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Was Shelley v. Kraemer Incorrectly Decided? Some New Answers (winner of the 2006 Outstanding Scholarly Paper Award from the Association of American Law Schools)

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WAS SHELLEY V. KRAEMER INCORRECTLY DECIDED?
SOME NEW ANSWERS
Mark D. Rosen

INTRODUCTION ................................. 2

I. SHELLEY'S ANALYTICAL SHORTCOMINGS AND ITS PROGRESSIVE NARROWING IN THE CASE LAW .................................................. 6
A. SHELLEY ITSELF .................................. 6
B. THE POST-SHELLEY CASE LAW ............ 7
   1. SHELLEY LIMITED ................................ 7
   2. SHELLEY APPLIED AND EXTENDED ........ 10
      a. SUPREME COURT DECISIONS ............. 10
         i. CHARITABLE TRUSTS ...................... 11
         ii. THE SIT-IN CASES .................... 13
      b. LOWER COURT DECISIONS ................ 15
   3. SUMMARY REGARDING THE POST-SHELLEY CASE LAW .... 18

II. THE HERETOFORE INADEQUATE SCHOLARLY EFFORTS AT RECONCEPTRUALIZING SHELLEY .................................................. 18
A. REJECTING THE PUBLIC/PRIVATE DISTINCTION ............. 19
B. PRESERVING THE PUBLIC/PRIVATE DISTINCTION ........... 24
   1. SUBSTANTIVe CONTENT OF THE CONTRACT RIGHT .......... 25
   2. BALANCING PROPOSALS ....................... 26
   3. DISCRIMINATION ............................... 29

III. POSITIVE ANALYSIS: THE CASE FOR RECONCEPTRUALIZING SHELLEY AS A THIRTEENTH AMENDMENT DECISION ..................... 33
A. THE LEGITIMACY OF RECONCEPTRUALIZING EARLIER DECIDED CASES ........... 33
B. SHELLEY AS A STATUTORY DECISION ...................... 34
C. SHELLEY AS QUASI-FEDERAL COMMON LAW ................. 40
   1. DISTINGUISHING FEDERAL COMMON LAW FROM THE QUASI-FEDERAL COMMON LAW OF CONSTITUTIONAL PREEMPTION ........................................ 41
   2. SHELLEY AS CONSTITUTIONAL PREEMPTION .............. 43

IV. NORMATIVE ANALYSIS: THE CASE FOR RECONCEPTRUALIZING SHELLEY AS A THIRTEENTH AMENDMENT DECISION ............. 47
A. A MORE COMPELLING CONCEPTUALIZATION ................... 47

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Introduction

Shelley v. Kraemer, the 1948 decision that famously disallowed state courts from enforcing racially restrictive covenants, has proven to be a very difficult case to rationalize. The Fourteenth Amendment, on which the Shelley Court relied, long had been held to apply to state actors but not individuals. Shelley did not purport to alter this, but where was the state action necessary for invoking the Fourteenth Amendment, given that the restrictive covenants were private contracts? The Court’s answer was that although the restrictive covenants themselves were perfectly legal, judicial enforcement of the covenants violated the Fourteenth Amendment’s Equal Protection Clause because a contract’s substantive provisions should be attributed to the state when a court enforces it. Under this critical component of Shelley’s reasoning – what the Article refers to as Shelley’s “attribution” rationale – courts could enforce only those contractual provisions that could have been enacted into general law. Because the Equal Protection Clause would not have allowed a law that banned African Americans from purchasing real property, it followed from Shelley’s analysis that judicial enforcement of racially restrictive covenants also was unconstitutional.

Shelley’s attribution logic threatened to dissolve the distinction between state action, to which Fourteenth Amendment limitations apply, and private action, which falls outside of the Fourteenth Amendment’s purview. After all, Shelley’s approach, “consistently applied, would require individuals to conform their private agreements to constitutional standards whenever, as almost always, the individuals might later seek the security of potential judicial enforcement.” This Article shows that, primarily for this reason, neither the Supreme Court nor lower courts have applied Shelley’s approach. Courts routinely enforce contracts whose substantive provisions could not have been constitutionally enacted by government. For instance, courts regularly enforce settlement agreements that limit the settling party’s ability to speak publicly in various respects, despite the fact that statutory limitations on the identical

1334 U.S. 1 (1948).
4See id. at 19-20.
5See id. at 21.
6Id. at 20-21.
speech would be unconstitutional. Similarly, courts regularly have enforced testamentary provisions that condition inheritance on a child’s marrying within a particular faith, despite the fact that the Establish Clause precludes states from enacting the identical provision. This Article then explains why this widespread judicial practice of eschewing Shelley’s rationale, and the pervasive norm of respecting the public/private distinction, are desirable.

But if Shelley’s rationale has not survived, can the case’s holding be justified? The Article shows that, perhaps surprisingly, neither courts nor scholars yet have been able to provide a satisfying answer; the many scholarly efforts to explain Shelley, which comprise an assortment of proposals to narrow the Court’s Fourteenth Amendment holding, all have deep analytical flaws, and courts have not even made a serious effort to reconcile Shelley’s holding with the contracts they regularly enforce. The Article then offers a wholly new rationale for Shelley that provides a principled basis for explaining both Shelley and the post-Shelley case law. The Article’s suggestion diverges more radically from the Shelley Court’s stated rationale than have the scholarly and judicial proposals to date: whereas scholars and courts have continued to explain Shelley as a constitutional decision grounded in the Fourteenth Amendment, this Article argues that Shelley is best understood as having been decided on the basis of non-constitutional federal law that emerges from the Thirteenth Amendment.

As the Article explains, an early Supreme Court decision held that the Thirteenth Amendment applies to individuals as well as states, and also concluded that Section 2 of the Thirteenth Amendment grants Congress the power to abolish the incidents of slavery, which the Court understood to include “disabilities to hold property [or] to make contracts.” Racially restrictive covenants implicate both property and contract rights and hence fall within Congress’s Section 2 powers. Furthermore, since the late nineteenth century there have existed two federal statutes, enacted under Congress’s section 2 powers, whose language readily could have been applied to racially restrictive covenants. One statute provides that “[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.” A second statute states that “[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . .” The Article explains how these statutes could have been used to strike down racially restrictive covenants, definitively establishes that these statutes were known to the Shelley Court, and considers why the Court eschewed them as a basis for its holding in the case.

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1See cases discussed infra at Part I.B.1.
2See id.
3Civil Rights Cases, 109 U.S. 3, 30 (1883).
The Article then provides responses to two potential objections to grounding *Shelley* in statutory law. First, the Article establishes the legitimacy of reconceptualizing already-decided cases on grounds not identified in the opinion, primarily by showing that the Court regularly does so. Second, the Article answers the objection that its statutory approach opens the door to the uncomfortable conclusion that racially restrictive covenants would have been legal and enforceable in the event Congress had not enacted the above-mentioned civil rights statutes in the late 1800s. The Article explains that the Court still could have declared the racially restrictive covenants illegal under a form of federal common law that this Article dubs “constitutional preemption.” Akin to dormant commerce clause doctrine, constitutional preemption would have allowed the Court to strike down state or private activity that constituted an incident or badge of slavery because Congress had the power to so regulate, even though the congressional power had not been exercised at the time of the Court’s decision. This sort of judicial determination would have had the status of federal common law, not constitutional law, an important distinction that the Article explains in detail.

Recognizing that the mere fact that *Shelley* could be reconceptualized as a Thirteenth Amendment-grounded decision does not establish that it should be, the Article then identifies seven benefits of presently reconceptualizing *Shelley*. First, the Article explains why a Thirteenth Amendment basis for the decision is more conceptually sound. Because the Thirteenth Amendment (unlike the Fourteenth Amendment) applies to individuals, it could target what really made racially restrictive covenants problematic: what was troubling was not the covenants’ enforcement but their substantive content, which is best understood as the product of individuals’ activities rather than action of the state.

Second, and relatedly, because the Thirteenth Amendment applies to individuals, it provides a basis for declaring the racially restrictive covenants themselves to be illegal, not just their enforcement. The Article’s Thirteenth Amendment approach hence eliminates a particularly noxious by-product of the *Shelley* Court’s analytics: the Court’s conclusion that racially restrictive covenants themselves were perfectly legal.13 This is important. The covenants’ legality not only has been an embarrassment to American jurisprudence, but a persuasive recent study has concluded that unenforceable restrictive covenants played an important role in entrenching racially segregated housing markets in this country.14

Third, the Article’s Thirteenth Amendment approach is far more consistent with post-*Shelley* case law, which virtually never holds that judicial enforcement of a contract constitutes sufficient state involvement to trigger the application of constitutional constraints to the contract’s substantive provisions. The Article’s approach hence provides doctrinal clarity by

13See *Shelley*, 334 U.S. at 13.
furnishing legal principles that explain a large body of case law that seems mystifying under the *Shelley* Court’s Fourteenth Amendment approach. Further, the post-*Shelley* case law simultaneously indicts *Shelley*’s Fourteenth Amendment rationale and endorses this Article’s suggestion; the foundational logic behind the common law method is that legal principles sometimes only can be inductively identified by observing patterns that emerge over time across large numbers of cases, and this common law logic hence suggests that the post-*Shelley* case law itself constitutes potent evidence that the Thirteenth Amendment provides the valid legal basis for indicting racially restrictive covenants, not the Fourteenth Amendment.

