things happen. When someone creates a property right, that necessarily gives that person power over non-owners. If a dispute arises between the owner and others, the state has no choice but to determine whether the property right will—or will not—be recognized. In the context of public accommodation laws, the question is whether a state may permit owners to refuse service in a discriminatory manner when they open their property to the general public. Answering that question requires state action. As Harold Horowitz noted, “there is state action in the definition and enforcement of the principle that a landowner is free, if he so wishes, to refuse to sell his land to a Negro.”<sup>293</sup> The only question is whether such state action is constitutional.<sup>294</sup>

## 2. Allocating Rights Among Persons

Professor Laura Underkuffler explains that property rights are unlike other constitutionally-protected rights. “Property rights,” she argues, “are allocative because they give to some what cannot be given to all: they allocate rights to particular individuals in finite, non-sharable resources.”<sup>295</sup> This means that “[i]f the enjoyment of a particular good by one person is protected, then the enjoyment of that same good by others is denied.”<sup>296</sup> Property rights are different from other rights for a second reason. “[T]hey alone deal with rights that—at their most basic level—are necessary for the survival of life itself.”<sup>297</sup>

The allocational nature of property rights means that the state cannot help but determine who owns particular resources and what rights go along with ownership. Either the landlord has the power to evict a tenant at will (without giving a reason) or the landlord is under an obligation to continue renting to the tenant unless the landlord can show just cause to evict. Either an owner has protection from loss of title to a strip of land occupied by her neighbor for twenty years or the neighbor has the power to acquire title to that land by adverse possession. Either an owner has the right to eject a homeless person from his property or the homeless person has a right to enter the property to

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293. Harold W. Horowitz, *The Misleading Search for “State Action,”* 30 S. CAL. L. REV. 208, 212 (1957).

294. *Id.* at 213.

295. Laura S. Underkuffler-Freund, *Property: A Special Right*, 71 NOTRE DAME L. REV. 1033, 1038 (1996). See also Moris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8, 13 (1927) (property law gives owners “power over the life of others”).

296. *Id.* at 1039.

297. *Id.*

save his life. The state cannot fail to act in cases like this; it must allocate the entitlement to someone and deny it to others; *there is simply no space within which the state can be said to not be acting.*

### 3. Authorizing and Prohibiting Property Rights & Freedoms

Condominiums are a relatively recent invention that came into being beginning in the 1960s.<sup>298</sup> At the outset, it was not clear whether courts would recognize condominiums as valid property rights.<sup>299</sup> Before condominiums, people owned single family homes or they owned entire buildings, either of which they could rent to others. Owning an apartment but not the building that it was in was not one of the options on the property menu. When states authorized developers to create condominiums, the states acted even though they were adding a new estate in land to the list of previously authorized estates.

That act of *authorizing* the creation of condominiums, and later extending that recognition to homeowners' associations in residential neighborhoods, was an act of the state. The state authorized private actors to create a new property right. The act of authorizing condominiums was as much an act of the state as the prior act of prohibiting such arrangements. The state must make a choice one way or the other—to allow or to prohibit. *Law is not only involved when the state prohibits; law is involved when the state permits.*

A New Yorker cartoon by Leo Cullum portrays a boardroom with seven men holding a meeting.<sup>300</sup> The one at the head of the table is laughing. He says: “I was just going to say, ‘Well, I don’t make the rules.’ But, of course, I *do* make the rules.”<sup>301</sup> Property law is like that. When the question is whether a property right is valid or not, the state must say yes or no. The state must answer the question, whether through a statute or common law. The state must, in other words, *take action*. A ruling that a property right will be recognized is as much a state action as one that says it will not be recognized.<sup>302</sup>

When an owner complains that their neighbor’s tree blocks sunlight needed for their rooftop solar panels, the state must choose between the conflicting property rights. If the state forces the neighbor to cut the tree in half, the state is acting. The state is *equally acting* if it allows the tree owner to prevent their neighbor from enjoying the bene-

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298. Donna S. Bennett, *Condominium Homeownership in the United States: A Selected Annotated Bibliography of Legal Sources*, 103 LAW LIBR. J. 249 (2011).

299. *Id.* at 253.

300. Leo Cullum, *I Was Just Going to Say*, CONDÉ NAST (Apr. 3, 2017), [http://www.condenaststore.com/-sp/I-was-just-going-to-say-Well-I-don-t-make-the-rules-But-of-course-New-Yorker-Cartoon-Prints\\_i8474277\\_.htm](http://www.condenaststore.com/-sp/I-was-just-going-to-say-Well-I-don-t-make-the-rules-But-of-course-New-Yorker-Cartoon-Prints_i8474277_.htm) [https://perma.cc/94KK-S58X].