Fourth, reconceptualizing *Shelley* as a Thirteenth Amendment-based decision may permit the creation of a more principled state action doctrine. This is so because the Thirteenth Amendment approach wholly removes *Shelley* from the state action context (for there is no need to identify state action in respect of a constitutional provision that applies to both private parties and the state), thereby freeing the state action doctrine from the hopeless task of identifying state action on *Shelley*’s facts. Fifth, and relatedly, reorienting *Shelley* relieves stress on the distinction between public and private that *Shelley* engendered; due to the case’s exceedingly high profile, *Shelley*’s muddling of the distinction between public and private has fueled some scholars’ suggestions that the public/private distinction is hopelessly indistinct and ought to be discarded, a position that has implications far beyond the state action doctrine.

Sixth, understanding *Shelley* as a Thirteenth Amendment-based decision has important institutional implications. Whereas *Shelley*’s Fourteenth Amendment approach allocated the determination of what contracts should be enforceable solely to courts, the legal basis for the decision suggested here – Section 2 of the Thirteenth Amendment – is a grant of congressional legislative power that accordingly invites Congress and the President to participate in determining what types of restrictive covenants (or other activities) qualify as incidents or badges of slavery. The Article then identifies the type of analysis that is involved in determining what constitutes incidents and badges of slavery, and shows that the more political branches have competencies that make their participation in this decisionmaking process extremely valuable.

Seventh, and finally, *Shelley* helped solidify a constitutional culture that largely overlooks the Thirteenth Amendment and instead relies primarily on Fourteenth Amendment due process and equal protection principles. The Article identifies some of the pernicious consequences of the Thirteenth Amendment’s marginalization, and suggests that reconceptualizing *Shelley* may have the welcomed effect of reviving Thirteenth Amendment principles that long have been dormant.

The Article is in four parts. Part I shows that the case law almost universally has rejected *Shelley*’s attribution rationale without having offered a principled explanation for having done so. Part II shows the inadequacy of
the scholarly efforts to reconceptualize *Shelley* that have been provided until now, critiquing proposed solutions that have come from Professors Louis Henkin, Louis Pollak, Laurence Tribe, David Strauss, Carol Rose, Robert Glennon and John Nowak, among others. In short, Parts I and II together show that the legal community consistently has sought to find an alternative rationale for *Shelley*, but that these efforts have understood the case as a constitutional decision grounded in the Fourteenth Amendment. Parts III and IV are the heart of the Article. Part III first establishes the legitimacy of reconceptualizing earlier Supreme Court decisions and then makes the positive law argument that *Shelley* is readily understood as a Thirteenth Amendment-based decision. Part IV makes the normative case for reconceptualizing *Shelley*, explaining the many benefits of grounding *Shelley* in the largely overlooked Thirteenth Amendment. A short conclusion follows.

I. *Shelley*’s Analytical Shortcomings and its Progressive Narrowing in the Case Law

After briefly describing the *Shelley* decision, this Part examines the post-*Shelley* case law, showing that courts almost uniformly have refused to apply *Shelley*’s rationale in subsequent cases.

A. *Shelley* itself. In 1911, thirty property owners, who together owned forty-seven mostly contiguous parcels of land in Missouri, signed a private contract intended to run with the land, that accordingly was recorded thereafter. The agreement was a restrictive covenant providing that a condition precedent to the sale of any and all the 47 properties was that they should not be occupied by “any person not of the Caucasian race.” In exchange for valuable consideration, Mr. and Mrs. Shelley, who were African-Americans, received a warranty deed to one of the parcels of land subject to the restrictive covenant from one Mr. Fitzgerald. Kraemer, an owner of one of the other parcels of land, thereafter sued Shelley in state court, asking the court to enforce the agreement and divest title out of the Shelleys. The Supreme Court of Missouri ruled that the covenant should be enforced.

The United States Supreme Court famously reversed, holding that judicial enforcement of the restrictive covenant would violate the Equal Protection Clause of the Fourteenth Amendment. But arriving at so normatively attractive an outcome was not doctrinally simple. The chief obstacle was the understanding that “the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.” Thus even though “restrictions on the right of occupancy of the sort sought to be created by the private agreements in these cases could not be squared with the requirements

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11 Id. at 4-5.
12 Id. at 21.
13 Id. at 13.
of the Fourteenth Amendment if imposed by state statute or local ordinance.” The restrictive covenant in this case did “not involve action by state legislatures or city councils.” The Court accordingly held that the restrictive agreements “standing alone cannot be regarded as a violation of any rights guaranteed by the Fourteenth Amendment” and hence were not themselves unconstitutional.

But the Court’s analysis did not end there. Though the restrictive covenant itself could not be said to be “action by the State” triggering the Fourteenth Amendment, the Court ruled 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.” After all, the “full coercive power of government” was being used to “to deny to petitioners, on the grounds of race or color, the enjoyment of property rights.” Furthermore, because enforcement orders came from courts, the “judicial action in each case bears the clear and unmistakable imprimatur of the State.”

One analytical step remained. After establishing that a court’s order to enforce a contract constituted state action, the question became what aspects of the enforcement order were attributable to the State. Without explanation, the Court determined that the substantive provisions of the contract themselves were appropriately deemed to be action of the state. Under Shelley’s “attribution” rationale, the question became whether a state could have enacted into general law the contract’s substantive provision. Because it could not have, it followed that enforcing the restrictive covenant also violated the guarantee of equal protection.

B. The Post-Shelley Case Law: Subsection 1 shows that Shelley’s attribution rationale has not been followed. With only a few exceptions, Shelley has been confined to the context of racial discrimination. American courts regularly issue orders enforcing private agreements where identical the restrictions enacted by a state legislature as general law would have triggered constitutional scrutiny. Arguments that court orders enforcing such private agreements qualify as state action under Shelley, and accordingly trigger constitutional scrutiny, have been regularly rebuffed. Subsection 2 reviews the limited circumstances where Shelley has been applied. Both subsections also show that neither the courts that have extended nor those that have limited Shelley have provided satisfactory explanations as to the scope of the principle of Shelley that they embrace.

1. Shelley Limited. First consider court enforcement of private agreements that curtail speech, what is one of the most favored rights
under contemporary constitutional jurisprudence. Particularly instructive are those cases where a party has sought to judicially enforce a settlement agreement limiting speech since settlement agreements, by their nature, always involve courts. Even where the settlement agreement has been entered into the docket by a court order, enforcement of the agreement has been held to not constitute state action. For instance, in United Egg Producers v. Standard Brands, Inc., two companies signed a settlement stipulation that had been entered into the docket by a court order in which each agreed to restrict their advertisements and thereby to limit their “First Amendment rights on commercial speech.” The Eleventh Circuit concluded that “court enforcement of that agreement is not governmental action for First Amendment purposes.” The Court limited Shelley to the “racial discrimination context,” reasoning that “if, for constitutional purposes, every private right were transformed into governmental action by the mere fact of court enforcement of it, the distinction between private and governmental action would be obliterated.” Consider as well a state appellate court that confronted the question of whether the First Amendment precluded it from enforcing a settlement agreement in which a person had agreed not to publicly criticize a certain type of psychological therapy. Despite the fact that the party’s speech was deemed to be in the public interest, and even though “one party’s free speech rights [were] restricted by that agreement,” the court ruled that enforcement did not constitute state action and upheld the agreement.

The pattern of judicial enforcement of agreements limiting speech continues outside the context of settlement agreements. Plaintiffs in one case sued in state court to enforce a provision in a lease agreement that prohibited tenants from distributing unsolicited newspapers. The defendants cited to Shelley and argued that enforcement of the provision would constitute state action, triggering heightened scrutiny under the First Amendment. An appeals court in California rejected this argument and issued the requested injunction, reasoning that “[a]lthough the United States Supreme Court has held that judicial effectuation of a racially restrictive covenant constitutes state action, it has largely limited this holding to the facts of those cases.” Similarly, the Kansas Supreme Court ruled that judicially enforcing a restrictive covenant barring the posting of signs does not qualify as state action.

25 Id. at 943.
26 Id.
27 Id.; see also id. ("where a court acts to enforce the right of a private party which is permitted but not compelled by law, there is no state action for constitutional purposes in the absence of a finding that constitutionally impermissible discrimination is involved.").
28 Id. (quoting Edwards v. Habib, 397 F.2d 687, 691 (D.C. Cir. 1968)).
30 Id at 871 (emphasis supplied).
31 Id. at 870.
33 Id. at 1034.
to be inapplicable, the Kansas court rejected the argument that “the test to be employed is whether a valid ordinance could be passed prohibiting the conduct proscribed in the restrictive covenant,” thus explicitly forswearing what I have called *Shelley’s* “attribution” rationale.