301. *Id.*

302. See Paul Brest, *State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks*, 130 U. PA. L. REV. 1296, 1315–22 (1982) (arguing that a body of property law constitutes state action).

fits of solar panels on their home. When cedar trees on one's land contain micro-organisms that destroy the apple trees on the land of others, the state must choose which property right will survive. If the state forces the cedar owners to destroy their trees to save the apple trees, it is acting. However, the state is *also* acting if it fails to protect the apple trees owners from communicable diseases being spread by other land owners. As the Supreme Court explained in *Miller v. Schoene*:<sup>303</sup>

[T]he state was under the necessity of making a choice between the preservation of one class of property and that of the other wherever both existed in dangerous proximity. *It would have been none the less a choice if, instead of enacting the present statute, the state, by doing nothing, had permitted serious injury to the apple orchards within its borders to go on unchecked.*<sup>304</sup>

Similarly, when someone raises dozens of dogs on their property in a rural area, creating cacophonous barking that drives the neighbors crazy, the courts are put in the position of either allowing the barking to continue—thereby authorizing harm to the neighbors and possibly inducing them to move—or prohibiting the activity to control the noise.<sup>305</sup> The state acts whether it allows the barking to continue or orders the owner to limit the barking or soundproof his facility. When the state authorizes a farm to expand or to locate in a residential area and to cause substantial and unreasonable harm to the use and enjoyment of neighboring property, the state is acting by depriving those neighboring owners of the right to be protected from a nuisance, despite the fact that the state is allowing, rather than prohibiting, an activity.<sup>306</sup> The state, through its courts or its legislature, must choose which property right to recognize—one of freedom of action or one of security. Choosing to allow someone to harm others is not inaction, because the state has the power—and the responsibility—to make the rules one way or the other. Inaction is not an option.

The state “acts” when it imposes a duty on an owner to use or not use their property in a particular way, but the state is equally acting when it rules that a use is permitted when that use affects the interests and rights of others. If an owner complains that a cell tower on neighboring property is ugly and bothersome because it has flashing red lights that reflect onto the water on his property all day and all night, a court must decide whether the tower owner has a duty to turn off the lights or to relocate the tower. If the tower owner has a duty, and it corresponds to a right in their neighbor to sue to stop the bothersome use of the tower owner's property, then the courts will apply the com-

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303. *Miller v. Schoene*, 276 U.S. 272 (1928).

304. *Id.* at 279 (emphasis added).

305. *Dobbs v. Wiggins*, 929 N.E.2d 30 (Ill. 2010).

306. *Bormann v. Bd. of Supervisors in and for Kossuth County*, 584 N.W.2d 309, 311–12 (Iowa 1998).

mon law of nuisance and order the tower owner to take down the tower or turn off the lights. State action through a court order is obvious.

State action should also be obvious if the court declares the use privileged by granting the tower owner freedom to build and operate the tower. Hohfeld would call that freedom a “privilege.”<sup>307</sup> The privilege corresponds with the neighbor’s vulnerability that Hohfeld calls “no-right.”<sup>308</sup>

Holding that an owner has no duty to take down the tower is a ruling of law that denies the neighbor any protection from flashing red lights that invade their land as well as any protection from the enormous structure visible just over the border. A common law ruling that an act is *damnum absque injuria*—that it causes damage without legal redress—is a ruling of law that permits a harmful act and places the power of the state on the side of the owner who is permitted to engage in the activity. Sometimes, such acts are so intrusive that they make the victim’s land unusable.<sup>309</sup> Holding that such acts can be engaged in, with or without compensation, privileges the property rights of one owner over those of another.

Public accommodations are no different. A ruling that an owner has a duty to grant access to the public without regard to race, religion, or sexual orientation places a duty on the store owner enforceable by court order. Conversely, a ruling that an owner is free to exclude patrons because of race, religion, or sexual orientation also constitutes state action permitting (authorizing) the owner to deny certain members of the general public the same rights to obtain goods and services in the public accommodation available to other members of the public. Permitting exclusion allocates a property right to the store owner rather than to the patron and conferring permission to exclude is coupled with a right to exclude that places a duty on the patron to stay out—a right enforceable by criminal trespass statutes.

The state “acts” not only when it coerces but also when it permits. Such permission entitles a property right to exist and be exercised in a certain way by a certain class of persons in a certain set of circumstances. Exclusion from a public accommodation is not a self-regarding act on the part of the store owner; it harms patrons who are members of groups facing prejudice by denying them the freedom to go shopping without calling ahead to see if they will be welcome.

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307. *Religious Liberty and Public Accommodations: What Would Hohfeld Say?* in WESLEY HOHFELD A CENTURY LATER: EDITED MAJOR WORKS, SELECT PERSONAL PAPERS AND ORIGINAL COMMENTARIES (eds. Shyam Balganesh, Ted Sichelman, & Henry Smith) (forthcoming, Cambridge U. Press, 2018).

308. *Id.*

309. *See, e.g., United States v. Causby*, 328 U.S. 256, 258, 260 (1946) (low-flying planes over owner’s land constitute a taking by the government when they render the land unusable).

If this is hard to understand, consider that the Civil Rights Act of 1866 which grants all persons the “same right . . . to make and enforce contracts . . . as is enjoyed by white citizens”<sup>310</sup> has been interpreted not only to enable people to enforce contracts that others make with them but also to place a *duty* on businesses open to the public to make contracts with customers without regard to race.<sup>311</sup> The right to make contracts includes the power to enter a retail store and insist on being served even if the owner wishes not to deal with a customer because of their race. The freedom to make contracts usually includes the freedom to refuse to contract with someone. But, public accommodations do not have the freedom to refuse service because of race. If they did, then the freedom to acquire property by purchasing it in a store would be severely curtailed for those who face widespread prejudice and discriminatory treatment.

Granting a public accommodation the freedom to deny service does not mean that the state is not involved in the denial. It is intimately involved because the freedom to deny service entails a common law ruling that grants the public accommodation owner the right to exclude patrons based on race and denies those patrons the freedom to shop on the same terms as are enjoyed by the majority citizens. Permissive property rights are still property rights, and they exist because state courts have deemed those rights to be legitimate, and the corresponding harms and vulnerabilities to be ones that the law does not protect against.<sup>312</sup>

Recall that southern plantation owners initially refused to contract with persons who had been enslaved and then tried to recreate slavery through sharecropping contracts that tied workers to the land through debt and purchase arrangements that made it legally impossible for them to leave.<sup>313</sup> Requiring plantation owners to contract with African American workers and regulating the terms of those agreements was necessary to preserve the liberty of the workers and to ensure equal rights to participate in the marketplace without regard to prior status as an enslaved human being.<sup>314</sup> A regime that allowed owners to refuse to hire newly freed persons or that allowed owners to impose terms that amounted to slavery in function (if not form), might have seemed permissive from the standpoint of the land owners. But, it would have been coercive from the standpoint of those trying to earn a living in the new “free” world.

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310. 42 U.S.C. § 1981.

311. *Runyon v. McCrary*, 427 U.S. 160, 168 (1976).

312. See Joseph William Singer, *The Anti-Apartheid Principle in American Property Law*, 1 Ala. C.R.–C.L. L. Rev. 83, 109 (2011).

313. See Aviam Soifer, *Status, Contract, and Promises Unkept*, 96 YALE L.J. 1916, 1929 (1987).

314. *Id.* at 1916, 1937–38.

#### 4. Regulating Externalities

We still have, in 2018, not fully recovered from the subprime mortgage disaster.<sup>315</sup> That sorry episode involved the creation of property rights that had the unfortunate side effect of wrecking the world economy and defrauding both borrowers and investors.<sup>316</sup> Toxic assets in subprime mortgages affected not only the contracting parties but everyone else.<sup>317</sup> Racial covenants are no different. They may seem to affect only the covenanting parties, but obviously they are intended to prevent others from moving into the neighborhood. If commonly practiced, racial covenants create an apartheid system as effective as one imposed by segregation statutes.

South Africa confronted a choice when it abolished *apartheid* in the 1990s.<sup>318</sup> At that time, roughly 10% of the population owned 90% of the land. Those 10% were white, while the non-owners were black.<sup>319</sup> Moreover, a significant portion of that white-owned land was taken from black owners many years earlier. The new constitution abolished the *apartheid* laws. Was the abolition of *apartheid* laws sufficient to abolish *apartheid*?

Not at all. If white owners refused to sell their homes to black buyers, if public accommodations refused to serve black customers, if white employers refused to hire black workers, then the property owners could have continued to deny access to property to the black majority. *Apartheid* would have continued *through the mechanism of private property law*.<sup>320</sup> As Louis Michael Seidman notes, “private action always occurs in the context of background state action that molds and enables private choice.”<sup>321</sup> Property rights have externalities, and the state must choose whether or not to protect society (and third parties) from those externalities. The state cannot say “don’t ask me, I don’t make the rules.” The state does make the rules, and the rules matter.

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315. See Lydia DePillis, *10 Years After the Recession Began, Have Americans Recovered?*, CNN (Dec. 1, 2017), <http://money.cnn.com/2017/12/01/news/economy/recession-anniversary/index.html> [<https://perma.cc/YPR8-CT8Z>].

316. See, e.g., Joseph William Singer, *Foreclosure and the Failures of Formality, Or Subprime Mortgage Conundrums and How to Fix Them*, 46 CONN. L. REV. 497, 533 (2013).

317. *Id.*

318. Edward Lahiff, *Q&A: Land Reform in South Africa*, PBS (July 6, 2010), <http://www.pbs.org/pov/promisedland/land-reform-in-south-africa/> [<https://perma.cc/8TLQ-CVHL>].

319. *Id.*

320. See SINGER, *supra* note 290, at 54. See also Singer, *Anti-Apartheid Principle*, *supra* note 312, at 92–93.

321. Seidman, *supra* note 286, at 17.

## 5. Correcting Injustice through Equitable Principles

Property law is replete with doctrines that seek to promote justice. Many are based on traditional equitable principles such as reliance, laches, unclean hands, and estoppel. Others are based on recognizing rights from relationships, while others reflect antidiscrimination principles. All of these doctrines balance interests of competing parties, and the method of balancing is not neutral or disinterested. The goal of these doctrines is to avoid injustice. In each case, the state is confronted with stark choices about which interests should prevail when a case presents plausible conflicting claims to property. The goal of promoting justice is what makes a claim plausible, even if formal law would assign the property right to someone else.

Property law generally requires heightened formality in order to clarify who owns what. The statute of frauds is most strictly enforced in the area of real property.<sup>322</sup> But, despite the need for clear title and formal means to transfer property rights, many doctrines recognize that expectations arise from informal arrangements and relationships as well as formal contracts, deeds, wills, and trusts. Courts have recognized that those expectations are often justified.<sup>323</sup> The exceptions are justified because people trust others who make oral representations to them or who create long-term relationships with them, and people can be forgiven for failing to poison the relationship by insisting on a writing. The exceptions are justified because people make mistakes—a lot of them—and the law cannot function to protect expectations if it does not recognize what expectations actually are.

Doctrines that recognize rights from informal arrangements include: adverse possession, prescriptive easements, easements implied from prior use, easements by necessity, implied reciprocal negative servitudes, acquiescence, estoppel, oral agreement about land boundaries, and constructive trusts, among others.