*Shelley*’s attribution rationale also has been rejected outside the context of private agreements limiting speech. The Establishment Clause unquestionably would preclude a State from enacting testamentary rules that condition inheritance on a child’s marrying a person of a particular religious faith. Courts have found, however, that judicial enforcement of wills containing such provisions does not constitute state action. As another example, due process requires that courts use specific procedures before imposing punitive damages. Though arbitration panels that issue punitive damages do not use these procedures, the Eleventh Circuit has ruled that judicial enforcement of arbitral awards of punitive damages does not constitute state action. In so ruling, the court limited *Shelley*:

The holding of *Shelley* . . . has not been extended beyond the context of race discrimination . . . . Instead, the concept of state action has since been narrowed by the Supreme Court . . . . We likewise decline to extend *Shelley* and hold that the mere confirmation of a private arbitration award by a district court is insufficient state action to trigger the application of the Due Process Clause.

It commonly is stated in cases, both federal (as exemplified by the Eleventh Circuit decision discussed immediately above) and state, that the rule

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39 Id.
41 See, e.g., Shapiro v. Union National Bank, 315 N.E.2d 825, 827-28 (Ohio Ct. Common Pleas 1974); Gordon v. Gordon, 332 Mass. 197 (1955). Referring to these cases, Professor Sherman has noted that “Shelley v. Kraemer has been cited in only two reported cases dealing with testamentary conditions affecting religious practice, and on each occasion the court upheld the validity of the condition and found Shelley to be inapposite.” Jeffrey G. Sherman, *Pashman v. Muddling*, 99 U. Ill. L. REV. 1273 n. 188 (1999).
42 Indeed, as the federal appeals court noted, in the arbitration setting we have almost none of the protections that fundamental fairness and due process require for the imposition of this sort of punishment. Discovery is abbreviated if available at all. The rules of evidence are employed, if at all, in a very relaxed manner. The factfinders (here the panel) operate with almost none of the controls and safeguards assumed in *Haslip*.
43 Davis v. Prudential Sec., Inc., 59 F.3d 1186, 1190 (11th Cir. 1995) (internal quotation omitted).
44 Id. at 1190.
of *Shelley* is limited to the context of racial discrimination.“ Two points are worth noting. First, these efforts to narrow *Shelley* are best understood as descriptive rather than normative, for no court decision has sought to explain why a race-specific attribution rule is desirable or rational. Instead, what is found are *ipse dixit* assertions that race is different, without an explanation as to why this should be so.” If anything, the paean to preserving the distinction between public and private found in these court decisions is better understood as a critique of *Shelley*, rather than an explanation as to why a race-specific *Shelley* rule is wise. It is hard to escape the conclusion that these courts are simply narrowing *Shelley* to its facts, unconcerned with locating a principle that can reconcile their holding with the *Shelley* decision.

Second, although assertions that *Shelley* has been limited to the context of racial discrimination are widespread in the opinions, the careful analysis of post-*Shelley* Supreme Court jurisprudence provided in the next subsection shows that this is not accurate. The Court has declined to extend *Shelley* even in situations of racial discrimination that raise state action questions very similar to *Shelley*. Apart from one case decided only five years after *Shelley*, it is more accurate to say that the Supreme Court has narrowed *Shelley* to its facts.

2. **Shelley Applied and Extended**. This subsection first reviews the limited context in which the Supreme Court has applied *Shelley*’s holding. It then examines the handful of lower court opinions that have extended *Shelley*.

   a. **Supreme Court decisions**. The Supreme Court clearly extended *Shelley* in only one instance, the 1953 in the case of *Barrows v. Jackson,* where it held that the equal protection clause prohibited a state court from awarding damages for breach of contract against a signor of a racially restrictive covenant who nonetheless had sold his property to African-Americans. Though both *Shelley* and *Barrows* involved racially restrictive covenants, there are two significant differences between the two cases that support the conclusion that *Barrows* represents an extension of *Shelley*. First, *Shelley* had held injunctive relief to constitute state action, and the award of injunctive relief

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“See, e.g., Casa Marie, Inc. v. Superior Court of Puerto Rico, 988 F.2d 252, 258-60 (1st Cir. 1993); Davis v. Prudential Securities, Inc., 59 F.3d 1186, 1191-92 (11th Cir. 1996) (“The holding of *Shelley*, however, has not been extended beyond the context of race discrimination”); Parks v. “Mr. Ford,” 556 F.2d 132, 136 & n. 6 (3d Cir. 1976) (“where state courts take action to enforce the right of private persons which are permitted but not compelled by law, there is no state action for constitutional purposes in the absence of a finding that racial discrimination is involved as under the doctrine of *Shelley*”); Lebron v. National Railroad Passenger Corp., 12 F.3d 388, 392, *re id on other grounds*, 115 S. Ct. 961 (1995) (Second Circuit’s statement of state action doctrine reflects the understanding that race is treated differently under the state action); Cable Invest. Inc. v. Woolley, 680 F. Supp. 174, 177 (M.D. Pa. 1987); Golden Gateway Center v. Golden Gateway Tenants Association, 29 P.3d 797, 810 (Cal. 2001) (“Although the United States Supreme Court has held that judicial effectuation of a racially restrictive covenant constitutes state action, it has largely limited this holding to the facts of those cases”).

“See, e.g., Gordon v. Gordon, 332 Mass. 197, 208 (1955) (upholding judicial enforcement of will conditioning gift on beneficiary marrying a Jewish woman: “In support of the constitutions arguments there are cited *Shelley v. Kramer*, . . . which seem to us to involve quite different considerations from the right to dispose of property by will.”); Golden Gateway Center, 29 P.3d at 810.

346 U.S. 249 (1953).
plausibly could be said to involve more action on behalf of the court than the award of monetary damages. Second, *Shelley* had disallowed judicial enforcement against innocent third parties (the African-Americans who had sought to purchase property) whereas *Barrows* disallowed judicial enforcement against one of the covenants. Indeed, it was on the basis of this latter distinction that Chief Justice Vinson, the author of *Shelley*, dissented in *Barrows*:

There are a handful of other Supreme Court cases that sometimes are treated by scholars as applications of the *Shelley* principle. Careful analysis of these cases, however, reveals that they were decided on different grounds than *Shelley*. Indeed, that the Court systematically has refused to analyze fact patterns very similar to *Shelley*’s by means of *Shelley*’s analytics suggests that these case manifest a pattern of Supreme Court resistance to extending *Shelley*.

i. Charitable Trusts. Consider first the 1966 case of *Evans v. Newton,* where the Supreme Court ruled that land that had been conveyed in a will in charitable trust to Macon, Georgia for the creation of a public park for the exclusive use of white people could not constitutionally be operated on that basis. *Newton* could be construed as an extension of *Shelley* insofar as the mere fact that the racial restriction was laid down in a “private” will did not insulate the city’s implementation of the will from constitutional scrutiny. Legal scholars frequently discuss *Evans v. Newton* in conjunction with *Shelley*.

*Newton* is best understood, however, as having been decided on the different ground that “the public character of [the 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.” Notably, the majority opinion in *Newton* did not cite to *Shelley.* Subsequent Supreme Court decisions likewise refer to *Newton* in terms of the “public function” principle, not as an application of *Shelley*.

Perhaps the most persuasive evidence that the Court did not understand *Newton* in terms of the *Shelley* principle can be found in the successor case of *Evans v. Abney*, which analyzed the constitutionality of Macon’s response to the *Newton* decision. After *Newton* was decided, Georgia state courts held that the trust became impossible of accomplishment and hence, under operation of law, was terminated and reverted back to the estate.

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4See *Barrows*, 346 U.S. at 262 (Vinson, C.J., dissenting).


6Tellingly, the cases of *Evans v. Newton* and *Evans v. Abney* are regularly reproduced in constitutional law textbooks in conjunction with analysis of the *Shelley* case. See, e.g., GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN, & MARK V. TUSHNET, CONSTITUTIONAL LAW 1722-23 (3d ed. 1996); KATHLEEN M. SULLIVAN & GERALD GUNThER, CONSTITUTIONAL LAW 993 (14th ed. 2001).


The Supreme Court in *Evans v. Abney* upheld this reversion.\textsuperscript{13} Commentators understandably have found it “difficult to discern how a court’s enforcement of a restrictive covenant is state action but a court’s enforcement of a reversionary clause in a will is not.”\textsuperscript{14} Under a *Shelley* analysis, after all, state court application of a law that had the effect of excluding Blacks on the basis of privately devised racial restrictions should have triggered the Equal Protection Clause.\textsuperscript{15} A careful analysis of *Abney* shows, however, that the Court relied solely on the “public function” conception of state action found in *Newton* when it upheld the reversionary clause. The Court’s holding in *Abney* thus suggests that the Court did not understand *Shelley* to mean that judicial involvement with private action renders that private action attributable to the state for purposes of the state action doctrine.\textsuperscript{16} Though the Court in *Abney* did not explicitly articulate its understanding of *Shelley*’s principle, *Abney*’s holding suggests a narrowing of *Shelley*’s principle, even in the context of racial discrimination.

There have been other Supreme Court cases that also concerned judicial enforcement of racially restrictive wills, and the Court eschewed reliance on *Shelley*’s principle in these cases as well. Consider the case of *Commonwealth of Pennsylvania v. The Board of Directors of City Trusts of City of Philadelphia*.\textsuperscript{17} Girard College was established pursuant to a testamentary will that by its terms disallowed attendance by African-Americans. When the United States Supreme Court found the operation of Girard College to be unconstitutional, it cited to *Brown v. Board of Education*, not *Shelley*, explaining that “[t]he Board which operates Girard College is an agency of the State of Pennsylvania. Therefore, even though the Board was acting as a trustee, its refusal to admit [African-American candidates] to the college because they were Negroes was discrimination by the State.”\textsuperscript{18} Akin to the Supreme Court’s analysis of the segregated public park that had been established pursuant to testamentary devise in Macon in the *Newton* case, the Supreme Court found state action not on the ground that the state was enforcing a private discriminatory will, but because the state was providing a public service when it implemented the charitable trust.\textsuperscript{19} In another case, the Court confronted a

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\textsuperscript{14}Shelley Ross Saxon, *Shelley v. Kraemer's Fiftieth Anniversary: “A Time for Keeping; A Time for Throwing Away”*, 47 U. Kan. L. Rev. 61, 86 (1998). It should be noted, however, that the reversion occurred not as a result of a provision in the will, but by operation of Georgia statutory law. See *Evans v. Abney*, 396 U.S. at 442-43 (1970). This only strengthens the argument that *Abney* is inconsistent with *Shelley* insofar as there is more state action where the legal rule being enforced comes from the state rather than private parties.

\textsuperscript{15}See *Evans v. Abney*, 396 U.S. at 456-57 (Brennan, J., dissenting). It should be noted that while *Evans v. Abney* indeed is difficult to reconcile with *Shelley*’s attribution principle, it is perfectly consistent with the public functions principle.

\textsuperscript{16}See *Evans v. Abney*, 396 U.S. at 456-57 (Brennan, J., dissenting). It should be noted that while *Evans v. Abney* indeed is difficult to reconcile with *Shelley*’s attribution principle, it is perfectly consistent with the public functions principle.

\textsuperscript{17}For a similar conclusion, see Robert J. Glennon Jr. and John E. Nowak, *A Functional Analysis of the Fourteenth Amendment “State Action” Requirement*, 1976 Sup. Ct. Rev. 221, 246.

\textsuperscript{18}353 U.S. 230 (1957) (per curiam).

\textsuperscript{19}Id. at 230. Details of the testamentary trust can be found at Sweet Briar Institute v. Button, 280 F. Supp. 312, 312 (W.D. Va. 1967).

\textsuperscript{20}In the follow-up case, the district court found that the Board's running of the college was unconstitutional under *Shelley*. See *Commonwealth of Pennsylvania v. Brown*, 270 F. Supp. 782 (E.D. Pa. 1967). The Third Circuit reaffirmed the district court's holding, relying both on a public functions and
testamentary trust that created Briar College and limited admittance to “white girls and young women.” It had been argued in federal district court that the enforcement of this racial stipulation constituted unlawful state action under Shelley - a straightforward application of Shelley. After the lower federal abstained from hearing the merits, the Supreme Court reversed, “remand[ing] for consideration on the merits.” What is significant for present purposes is that the Court did not cite to Shelley, but instead cited to the 1964 Civil Rights Act.

ii. The Sit-in Cases. The Court’s effort to contain Shelley’s principle also can be seen in the sit-in cases of the 1960s. In the first case, Peterson v. City of Greenville, African-Americans had been arrested for violating a racially neutral trespass statute when they refused to leave the lunch counter at a department store in Greenville, South Carolina. In addition to the trespass ordinance, the city also had a law that proscribed restaurants from serving blacks and whites together. Although the defendants had been arrested on the basis of Greenville’s trespass statute, and despite the fact that the city argued that the department store’s management would have asked the black patrons to leave even if there had not been a segregation ordinance, the Court not unreasonably concluded that the convictions “had the effect . . . of enforcing the [segregation] ordinance.” The Court accordingly concluded that the convictions “enforce[d] the discrimination mandated by” the city’s segregation ordinance, and for that reason ran afoul of the Fourteenth Amendment. The Peterson Court hence did not have to make use of Shelley’s attribution principle to impute private discrimination to the state because the segregation ordinance itself uncontroversially constituted state action.

Subsequent sit-in cases posed considerably harder questions because the government’s role was more attenuated. For example, in Lombard v. Louisiana, a companion case to Peterson, African-Americans were arrested under a state criminal mischief statute for refusing to vacate a refreshment counter per the restaurant manager’s request. In Lombard, there was no statute or ordinance that proscribed integration. In the absence of state or city regulation that could qualify as state action, an obvious approach to locating state action would have been to invoke Shelley’s attribution rationale so that the manager’s discriminatory intent would be applied to the police and judiciary that were enforcing his discriminatory desires. Indeed, such a Shelley analysis is precisely what Justice Douglas advocated in his concurring opinion.
Notably, the majority opinion by Chief Justice Warren declined to find state action by means of *Shelley* attribution, but found state action in the Mayor’s warning that demonstrators would be arrested pursuant to general laws against disturbing the peace or creating disturbances on private property.\(^6\) The Court treated these words of the Mayor “exactly as if [the city] had an ordinance prohibiting . . . desegregated service in restaurants.”\(^7\) The point for present purposes is not to decide whether *Lombard*’s reasoning is plausible, but to highlight that the Court quite clearly elected to avoid reaching its result by applying *Shelley*.

The Court’s reluctance to extend *Shelley* is most striking in the case of *Adickes v. S. H. Kress & Co.*\(^3\) The facts in *Kress* were similar to the earlier decided cases,\(^4\) but with one essential difference: there were no express ordinances or statements by law enforcement officials concerning segregation. There hence was no readily apparent positive state law to which the restauranteur’s refusal to serve the plaintiff could be connected.\(^5\) Under such circumstances, *Shelley*’s attribution rationale was the most conspicuous precedential approach for locating state action. Though the *Kress* Court was not unaware of *Shelley* – indeed, the Court referenced *Shelley* numerous times during the course of its opinion – *Kress* eschewed *Shelley*’s analytics. Rather than applying *Shelley* to find state action by attributing the restauranteur’s discrimination to the state, the *Kress* Court purported to locate affirmative discriminatory regulation on the part of the state: “[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.”\(^6\) This is radical: custom – the norms and decisions of private individuals – is actually being accorded the status of state law.\(^7\) *Kress*’s analysis eliminated the very predicate for *Shelley*’s approach: the private party’s discriminatory decision need not be attributed to the state by means of judicial enforcement, but instead the private individuals’ discriminatory practices themselves are reconstituted as discriminatory state law itself. The Court’s decision not to ground its holding in *Shelley*’s approach could not have been clearer.

*Kress*’s analysis is the most striking example, but all the sit-in cases share a common analytic approach that bespeaks the Court’s uneasiness with

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\(^6\)Id. at 271, 273-4.
\(^7\)Id. at 273.
\(^8\)398 U.S. 144 (1970).
\(^9\)“Though it was not relevant to the Court’s analysis, the plaintiff was a white woman who had been denied service because she was in the company of African-Americans. See id. at 146-47.
\(^10\)“In a separate opinion, Justice Brennan makes a strong argument that the state “statutes do in fact manifest a state policy of encouraging and supporting restaurant segregation so that [the restaurant’s] alleged privately chosen segregation is unconstitutional state action.” Id. at 195 (Brennan, J., partly concurring and partly dissenting). What matters for present purposes is that the majority did not embrace this characterization of state law and yet still located state action.
\(^11\)Id. at 171.
\(^12\)Carol Rose recently has made a similar argument, which I explain and then critique later in this paper. See infra at p. 31.
extending Shelley: the Court found state action in these cases by purporting to locate state policies that “compelled the act” of refusing to serve Blacks, not in the Shelley modality of attributing private discriminatory decisions (in this case, of the restauranteurs) to the state when the state enforces facially neutral laws. That the Court consistently refused to extend Shelley’s approach in circumstances analogous to Shelley’s definitively establishes the Court’s reluctance to utilize Shelley’s approach even in race discrimination cases.

b. Lower court decisions. The lower court decisions discussed above in Part I.B.1 are representative of the vast majority of cases in which courts have refused to extend Shelley. As this subsection shows, however, there are some rare instances where courts have applied Shelley. Like their counterparts refusing to extend Shelley, the reasoning found in these decisions is inadequate. The decisions do not locate a principled end point that would preserve the public/private distinction. Furthermore, the handful of decisions extending Shelley cite to Shelley without explaining how they fit into the large body of post-Shelley case law that has limited Shelley’s principle.

An early case applying Shelley’s attribution principle is the 1966 decision of Spencer v. Flint Memorial Park Association. The plaintiff had purchased burial rights in a cemetery, subject to the condition that only Whites should be buried there. Plaintiff sought to bury an African-American, and at issue in the Spencer case was whether the state court could enforce the racially restrictive contractual provision. The Michigan appellate court ruled that enforcement would violate the Fourteenth Amendment, reasoning that Shelley’s principle applied to “cemetery lots to the same extent that such analysis applies to more conventional property interest.” The state court made it “absolutely clear that such conclusion in no way prevents cemeteries maintained by a particular religious faith from restricting burial rights to members of that faith.” Deeply troubling, however, is the court’s failure to explain why the judicial enforcement of religious conditions were constitutionally different from the judicial enforcement of racial conditions.