Doctrines that allocate property rights based on relationships include: constructive trusts, equitable distribution of property on divorce, community property, statutory share provision for surviving spouses, homestead laws, partition of property held in joint tenancy or tenancy in common, and leasehold arrangements that create expectations that housing will comply with relevant building codes. Property law also protects justified expectations by protecting prior nonconforming uses and granting variances in zoning law, as well as protecting reasonable, investment-backed expectations (or vested rights) under both zoning and regulatory takings law.

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322. Lawrence M. Boesch, *MAGNIFICENT EXCEPTIONS Practitioners Can Sometimes Overcome a Statute of Frauds Defense by Asserting Equitable Estoppel*, L.A. LAW, 38, 38–39 (May 2001).

323. See generally Joseph William Singer, *The Rule of Reason in Property Law*, 46 U.C. DAVIS L. REV. 1369, 1373 (2013); Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 658 (1988).



Since the 1960s, property law has protected access to both commercial and residential property without regard to race. With regard to public accommodations, the law in almost all states protects access without regard to race, sex, religion, national origin, or disability. With regard to housing, access extends to persons without regard to multiple factors, including sex, disability, familial status, religion, national origin, and increasingly sexual orientation and gender identity. Anti-discrimination law has become a core aspect of American property law. If we consider statutes to be as important as common law—and why on earth would we not accept that fact?—then property law in the twenty-first century is premised on a foundational norm of equal access to property markets.

It is true that the list of protected categories changed over time, and it is also true that the list of places considered to be public accommodations also changed over time.<sup>324</sup> But what cannot be contested is the fact that the states and the federal government have made laws determining when an owner is free to refuse service to customers and when an owner is not free to refuse service. This is not a choice that the state can avoid. It is an allocative decision; the state will act whether it gives owners the freedom to refuse service because of the owner's religious beliefs or it gives customers a right to access public accommodations without regard to sexual orientation. State action is present either way.

## B. *Equal Protection of Law*

### 1. Equal Protection Depends on Law, Not Action

The word “action” is not mentioned in the Fourteenth Amendment.<sup>325</sup> The Equal Protection Clause maintains that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>326</sup> *Law* is central, not *action*.<sup>327</sup> The state action doctrine is a judicial invention that originated in cases like the *Civil Rights Cases*<sup>328</sup> and *Virginia v. Rives*.<sup>329</sup> The focus on “action” is fundamen-

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324. Compare the short list in the Civil Rights Act of 1964, Title II, 42 U.S.C. § 2000a, with the much longer list in the Americans with Disabilities Act of 1990, 42 U.S.C. § 12181.

325. U.S. CONST. AMEND. XIV.

326. U.S. CONST. AMEND. XIV, § 1.

327. Black, *supra* note 15, at 93 (describing the views of Harold W. Horowitz in his article, *The Misleading Search for “State Action,” supra* note 293, that, in Black's words, “state action always enfolds private action, because the state always attributes some legal significance to private action”; what matters is not the presence of state action but “the constitutionality of that ‘state action’ which is always present”).

328. *United States v. Stanley*, 109 U.S. at 11 (“It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment.”).

329. *Virginia v. Rives*, 100 U.S. 313, 318 (“[T]he provisions of the Fourteenth Amendment of the Constitution . . . all have reference to State action exclusively, and not to any action of private individuals.”).

tally misguided. The judiciary consistently acknowledged that *inaction* can effect an unconstitutional denial of equal protection. For example, in *U.S. v. Hall*, the earliest case to interpret the Fourteenth Amendment, the United States Supreme Court held that “[d]enying includes inaction as well as action, and denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection.”<sup>330</sup> The Court further held that:

The citizen of the United States is entitled to the enforcement of the laws for the protection of his fundamental rights, as well as the enactment of such laws. Therefore, to guard against the invasion of the citizen’s fundamental rights, and to insure their adequate protection, as well against state legislation as state inaction, or incompetency, the amendment gives congress the power to enforce its provisions by appropriate legislation.<sup>331</sup>

Many legal scholars reached the same conclusion. For example, Professor Chemerinsky noted that “a state *denies* and *deprives* rights and equality if it fails to stop private invasions or denies redress for violations.”<sup>332</sup> Professor Black similarly stressed that “[i]naction, rather obviously, is the classic and often the most efficient way of ‘denying protection.’”<sup>333</sup>

## 2. Common Law is Law, which Must Comply with the Equal Protection Clause

Common law is an important component of the “laws” of which the Fourteenth Amendment guarantees citizens “equal protection.” Courts have recognized that common law is subject to the Constitution to the same degree as statutory law. For example, the Court in *New York Times v. Sullivan* struck down a common law libel rule as unconstitutional. The Court noted that:

Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. . . . The test is not the form in which state power has been

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330. *U.S. v. Hall*, 26 F. Cas. 79, 81 (1871); Mack, *supra* note 14, at 358.

331. *Id.* See also *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 726 (1961) (“By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so ‘purely private’ as to fall without the scope of the Fourteenth Amendment.”).