One field where it may at first appear that courts have applied Shelley’s principle, even outside the context of racial discrimination, is testamentary restrictions. Although courts in many instances have enforced religious-based testamentary conditions, courts in some other jurisdictions have ruled that the enforcement of trusts that discriminate on the basis of race and gender constitutes state action in violation of the Constitution. In In re Crichfield Trust, for example, a New Jersey court found it necessary to reformulate a trust that

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75 Adickes, 398 U.S. at 170.
77 Id. at 628.
78 Id. at 629.
79 See supra at xx.
had established a yearly college scholarship for “worthy boys of Summit High School” so that the trust benefitted all worthy graduates, regardless of gender. Citing to *Shelley*, the court held that “[t]he involvement of the court itself in supervising and directing the administration of a charitable trust is state action.” 82 A federal district court similarly held that “[t]he State cannot require compliance with [a racial] testamentary restriction because that would constitute State action barred by the Fourteenth Amendment.” 83

While the language in these decisions certainly suggests that these courts’ holdings simply are contrary to the religious-based testamentary conditions, all of these cases involved charitable trusts in which state administration of the trust resulted in the provision of services to the public. State administration of the trust hence had the appearance of the government providing services to the public, thereby bringing the cases under the well established “public functions” component of the state action doctrine. Two of the cases involved land granted for the purpose of creating public colleges, 84 and the other two involved trusts for college scholarships to be awarded graduates of public high schools. So, for example, Virginia’s implementation of the will of Fletcher Williams, which established the Sweet Briar College, required that applications from those who were not “white girls and young women” had to be rejected, 85 and implementation of the will of Stephen Girard meant that a Board of Trusts, which had been created by the state of Pennsylvania to run Girard College, had to refuse admission to all Black candidates. 86 Implementation of the will of Frieda Crichfield meant that the Board of Education of the city of Summit could not award a college scholarship to girls graduating from the public high school, 87 and implementing the Wright will similarly meant that only boys graduating from Keene High School were eligible for a college scholarship. 88 It is quite possible that the “public functions” component of these cases (i.e., that the state’s implementation of these wills required that they provide services similar to those ordinarily provided by government) played a role in the courts’ decisions, 89 as was true when the Supreme Court held Philadelphia’s operation of Girard College to be unconstitutional and similarly struck down the city of Macon’s operation of a racially segregated park. 90

82 *Id.* at 90.
83 *Sweet Briar*, 280 F. Supp. at 312.
84 *See Brown*, 392 F.2d at 121-24; *Sweet Briar*, 280 F. Supp. at 312.
85 *Sweet Briar*, 280 F. Supp. at 312.
89 A similar point was made by the state court in *Shapira v. Union National Bank*, 315 N.E.2d 925, 828 (Ohio Ct. Comm. Pleas 1974); cf. In re Certain Scholarship Funds, 575 A.2d 1325 (N.H. 1990) (deciding under state constitution that “the participation by the principal, School Board, and the City of Keene Trustees of Trust Funds, as agents of the State, in the administration of these discriminatory trusts amounts to ‘state action’”).
There are only a handful of other reported cases where courts have applied the *Shelley* principle. A few older cases cited to *Shelley* and ruled that judicial enforcement of non-racial restrictive covenants constituted state action.¹ Though there are not a sufficient number of cases to identify a clear pattern, the case law to date suggests that courts have been more apt to find state action when confronted by restrictions that disallow particular classes of persons or groups from living in a place. For example, some courts have found state action when asked to enforce restrictions excluding children² or that have the effect of barring houses of worship.³ Virtually all courts, however, have ruled that judicial enforcement of these types of restrictions regarding the use of property do not constitute state action.⁴ Unfortunately, none of these court decisions has provided a principled defense of its rule that attempts to explain how its holding fits with the pattern of post-*Shelley* jurisprudence. The cases finding state action cite only to *Shelley* without explaining whether their approach threatens the stability of the public/private distinction,⁵ whereas the cases finding no state action tend to limit *Shelley* to the racial context without explaining why there should be such a context-specific constitutional rule.⁶

There is one context where courts uniformly have applied the *Shelley* principle. American courts that have been asked to enforce foreign judgments that are based on foreign laws that could not have been enacted by an American polity due to the Constitution have concluded that it would be unconstitutional for them to enforce such foreign judgments. For instance, British defamation law is more pro-plaintiff than the First Amendment allows American defamation law to be. When asked to enforce British defamation judgments, these courts have cited to *Shelley* and concluded that enforcing such judgments would constitute state action in which the substantive content of the legal restriction would be attributed to the court. These courts all have neglected to take account of the post-*Shelley* case law. If enforcing the foreign judgment constitutes state action even though the substantive law governing the parties’ relationship had not been created by an American polity, what

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¹See, e.g., Franklin v. White Egret Condominium, Inc., 358 So.2d 1084, 1087-88 (Fla. Dist. Ct. App. 1977) (enforcement of restrictive covenant barring children under the age of 12 to be unconstitutional), aff’d by 379 So.2d 346 (Fla. 1979); West Hill Baptist Church v. Abbate, 261 N.E.2d 196, 200 (Ohio Common Pleas 1969) (finding that judicial enforcement of restrictive covenant excluding houses of worship constitutes state action).
³See Abbate, 261 N.E.2d at 200.
⁴See Ireland v. Bible Baptist Church, 480 S.W.2d 467, 470 (Tex. Ct. App. 1972) (finding no state action in judicial enforcement of a covenant restricting use of land to single-family residential purposes and thereby excluding houses of worship, the same type of covenant at issue in the Abbate case discussed above); Langley v. Monumental Corporation, 496 F. Supp. 1144 (D. Md. 1980) (no state action in use of judicial system to evict renter who lived in apartment with children, contrary to age restriction on those permitted to reside in the apartments).
⁵See, e.g., Franklin, 358 So.2d at 1088-89 (“When [plaintiff] sought to invoke the powers of the trial court to compel a reconveyance of the interest of Norman Franklin in the condominium apartment to his brother, it invoked the sovereign powers of the state to legitimize the restrictive covenant at issue”); Abbate, 261 N.E. 2d at 200 (holding that “if a zoning ordinance is in its operation unconstitutional, a restrictive covenant in the same area having the same effect would likewise be unconstitutional”).
⁶See, e.g., Ireland, 480 S.W.2d at 470; Langley, 496 F. Supp. at 1151.
would their reasoning suggest about the enforceability of settlement agreements or private contracts in which individuals agree to limit their speech? Are these courts of the view that all the cases that have upheld the enforceability of such agreements were mistakenly decided? It is unlikely they would so conclude, but one cannot be certain because these courts have not sought to explain how their holdings fit with the post-Skelley case law."

3. **Summary Regarding the Post-Shelley case law.** Shelley’s attribution rationale has not fared well. With only one exception, the Supreme Court has not extend Shelley’s principle, even in other racial contexts. Lower courts almost uniformly have refused to extend Shelley, but instead regularly enforce private agreements whose substantive terms would trigger constitutional review if they had been enacted by an American polity. Only a handful of lower court opinions have applied Shelley’s principle. The largest set of such cases, those concerning state enforcement of restrictive testamentary gifts, are explainable on alternative grounds. With regard to non-racial restrictive covenants and foreign judgments, the other contexts where Shelley has been applied, courts have cited to Shelley without considering how their holdings comported with the post-Shelley case law and without locating a principled way of rescuing the public/private distinction. The cases limiting Shelley are not immune from criticism either: while many have well explained Shelley’s threat to the distinction between public and private action, none has provided a principled justification for why the Shelley rule appropriately applies only to the racial context. The logic of these cases indicts rather than vindicates the Court’s holding in Shelley, and the cases are best understood as attempts to limit Shelley to its facts.

II. **THE HERETOFORE INADEQUATE SCHOLARLY EFFORTS AT RECONCEPTUALIZING SHELLY**

To date, the scholarly explanations of Shelley fall into two broad camps. A small band of scholars understands Shelley’s problematic analytics as a reflection of inherent weakness of the public/private distinction and accordingly advocates the distinction’s elimination, arguing that constitutional limitations ought to apply not just to government but to individuals as well. All other scholars have sought to provide an alternative justification for Shelley that grounds the decision in the Fourteenth Amendment in a manner that preserves the public/private distinction. While many of the justifications offered by scholars in the second camp are quite ingenious, none enjoys widespread acceptance. This Part II first explains why explanations of Shelley that rely on rejecting the public/private distinction should be eschewed. It then shows that the second camp’s explanations all have significant analytical shortcomings. Perhaps surprisingly, many of the scholars’ explanations actually

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59Elsewhere I have argued that these cases are poorly reasoned and wrongly decided. See Mark D. Rosen, *Exporting the Constitution*, 53 EMORY L.J. 171 (2004).

60This includes Professor Erwin Chemerinsky, Paul Schiff Berman, and Richard Kay, discussed immediately below in Part II.A.
support the non-Fourteenth Amendment approach to Shelley that this Article identifies and defends in Parts III and IV.