332. See, e.g., Chemerinsky, *supra* note 8, at 522.

333. Black, *supra* note 15, at 73.

applied but, whatever the form, whether such power has in fact been exercised.<sup>334</sup>

Professor Gardbaum agreed that “[t]he common law at issue in private litigation is subject to the Constitution in precisely the same way as statutory private and public law.”<sup>335</sup>

Common law rules can be active or passive, mandatory or permissive.<sup>336</sup> They can require private parties to take action or refrain from taking certain actions, or they can permit private parties to take or refrain from certain actions. For example, the common law rules of every state, except New Jersey, appear to permit places of public accommodation to exclude patrons on the basis of characteristics like race, religion, sex, sexual orientation, and gender identity.<sup>337</sup> In contrast, the New Jersey common law rules prohibit places of public accommodation from arbitrarily or unreasonably denying service to any potential patron.<sup>338</sup> These varying common law rules are equally subject to the strictures of the Constitution. Regardless of their status, common law rules must not “deny to any person . . . the equal protection of the laws.”<sup>339</sup> In Professor Gardbaum’s words, “[a]ll state laws, permissive and mandatory alike, are equally and directly subject to the Constitution under the Supremacy Clause.”<sup>340</sup> There are cases where the state has a duty to prohibit certain types of conduct. The state does not escape its constitutional equal protection obligations when the state allows people to harm each other, whether physically or through discriminatory denial of services.<sup>341</sup>

### 3. Common Law That Allows Discriminatory Exclusion from the Marketplace Violates the Equal Protection Clause

If state common law *required* places of public accommodation to exclude patrons on the basis of characteristics like race, religion, sex, sexual orientation, or gender identity, it would unquestionably violate the Equal Protection Clause in the same way that a statute requiring such discrimination would violate the Equal Protection Clause. Common law rules that *authorize* discriminatory exclusion from places of public accommodation, like the current common law rules of every

334. *N.Y. Times v. Sullivan*, 376 U.S. 254, 265 (1964).

335. Gardbaum, *supra* note 9, at 420.

336. *Id.* at 439 (“Both mandatory and permissive laws are laws of the state. . . . Thus, a state law expressly permitting racial segregation in public schools is undoubtedly unconstitutional under the Equal Protection Clause just as the state law requiring such segregation invalidated in *Brown*.”).

337. See Singer, *supra* note 52, at 1290.

338. See *Uston v. Resorts Int’l Hotel, Inc.*, 445 A.2d 370, 375 (N.J. 1982).

339. U.S. CONST. AMEND. XIV, § 1.

340. See Gardbaum, *supra* note 9, at 426.

341. See Seidman, *supra* note 286, at 16 (explaining that the contrary view characterizing the conventional understanding of the state action doctrine as defining an area where the state can act, but is not obligated to do so).

state, except New Jersey,<sup>342</sup> should also be understood to not only be subject to the Equal Protection Clause but to violate it.<sup>343</sup> In other words, the Equal Protection Clause infuses the common law with an equality principle that requires equal access to places of public accommodation.<sup>344</sup>

This proposition may seem surprising, but it is grounded in the same cases responsible for the state action doctrine and all of its woes: the *Civil Rights Cases*. The Supreme Court in the *Civil Rights Cases* assumed that the common law guaranteed equal access to places of public accommodation. Specifically, the Court noted:

The wrongful act of an individual, unsupported by any such [state] authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if 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 for redress.*<sup>345</sup>

As Professor Chemerinsky explained, this passage demonstrates that: “[I]n announcing the state action doctrine, the Court assumed that the common law protected against private discrimination and private violations of rights, and held that private discrimination in accommodations, restaurants, and transportation was not controlled by the Constitution, but rather prohibited by the common law.”<sup>346</sup>

Professor Tribe similarly concluded that “[t]he Supreme Court assumed . . . that the right to nondiscriminatory treatment was an aspect of an individual’s common law liberty.”<sup>347</sup> As Professor Chemerinsky concluded, “the key point is that in the *Civil Rights Cases*, which are

342. See Singer, *supra* note 52, at 1290.

343. See A. Leon Higginbotham, Jr., *Race, Sex, Education and Missouri Jurisprudence: Shelley v. Kraemer in a Historical Perspective*, 67 WASH. U. L. Q. 673, 705 (1989) (history teaches that “we cannot leave our most precious human rights to the exclusive vagaries of state court protection”). *Contra*, Horowitz, *supra* note 293, at 213 (arguing that it is not unconstitutional for a state to “permit a landowner to discriminate on the basis of race in selling his land”).

344. See Kenneth L. Karst & Harold W. Horowitz, *Reitman v. Mulkey: A Telephase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39, 55–56 (1967) (arguing that the equal protection clause places an “obligation” on the states to adopt laws that “command some minimum level of equality” by preventing invidious discrimination in private property markets). *Cf.* James M. Oleske, Jr., “*State Inaction*,” *Equal Protection, and Religious Resistance to LGBT Rights*, 87 COLO. L. REV. 1 (2016) (state failure to prohibit sexual orientation discrimination violates the Equal Protection Clause if the state prohibits other forms of discrimination but not otherwise). For an argument that the common law itself should be interpreted or modernized to prohibit sexual orientation discrimination in public accommodations even if this is not required by the Equal Protection Clause, see Paul Vincent Courtney, *Prohibiting Sexual Orientation Discrimination in Public Accommodations: A Common Law Approach*, 163 U. PA. L. REV. 1497 (2015).

345. *The Civil Rights Cases*, 109 U.S. 3, 17, 25–26.

346. Chemerinsky, *supra* note 8, at 515.

347. LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1152 (1978).

viewed as the source of the state action requirement, the Court's decision relies in large part on an assumption of effective common-law protection against private discrimination."<sup>348</sup>

If we remove the assumption of effective common law protection against private discrimination, an assumption central to the Court's establishment of the state action doctrine, the state action doctrine becomes particularly unstable. If owners of public accommodations are free to engage in invidious discrimination and the state will enforce their property rights via application of civil and criminal trespass law, the state is delegating power to public accommodation owners to deny marketplace access for irrelevant and oppressive reasons. If the common law provides no right to enter public accommodations without regard to race or sexual orientation, the common law loses its claim to providing the "equal protection of the laws."<sup>349</sup>

If this conclusion is surprising, consider what legal framework we would face if Congress repealed Title II of the Civil Rights Act of 1964 and the Civil Rights Act of 1866 and no federal statute prohibited discrimination on the basis of race in public accommodations. Imagine that a state had no state law prohibiting such discrimination, like Texas. Imagine also that Texas common law allowed all owners to refuse service or to provide discriminatory, unequal services for any reason—including race. Imagine that racial prejudice was widespread in the state and that few if any businesses were owned by or open to African American patrons. Imagine that it was hard to find a store that would serve you if you were African American and that those that did serve you refused to let you try on clothes, required you to move to the back of the line if white people approached the checkout counter, and accosted you with racist epithets as you shopped. Imagine finally, that one or two cities in the state had stores that provided equal access to African Americans but that 90% of the state was composed of small towns or rural areas where prejudice and discrimination were widespread and commonly accepted. People would either have to move to the city or to another state in order to shop without calling ahead to see if they are welcome. People might not be able to buy certain goods or services at all without traveling to the few accommodating municipalities that serve them. Would such a legal system be immune from challenge under the Equal Protection Clause?

If the answer is yes, then African Americans would face a segregated market system that was functionally similar to what was faced under a regime of mandated segregation. If the state allows, but does not mandate, discriminatory treatment, the functional results are the same as they would be if the state mandated discriminatory treatment.

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348. See Chemerinsky, *supra* note 8, at 516.

349. U.S. CONST. AMEND. XIV, § 1.

Then the question is whether the state bears any responsibility for this state of affairs. The answer to that question should be yes.

The state is responsible for its common law, and it is responsible for defining which property rights can be legitimately recognized. If the state authorizes a property rights regime that functions like an *apartheid* regime, it is responsible for that system. It makes no difference that the discrimination is based on “private” prejudice. What matters is the state definition of property rights—something only the state can do and a function that is decidedly public in nature. The state has granted owners of public accommodations the power to call on police, prosecutors, and judges to punish individuals who claim the same right to contract as is enjoyed by white citizens. This is not a case where the state is not acting; nor is it a case where the state has no role to play in empowering and perpetuating a racial caste system. The state creates, defines, and enforces its common law of private property and, in so doing, it denied, or severely constricted, African Americans the freedom to pursue happiness, while sending a message of racial inferiority.

One cannot contract for or purchase property if no one will deal with them because of their race. And if one cannot acquire property, one cannot own it. Such a regime denies property rights on the basis of race. The right to deny service or to provide discriminatory service based on race in a public accommodation is not a property right compatible with equality under the law. A state that recognizes such a private property right has violated the Equal Protection Clause.

Why does exclusion from a public accommodation on the basis of sexual orientation also deny equal protection of law?<sup>350</sup> It does so for the same reason that enforcement of racially restrictive covenants denies equal protection of law. Recognizing and enforcing a right to deny access to the marketplace to someone just because they are gay denies access to the public world where we all make a living and acquire the goods and services we need to survive. Not only does it inflict economic harm, but it imposes painful and irremediable dignity harms.<sup>351</sup>

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350. For the Authors’ prior work on the injustice of sexual orientation and other forms of discrimination in public accommodations, see Saidel-Goley, *supra* note 5; Singer, *Anti-Apartheid Principle*, *supra* note 312; Singer, *No Right to Exclude*, *supra* note 52; Joseph Singer, *Property and Equality: Public Accommodations and the Constitution in South Africa and the United States*, 12 S. AFRICAN J. PUBLIC L. 53 (1997); SINGER, RELIGIOUS LIBERTY, *supra* note 307; Joseph William Singer, *Property and Sovereignty Imbricated*, THEORETICAL INQUIRIES IN LAW (forthcoming, 2017); Joseph William Singer, *Should We Call Ahead? Property, Democracy, & the Rule of Law*, 5 BRIGHAM-KANNER PROPERTY CONF. J. 1 (2016).

351. The Authors’ approach avoids the worry of Mark D. Rosen that all contract enforcement would automatically be subject to constitutional equality norms if court enforcement of a contract is always state action by shifting attention to what constitutional equality requires as a substantive normative matter rather than asking whether the state has acted. See Mark D. Rosen, *Was Shelley v. Kraemer Incorrectly Decided?*

Singer Audra McDonald explained it best. After Indiana passed a law expressly granting owners of public accommodations the power to cite their religious beliefs as a reason to deny service to LGBTQ persons, first she tweeted: “Some in my band are gay & we have 2 gigs in your state next month. Should we call ahead to make sure the hotel accepts us all?”<sup>352</sup> She then tweeted: “or maybe I should fire my gay band members just to be on the safe side.”<sup>353</sup>

The issue is not simply whether one can obtain service, but whether one must suffer the humiliation of being turned away because one is not “worthy” of being treated as a human being.<sup>354</sup> In the context of the Fair Housing Act, civil rights damages are available if a landlord refuses to rent to a prospective tenant because of that tenant’s race even if the tenant suffers no economic harm because the tenant goes across the street after the housing denial and finds an apartment that is bigger, nicer, cheaper, and with a nonracist landlord. The legal system awards significant damages to the wronged tenant because what is at issue is not merely the ability to obtain the things necessary to live, but the ability to live daily in the public market without being denigrated, demeaned, shamed, abased, belittled, humiliated, mortified, and excluded due to aspects of one’s identity that are legally irrelevant to the market transaction at issue.