A. Rejecting the public/private distinction. One approach to rationalizing Shelley that has been embraced by a small group of esteemed scholars – including Professors Chemerinsky," Berman," and Kay" – is to invoke the decision as evidence that the distinction between public and private is "incoherent," as legal realists and other critics have argued for generations."

Reconceptualizing Shelley in this respect – as a decision that confirms the unsoundness of the public/private distinction – is problematic because maintaining the public/private distinction is desirable. This section explains the shortcomings of the critics' rejection of the public/private distinction and the state action doctrine. Contrary to the critics' claims, the distinction between private and public action is not illogical, but instead reflects cultural values. The longstanding resilience of the public/private distinction despite generations of critique suggests that the distinction reflects deeply grounded American cultural values, which this section then identifies. The twin facts that the distinction is not illogical and that it reflects deep American values jointly cast serious doubt on attempts to reconceptualize Shelley in a manner that jeopardizes the public/private distinction.

The core of the classical critique is that "the state always plays a major role, implicitly or explicitly, in any legal relationship." This is because "all private actions take place against a background of laws." For example, law affirmatively permits activities or implicitly permits them by failing to prohibit them. Furthermore, "individual choices are strongly influenced by the context of state-created law." "Explicit government actions on such things


Berman, supra note 100, 149, at 1279.


The analysis that follows in the next subsection is a further development of an argument I first presented in Rosen, supra note 97, at 199-205.

Berman, Cultural Value, supra note 100, 149, at 1279.

Id.


Berman, supra note 100, 149, at 1279.
as fiscal and monetary policy, licensing of occupations, zoning, and education, among many other subjects, determine the environment in which individual decisions are made, and determine, in significant degree, the costs and benefits of alternative personal choices.” In short, these critics have argued, it makes no sense to attempt to draw a line between public and private action because the two are intimately and irreversibly intertwined.

Analysis of the strength of the classical critique of the public/private distinction must begin with the empirical observation that the distinction has “survive[d] both as a matter of constitutional doctrine and popular intuition.” Is the durability of the public/private distinction the regrettable result of courts having been deaf to logic? I shall suggest otherwise: the distinction’s durability reflects an aspect of American culture of which courts and legal analysts appropriately ought to take account.

First, if we observe the logical end point of the classical critique, we see that it virtually eliminates the realm of “private,” for practically no laws can be said to be axiomatic; an alternative rule, or no regulation at all, almost always is plausible. The classical critique thus suggests that virtually all, if not all, activity undertaken by a person is appropriately attributed to the state and hence is properly subjected to constitutional limitations. That this conclusion likely is startling to most people suggests that the classical critique omits some relevant considerations.

Indeed it does. What the classical critique neglects can be identified by means of a two step argument. First, all the classical critique establishes is that there always is state involvement – what I’ll call “government agency” – in individuals’ decisionmaking. That there always is some government agency is only half the story, however, for it still may be meaningful to identify individual agency. There may be individual agency where the legal consequence of an individual’s action is the result of the action’s interaction with the law. This is true even where the law that determines the action’s consequence could have been different, and where the law is not the choice of the individual, but has been imposed upon her. To be sure, individuals under such circumstances have constrained autonomy insofar as they operate subject to a non-axiomatic set of rules that they have not chosen. Nevertheless, individual agency surely is present when an individual’s action is deliberate and the person can predict

109Kay, supra note 101, 107, at 334-35.
110Id. at 1278. Similar observations concerning the doctrine’s durability have been made by many others. See, e.g., Horwitz, supra note 103, at 1427 (noting that the distinction between public and private is “still . . . alive and, if anything, growing in influence”).
111For such a suggestion, see Horwitz, supra note 103, at 1427; cf. Erwin Chemerinsky, Rethinking State Action, 80 Nw. U. L. Rev. 503, 504-5 (1985) (concluding that early scholars were “successful in demonstrating the incoherence of the state action doctrine”).
112Cf. Mark Tushnet, Shelley v. Kramer and Theories of Equality, 33 N.Y.L.S. L. Rev. 383, 391 (1988) (“When the courts continue to invoke a legal doctrine [state action] in the face of almost universal criticism, where the doctrine could be replaced by one that eliminates the grounds of criticism, and where the substitute doctrine need not alter any results, I suggest that the presumption ought to be that the doctrine is doing something to which the critics are not attending.”).
Alternatively, the argument of critics of the public/private distinction can be understood to be that the government agency component overwhelms individual agency so that it is appropriate to conclude that there always is state action so long as there is some government agency. If so, some argument must be proffered as to why this is so. I have not found it. Moreover, one would expect that the conclusion of whether individual agency or government agency predominates would vary from context to context. Proponents of this version of the classical critique, however, do not appear to make context-specific arguments, but instead typically conclude that there always is state action. The absence of any such argument suggests that this argument boils down to the claim that there is only government agency, and any such assumption is incorrect for the reasons described above in text.
always will also have some “non-x” characteristics.

This does not mean that all legal questions are “hard.” What typically makes a legal question “not hard” is not that a legal category corresponds to a pure reality, but that a given situation is most plausibly characterized one way or the other. What determines whether a given situation is “most plausibly characterized” one way or the other is not logic but judgment. The mere fact that subjective judgment is involved, however, does not mean that the judgment necessarily will be controversial. The judgment is a product of the socially constructed intuitions, values, and ideology that constitutes a culture. To the extent there is a rich and widely shared culture, it is to be expected that there will be widespread agreement as regards many if not most judgments.115

It is at this point that the endurance of the public/private distinction becomes analytically relevant. Because one always can locate an aspect of government agency in respect of any activity that a person undertakes insofar as some polity could have proscribed it, the approach taken by Shelley cannot be said to be illogical. As discussed above, however, one also can meaningfully speak of individual agency where the end result of a person’s action is function of the action’s interaction with non-axiomatic laws. We thus are presented with a situation where there is an admixture of government and individual agency. As shown above, American case law has concluded that the component of individual agency virtually always predominates in the context of judicial enforcement contracts entered into by private citizens. This conclusion is not logically necessary, but nor does it violate logic. Rather, the conclusion is a reflection of commonly held American political cultural values.

Accordingly, the type of argument that critics of the public/private distinction must advance is not one of logic but normativity: for instance, they must convince people that a court’s enforcement of a contract is more plausibly construed as state action than a vindication of private ordering. I am skeptical that the critics can succeed in convincing many people of this. Several contemporary critics of the public/private distinction appear to agree that their arguments are not likely to sway the masses, and that the public/private distinction is here to stay.116 With this I concur. But to the extent these contemporary critics’ conclusions rest on the belief that the distinction’s

115 Litigation is not the set of data to consult to check the extent to which there exists a shared culture. Indeed, litigated cases are better described as records of failed common understandings. A better place to look to check if the point made in text is valid is to ask whether lawyers generally are able to understand what law instructs. Though there always are ambiguities at the margins, the answer unquestionably is yes, as is attested to by the everyday world of transactional lawyering in which attorneys give advice to their clients and draft agreements on the basis of an understanding of what the law instructs.

116 See Cultural Value, supra note 100, 149, at 1268 (“Although the [argument that there is no coherent distinction between public and private] may be correct, its appeal seems limited. Indeed, not only have courts been unmoved, but my guess is that most Americans are likely to resist, on an intuitive level, scholarly attempts to erode the distinction between public and private. Most of us like to believe that there are spheres of privacy in which we exist, untouched by the state. The argument that such private spheres are illusory, and that our activities are inextricably bound up in the state, therefore, is unlikely to be persuasive.”); Kay, supra note 101, 107, at xx (trying to explain the durability of the public / private distinction notwithstanding the “persuasive” critiques of the distinction that critics have provided).
resilience reflects a lack of analytical clarity on the part of the general public. I object. Rather, the distinction’s durability reflects values that are an important part of our country’s larger political culture.

To see this, it is necessary to identify the cultural values behind the distinction. Judicial opinions have identified three benefits. The first concerns autonomy: maintaining the distinction retains a larger sphere for individuals to order their lives as they so choose. For example, the distinction allows for sectarian private schools in a constitutional culture in which public schools cannot advance sectarian religious education. The expanded range of options that can be found as a result of the public/private distinction has cascading autonomy consequences. For instance, the distinction allows for a broader array of social institutions, such as sectarian schools that teach religion and create distinctive social environments. Parents accordingly have a richer cluster of options among which they can choose, expanding their effective autonomy.

Indeed, in the First Amendment context in particular, erasing the distinction between public and private threatens to impose an orthodoxy on citizens by disallowing citizens to discriminate on the basis of viewpoint. In this sense, ignoring the distinction between public and private threatens to destroy what many believe to be the core concern of the First Amendment: the protection against a government-created orthodoxy. Extending constitutional restrictions to all actions of individuals can be understood as limiting rather than expanding freedom, for the distinction’s erasure infinitely expands the degree to which the individual is subject to government regulation and, in that respect, is “disquietingly totalitarian.” Applying constitutional limitations to the actions of individuals, families and associations would limit the extent to which these non-governmental societal institutions can operate as they deem best, regulate their members, and influence others in society of the merits of their viewpoints by means of advocacy and the living-out of their

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17 This would appear to be implicit in Professor Berman’s account insofar as he simultaneously states that he finds the incoherence critique convincing, see *Cultural Value*, supra note 100, at 1279-80, and concludes that most Americans are likely to resist scholarly attempts to erode the distinction between public and private, see id. at 1268.