This does not mean that owners have no right to the protections provided by trespass law. It does not mean that the Constitution regulates whom an owner can invite to their dinner party. It does not mean that the Constitution says who your friends can be. That is because the Constitution protects freedom of association and privacy, and it allows citizens the room to choose their intimate relations and their friends in the private sphere of the home and in the church, mosque, or synagogue.<sup>355</sup>

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*Some New Answers*, 95 CAL. L. REV. 451, 453 (2007). For the opposite view, see Horowitz, *supra* note 293, at 209 (“whenever, and however, a state gives legal consequences to transactions between private persons there is ‘state action’—i.e., that the definition by a state of legal relations between private persons is, for the purposes of the Fourteenth Amendment, a matter of ‘state action.’”); *id.* (“There is state action in the definition and enforcement of the right-duty relationship, and there is state action in adjudicating that there is no right-duty relationship”).

352. Michael Paulson, *Audra McDonald Takes to Twitter to Criticize Indiana Law*, N.Y. TIMES (Mar. 27, 2015), [http://artsbeat.blogs.nytimes.com/2015/03/27/audra-mcdonald-takes-to-twitter-to-criticize-indiana-law/?\\_r=0](http://artsbeat.blogs.nytimes.com/2015/03/27/audra-mcdonald-takes-to-twitter-to-criticize-indiana-law/?_r=0) [https://perma.cc/36GQ-KYQ S].

353. *Id.*

354. Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2575 (2015) (noting that the object of the 1964 public accommodations law was “the deprivation of personal dignity that surely accompanies denials of equal access to public establishments,” quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) (quoting S. REP. NO. 88-872, at 16–17 (1964))).

355. See Henkin, *supra* note 258, at 498 (“the state may not forbid a person to whimsical or capricious in his social relations or as to whom he will admit to his

But, the right of association and the right of privacy does *not* entail the conclusion that places open to the general public must be treated the same as a private home. Homes and businesses are situated differently; the social context matters.<sup>356</sup> Public accommodations are part of the public world to which free and democratic societies grant equal opportunity and access. One does not have to belong to a privileged class or caste to enter the market or obtain private property. One does not have to profess a particular religion, have a particular skin color, ancestry or sex, to get a job, rent an apartment, or buy a cake. One does not have to have a particular set of abilities. And now that the Supreme Court recognized that the Constitution protects liberty, equality, and dignity for all persons regardless of their sexual orientation, people do not have to be straight to be qualified to eat at a restaurant. Free and democratic societies do not recognize ascribed statuses; that means that such societies cannot delegate power to public accommodation owners to establish such castes by means of their private property rights.

The fact that federal and state statutes regulate public accommodations does not mean that the Constitution itself does not also require equal access to the marketplace. The state action doctrine posed an unnecessary and unwarranted bar to the recognition of the ways equal protection of law applies to common law property and contract rights. And if the Authors are right that common law is part of the “law” for which the Fourteenth Amendment requires “equal protection,” then those statutes can be interpreted as implementing constitutional norms.

Additionally, sincere religious belief cannot provide a defense to the requirement that public accommodations serve the public in a nondiscriminatory fashion.<sup>357</sup> If that were so, then the law could not prohibit discrimination on the basis of religion in public accommodations. If an owner can invoke their religious beliefs as a reason not to serve a customer in a public accommodation, then an owner can claim that selling goods to Jews ratifies their failure to accept Jesus as their

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home”); James R. Oleske, Jr., *Doric Columns Are Not Falling: Wedding Cakes, the Ministerial Exception, and the Public-Private Distinction*, 75 MD. L. REV. 142 (2015) (arguing that the courts have created a fairly consistent and clear line distinguishing areas of family and religious life where discrimination is allowed and areas of commerce and market relations where it is prohibited and not subject to exemptions based on religious belief).

356. See Henkin, *supra* note 258, at 498–99 (explaining the difference between the home and the store).

357. See James M. Oleske, Jr., *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, 50 HARV. C.R.–C.L. L. REV. 99 (2015) (explaining why religious exemptions from public accommodation laws prohibiting sexual orientation discrimination are no more warranted than those that would allow racial discrimination); Sepper, *supra* note 229 (explaining why religious liberties do not justify exemptions from public accommodation laws).



savior. It would allow an owner to refuse to serve Christians on the ground that they are uncharitable to LGBTQ persons. If religion is a sufficient reason to act in a discriminatory manner, then religious discrimination must be allowed. Yet, no one has suggested that the word “religion” be excised from the Civil Rights Act of 1964 so that religious discrimination could become freely available both in public accommodations and employment. In addition, if religion could justify discrimination, racial segregation would have continued in the South after 1964 based on the sincere religious beliefs of hotel, restaurant, and entertainment owners.<sup>358</sup> The Constitution grants a high degree of protection for religious exercise, but those protections do not entitle individuals to institutionalize discriminatory refusals in public accommodations, housing, and employment. This is precisely because our society privileges equality and liberty and because we have no established religion. Religion takes a back seat to the norm of equal access to the marketplace.

The Constitution does not require that all types of property be treated alike.<sup>359</sup> In the private home, one can choose their associates freely but public accommodations are subject to a general obligation to allow access without regard to race, religion, disability, national origin, sex, and, yes, to sexual orientation and gender identity. When the state enforces trespass law by excluding someone from a private home, the state is acting; when it excludes someone from a public accommodation, it is also acting. Whether the state requires discrimination or allows discrimination, the state is acting. What matters is not *whether the state acted*; what matters is *whether the state denied equal protection of law*.<sup>360</sup> Enforcing a homeowner’s discriminatory wishes about whom to invite to dinner does not deny equal protection of law; enforcing a restaurant’s refusal to serve a gay couple does.<sup>361</sup> What

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358. See *Newman v. Piggie Par Enters.*, 256 F. Supp. 941, 945 (D.S.C. 1966), *aff’d in relevant part and rev’d in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff’d and modified on other grounds*, 390 U.S. 400 (1968) (rejecting the argument that religious belief could justify racial discrimination in a restaurant); SINGER, RELIGIOUS LIBERTY, *supra* note 307; Singer, *Property and Sovereignty Imbricated*, *supra* note 350; Singer, *Should We Call Ahead?*, *supra* note 350.

359. See Chemerinsky, *supra* note 8, at 506 (“eliminating the concept of state action would not mean that private parties always would be held to the same institutional standards as the government” given constitutionally protected liberty interests such as freedom of association).

360. See Minow, *supra* note 83, at 164 (“The state action doctrine, and the distinction between what should be viewed as public and what as private, embed normative choices inside definitions without clarifying what is at stake for society.”); Schmidt, *supra* note 133, at 599 (quoting *Peterson v. Greenville*, 373 U.S. 244, 249 (1963) (Harlan, J., concurring)) (“The critical question . . . [is] not whether there is state action or not [but whether] ‘the State’s involvement in an arbitrary discrimination is such that it should be held responsible for the discrimination.’”).

361. See Black, *supra* note 15, at 100–01 (noting the Equal Protection Clause is compatible with preservation of “private life” while requiring access to the more public world of lunch counters, housing developments, and community swimming pools).

matters is not state action; what matters is what it means to ensure equal liberty in a free and democratic society that recognizes the equal dignity of each human being.<sup>362</sup>

## V. CONCLUSION

Arresting a person constitutes state action. Prosecuting a person constitutes state action. Imposing a criminal sanction constitutes state action. But further, *threatening* to use the coercive powers of the state to keep a person from entering the marketplace by delegating the power to owners of public accommodations to treat that person as a second-class citizen not entitled to buy a shirt or flowers, eat in a restaurant, book a hotel room, or rent property *also* constitutes state action.<sup>363</sup> It does not matter that the discriminatory motive originates in the owner of the public accommodation rather than a state official. Telling citizens that they cannot enter public accommodations if the owners do not wish to treat them as equal citizens puts the coercive power of the state on the side of exclusion, denial of goods and services, and enforcement of a social caste system.

What matters is not *whether the state acted* but *whether its laws provide for equal treatment* in the spheres of social life to which a free and democratic society guarantees access, liberty, and dignity. Just societies ensure both liberty and equality. The time has long since passed when those values could be reasonably interpreted to allow invidious discrimination in public accommodations. The right to discriminate based on race in a public accommodation is not a property entitlement that a free and democratic society can recognize—at least if it is true to its foundational values. The same applies to LGBTQ persons. Gay and lesbian persons—and all LGBTQ persons—are human beings. The state must treat human beings with dignity and must respect their equal worth and liberty.

The right to exclude from a public accommodation because of sexual orientation is a property right that is characteristic of a society that does not treat persons with equal concern and respect. It does not reflect a principle of equal liberty. It is not a property right that can be

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362. See Chemerinsky, *supra* note 8, at 506 (framing the question as whether free association or privacy interests should or should not prevail over equality claims in particular social contexts); *id.* at 540 (“Liberty would best be protected if the courts openly articulated the competing interests that they were balancing”); Henkin, *supra* note 258, at 492 (exploring when “liberty claims” override “equal protection” claims); Schmidt, *supra* note 133, at 601–602 (“the [state action] doctrine’s surface concern with the relatively mechanical, content-neutral linkages between official state actors and private actors fails to capture—or worse, obscures—the fundamental constitutional values at stake.”); Tribe, *supra* note 7, at 30 (“The doctrine of equal dignity signals the beginning of the end for discrimination on the basis of sexual orientation in areas like employment and housing, which remains legal in many states and has yet to be expressly banned in federal legislation.”).

363. See Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8 (1927) (characterizing property rights as delegations of sovereign power).

validly recognized by a constitutional democracy. The Supreme Court long ago recognized that “the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment.”<sup>364</sup> A common law rule that empowers owners of public accommodations to refuse service or to provide discriminatory services is an act of state, and is not consistent with the principle that all human beings are created equal.

Human beings are entitled to dignity. We have no social castes in the United States. People should not have to call ahead to see if they are welcome in public spaces; they should not have to wonder whether they will be able to enter the marketplace to attain the things they need to live when they move to another state. Public accommodations serve the public, and LGBTQ persons are part of the public. The Constitution limits the property rights that can be recognized and enforced. Only a right to the privileges and benefits of public accommodations without regard to sexual orientation or gender identity is consistent with the Constitution’s “full promise of liberty.”<sup>365</sup>

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364. *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

365. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015).