18 For a powerful articulation of this view, see William P. Marshall, *Diluting Constitutional Rights: Rethinking ‘Rethinking State Action’*, 80 N.W. U. L. Rev. 558, 560-61 (1985). To be sure, this conception of autonomy is not axiomatic. Under Aristotelian and certain religion approaches to personhood, for example, it is thought that appropriate constraints paradoxically increase autonomy. The notion is that limitations permit the development of virtue, which is the prerequisite to true choice. See Mark D. Rosen, *The Outer Limits of Community Self-Governance in Residential Associations, Municipalities, and Indian Country: A Liberal Theory*, 84 Va. L. Rev. 1053, 1066 & n. 50 (1998). For purposes of this Article, which concerns American culture, it is not problematic to utilize the American conception of autonomy, even if it is not axiomatic.


20 Marshall, supra note 118, at 561 (quoting Frank Goodman, *Professor Brest on State Action and Liberal Theory, and a Postscript to Professor Stone*, 130 U. Pa. L. Rev. 1331, 1338 (1982)).
commitments.\textsuperscript{121}

The second and third standard reasons courts have proffered to justify the distinction between public and private – separation of powers and federalism considerations – reflect the democratic ideal of limiting the scope of the judiciary so as to retain space for democratic politics. In a jurisprudential world in which there are hearty federal constitutional doctrines and a strong version of judicial review, the absence of a strong distinction between public and private would dramatically increase the power of courts in relation to the other branches of the federal government and the states. Activities currently treated as “private” and not subject to Fourteenth Amendment limitations generally may be regulated by Congress or the states. Erasing the distinction between public and private would extend the scope of judicially determined constitutional constraints and accordingly limit the scope of federal and state legislative power. This could have all sorts of pernicious effects, including, paradoxically, inhibiting the evolution of culture insofar as democratic politics and our federal system may provide a better opportunity for the gradual modification of societal consensuses than does judicial imposition of policies that are counter to a contemporary popular consensus.\textsuperscript{122}

In short, the critics of the public/private distinction bear the burden of remaking critical aspects of our country’s political culture. Popular opposition to erasing the public/private distinction and making all contract claims (for example) subject to constitutional limitations is not illogical, for both individual agency and state agency are present in the making and enforcement of all contracts. The widespread tendency to view contracts as belonging to the “private” realm reflects deeply held American cultural values that favor protecting individual autonomy against all-encompassing governmental regulation and preserving room for democratic politics by limiting the role of courts. That the public/private distinction is not illogical and that it reflects deeply held cultural values are two strong justifications for resisting a reconceptualization of Shelley that jettisons the state action doctrine. (In any event, the analysis that follows in Parts III and IV may be convincing even to one who holds the view that the public/private distinction is analytically unsound; after all, rejection of the distinction is not inconsistent with the possibility that Shelley can be solidly justified on grounds outside of the Fourteenth Amendment.)

B. Preserving the public/private distinction. Almost all scholars who have analyzed Shelley have sought to identify a limiting principle that preserves the distinction between public and private action. These scholarly approaches can be usefully grouped into three categories: (1) those that limit Shelley on the basis of the substantive content of the contractual right, (2) those that understand Shelley as inviting a balancing test, and (3) those that limit Shelley to

\textsuperscript{121}For an important discussion that explores the role of non-governmental institutions in shaping individuals and society, see Rodrick M. Hills, Jr., The Constitutional Rights of Private Governments, 78 N.Y.U. L. Rev. 144 (2003).

\textsuperscript{122}For an interesting discussion of this, see Tushnet, supra note 113, at 404-06; see also infra note 307 and surrounding text.
the context of racial discrimination.

The analysis that follows shows that each of these scholarly approaches to rationalizing Shelley encounters significant analytical obstacles. Further, while differing in important details, the scholarly approaches taken to date share two crucial characteristics. First, all conceptualize Shelley as having articulated a constitutional rule growing out of the Fourteenth Amendment—which is not surprising, of course, insofar as the Shelley Court did the same. Second, the proposals implicitly reject the notion that state action is a trans-substantive principle. Instead, each of these scholars concludes that determining whether enforcement triggers constitutional scrutiny turns on highly context-sensitive analysis. As Part IV shows, this shared scholarly conclusion constitutes strong support for this Article’s effort to reconceptualize Shelley as a Thirteenth-Amendment based decision: the highly context-sensitive analysis identified by the scholars is best undertaken by courts in conjunction with legislative and executive involvement, and the Thirteenth Amendment approach introduced in this Article invites such coordinate branch participation whereas the Fourteenth Amendment approach does not.

1. **Substantive Content of the Contract Right.** An early, influential article by Professor Thomas Lewis argued that Shelley was correctly decided because “the common law of the state functioned to delegate zoning power to private parties.” Lewis thought that restrictive covenants were “peculiarly akin to sovereign powers” and hence properly subject to the Fourteenth Amendment. A notable difficulty with Lewis’ approach is determining what private actions are sufficiently akin to sovereign powers to trigger constitutional scrutiny. Professor Lewis thought restrictive covenants qualified because covenants that ran with the land restricted land use even “beyond the period of ownership of the land by any of the parties initiating the restriction.” Yet corporations and charitable trusts similarly allow a party to determine how property is to be used even after that party no longer owns the property. Are these also to be subject to Fourteenth Amendment limitations? That Professor Lewis equivocates on these questions—he suggests that although “the Constitution does not demand equation between state and corporation or state and charity,” Fourteenth Amendment limitations might properly attach to some of these entities’ activities—betrays the context-sensitive analysis his proposal requires. It also suggests that Lewis has not

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123 Id. at 1116.
124 On this view, the covenants themselves presumably would be violative of the Fourteenth Amendment, not just judicial enforcement. The proponent of this approach appears to explicitly embrace this conclusion. See id. at 1113-14 (suggesting that Shelley stands for the principle that “the power to enter into a covenant restricting land use and occupancy of the basis of race is lacking because that part of the common law that provides the particular property rights necessary for such an arrangement is invalid . . .”).
125 Id. at 1115. Justice Douglas appeared to embrace this approach. See Reiman v. Mulkey, 387 U.S. 369 (1967). (“Leaving the zoning function to groups which practice discrimination and are [state licensed] constitutes state action in the narrowest sense in which Shelley can be construed.”); see also Bell v. Md., 378 U.S. 226, 245, 328 (1964) (Douglas, J., concurring).
126 Lewis, supra note 123, at 1119-20.
identified satisfactory criteria for distinguishing between private and public activity.\footnote{Professor Carol Rose recently has argued that “[w]idespreadness and inescapability” were the aspects of restrictive covenants that “made them seem so much alike a private takeover of governmental functions.” Carol Rose, Property Stores: Shelley v. Kraemer, in PROPERTY STORIES 169, 195 (GERALD KORNGOLD AND ANDREW P. MORRIS, ED.) (2004). There is much wisdom to these criteria, but they only underscore how narrow and context-specific Shelley’s principle becomes under such an approach. 128}

2. **Balancing Proposals.** Two of the best known approaches to rationalizing Shelley advocate that the decision should be understood as licensing courts to undertake a “balancing” of competing considerations to determine when judicial enforcement of a contract appropriately triggers constitutional review. In a famous article, Professor Henkin argued that the phrase state action does not “contribute[] to clarity,” but instead suggested that the Fourteenth Amendment appropriately applies when “the state is responsible for a denial of rights.”\footnote{Henkin proposed two interlocking principles for deciding when the state is appropriately deemed “responsible” for “enforcing private discrimination.” First the state is responsible only when it could have proscribed the discrimination. Second, Henkin argues, though the state almost always has the power to proscribe the private discrimination, there are a “few” circumstances under which the state is without power to do this, namely, when the constitutional rights of liberty and property “that remain[] in the due process clause” outweigh the constitutional right of equal protection.} Henkin proposed two interlocking principles for deciding when the state is appropriately deemed “responsible” for “enforcing private discrimination.”\footnote{Henkin’s approach is subject to several criticisms. First, it leaves very little room for “private” action; the substantive due process rights to liberty and property that define the scope of enforceable contracts is vanishingly small, as Henkin himself recognized. Indeed, there is little functional difference between Henkin’s approach and the classical critique of the public/private distinction discussed above; the classical critique, it should be recalled, rejected the distinction because the government could have proscribed the “private” activities, but this logic dissolves the public/private distinction only with regard to those matters over which the government potentially could have regulated. Henkin’s argument accordingly is subject to the same criticisms leveled above against the classical critique. Relatedly, Henkin’s approach is inconsistent with the case law insofar as courts continue to enforce such things as contractual limitations on speech.} Henkin’s approach is subject to several criticisms. First, it leaves very little room for “private” action; the substantive due process rights to liberty and property that define the scope of enforceable contracts is vanishingly small, as Henkin himself recognized.\footnote{Indeed, there is little functional difference between Henkin’s approach and the classical critique of the public/private distinction discussed above; the classical critique, it should be recalled, rejected the distinction because the government could have proscribed the “private” activities, but this logic dissolves the public/private distinction only with regard to those matters over which the government potentially could have regulated. Henkin’s argument accordingly is subject to the same criticisms leveled above against the classical critique. Relatedly, Henkin’s approach is inconsistent with the case law insofar as courts continue to enforce such things as contractual limitations on speech.} Second, to the extent that Henkin leaves space for private action, the process he proposes for defining that space is highly context-dependent and resists the principled application that is institutionally appropriate for courts.\footnote{Second, to the extent that Henkin leaves space for private action, the process he proposes for defining that space is highly context-dependent and resists the principled application that is institutionally appropriate for courts.}

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130 Id. at 491-92.

131 Id. at 492.

132 Id. at 492-93.

133 See id. at 489-90.

134 Although Professor Henkin conceivably could respond that his approach to state action is limited to equal protection, his article does not explain why his analysis should be so confined.

Henkin acknowledges that the conflict between competing constitutional commitments “can only be decided in the light of a complex of considerations of varying import and relevance.”\textsuperscript{136} So, for instance, Henkin tentatively concludes that although “a state cannot prevent an individual from leaving property to A rather than B, both strangers, even if the reason is that A is white and B a Negro, . . . the state can prevent a testator from leaving property to a private institution, nonreligious in character, which practices religious or racial discrimination.”\textsuperscript{137} More generally, Henkin embraces a jurisprudence of “balancing” the competing liberty and equality interests,\textsuperscript{138} a methodology that Henkin himself later argued was not susceptible to principled application.\textsuperscript{139} Henkin’s later writings with regard to balancing’s pitfalls are persuasive. The way in which competing constitutional commitments are balanced or harmonized is a highly subjective process that simultaneously reflects and defines the decisionmaker’s very character.\textsuperscript{140} For this reason, a doctrinal approach that assigns such decisionmaking exclusively to courts – as Henkin’s Fourteenth Amendment approach does – is undesirable. As I argue at length below, there are strong reasons to prefer a doctrinal approach that invites the participation of the more political branches of government in respect of this type of decisionmaking process.

Fifteen years after Professor Henkin’s article, Professors Glennon and Nowak put forward yet another balancing proposal that purported to rationalize Shelley (as well as the Court’s other state action decisions). Their famous article launched a frontal assault on the notion that the quantum of state involvement explains the doctrine of state action.\textsuperscript{141} They instead argued that the state action doctrine is invoked where there is a “battle for supremacy between the asserted rights of private persons,”\textsuperscript{142} and that what really drives the Court’s state action decisionmaking is determining whether an individual’s activity undermines another person’s rights to such a degree that the Constitution is appropriately triggered. In their view, the state action doctrine is actually a “balancing process that weighs the value of a challenged nongovernmental practice against the harm it does to a given right and the

\textsuperscript{136}Id. at 494.
\textsuperscript{137}See Henkin, supra note 129, at 500.
\textsuperscript{138}See id. at 491-92.
\textsuperscript{140}See Henkin, supra note 27, at 1048-49. For more on this point concerning the subjectivity of balancing competing constitutional commitments, see infra at p. 55 et seq.
\textsuperscript{141}See Robert J. Glennon, Jr. and John E. Nowak, A Functional Analysis of the Fourteenth Amendment “State Action” Requirement, 1976 SUP. CT. REV. 221. For example, they persuasively argue that there is no difference in the quantum of state action that explains the widespread judicial willingness to enforce trespass laws in respect of private homes on behalf of homeowners who wish to exclude a person solely for racial reasons and the unwillingness of several Justices to enforce trespass laws against restaurants in the sit-in cases.
\textsuperscript{142}Glennon & Nowak, supra note 141, at 230.
value of that asserted right." The state action doctrine appropriately asks, in their view, whether the “actions of [a] person so endanger fundamental constitutional values that they are prohibited by the Amendment.”

There are important difficulties with Glennon and Nowak’s approach. First, though their argument purports to protect the state action doctrine, at its core it is a denial of the constitutional significance of the distinction between governmental and individual action; after all, in their view, any “nongovernmental practice” is properly subject to constitutional limitations so long as the practice sufficiently “impairs certain fundamental [constitutional] values.” The rejection of the public/private divide that Glennon and Nowak embrace is not as thoroughgoing as either Henkin’s or that of the classical critique, but it nonetheless is a square rejection of the notion that private activity is beyond the scope of the Fourteenth Amendment’s proscriptions. Glennon and Nowak’s thesis accordingly is subject to the criticisms leveled above against the classical critique.

Second, Glennon and Nowak’s analysis begs the question of the constitutional source of the constitutional prohibitions they defend. In essence they embrace the view that constitutional provisions include prophylactic measures that themselves have a constitutional status; they argue, after all, that activities by nongovernmental entities that “endanger fundamental constitutional values” themselves are unconstitutional. Even if constitutional values require prophylactic protections to be effective, however, it does not logically follow that the prophylactic measures themselves have the status of constitutional law. What, after all, is the source of the Court’s power to make a prophylactic rule of constitutional authority? To this day, the Supreme Court has not answered this question. A plausible alternative not considered by

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149See supra Part II.A.
150See Glennon & Nowak, supra note 2, at 259.
147See United States v. Dickerson, 530 U.S. 428, 446 (1999) (Scalia, J., dissenting). Although the Supreme Court overruled 28 U.S.C. §3501 in the Dickerson case, it pointed neglected to confront the question of whether the Miranda decision announced a prophylactic rule and, if it did, what was the source of the Court’s authority to do so. See Mitchell N. Berman, Constitutional Decision Rules, 90 Va. L. Rev. 1, 28 (2004) (noting this).
148See Berman, supra note 100, 149, at 28-30. The question of the source, legitimacy, and status of prophylactic rules has received extensive discussion in the academic literature. See id. at 20-32. Though the Court still has not directly answered these questions concerning prophylactic rules, Professor David Strauss’ view – that “prophylactic’ rules are not exceptional measures of questionable legitimacy, but are
Glennon and Nowak’s analysis is that court-fashioned prophylactic measures have the status of federal common law.151

In addition to its significance in respect of determining the prophylaxis’ legitimacy, the precise status of the prophylaxis has crucial institutional implications: whereas federal common law can be displaced by Congress,152 the general view is that Court-articulated constitutional rules may not.153 In today’s world of judicial supremacy in constitutional interpretation, Glennon and Nowak’s approach thus allocates the responsibility for creating prophylactic rules exclusively to courts. This is unfortunate for several reasons. First, the highly inexact nature of the balancing process that Glennon and Nowak identify as lying at the core of their prophylactic conception of the state action doctrine is a decisionmaking process that is highly subjective154 and that both reflects and constitutes the character of the entity that decides how the competing constitutional interests are to be harmonized – highly subjective, political decisionmaking processes well suited to the more political branches of government. The involvement of the legislative and executive branches is also desirable because prophylactic rules by their nature are practical tools whose design is appropriately informed by circumstances that may change over time or social science that becomes more refined over time;155 Congress and the executive branch are better situated than courts to take account of such factors and to alter the prophylactic rules as circumstances change and as scientific knowledge advances. For all these reasons, the more political branches properly play a role in the formulation of prophylactic rules.156

3. Discrimination. Several other scholarly approaches seek to limit Shelley’s approach to the context of discrimination. An early effort at reconceptualizing Shelley, which was advanced by Judge (then Professor) Louis Pollak, suggested that state action was present only when judicial enforcement would require discrimination – on the basis of racial, religious or other “prejudices” that a person might hold – by a person who did not wish to

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a central and necessary feature of constitutional law,” David A. Strauss, The Ubiquity of Prophylactic Rules, 55 U. Chi. L. Rev. 190, 190 (1988) – has been accepted by most scholars. See Berman, supra note 100, 149, at 23 & n. 76. Even so, the prophylactic rules that Strauss and others deem to be central features of constitutional law are different in kind from the type of prophylaxis embraced by Glennon and Nowak: whereas Strauss and others justify the Court’s promulgation of legal tests that disallow activities that themselves may not be unconstitutional, Glennon and Nowak’s approach to state action licenses the application of constitutional limitations to parties not actually subject to the Constitution’s constraints.

152See id.
154David Currie’s critique of Henkin’s approach would appear to be equally applicable here. See Currie, supra note 135, at 359 & n. 176.
156For more on this point, see supra Part IV.G.
discriminate.\textsuperscript{157} Pollak’s approach required analysis both of the nature of the legal right and the type of judicial enforcement that was sought. Under this view, \textit{Shelley} was correctly decided because enforcing the racial covenant would have prevented a willing seller from selling his home to African-Americans.

There are deep problems with Pollak’s suggested approach. Professor Louis Henkin rightly assailed the notion that the presence of state action is a function of the mental state of individuals.\textsuperscript{158} Another oddity of Pollak’s view is that there would be no state action when courts enforce restrictive covenants on behalf of persons who want to discriminate.\textsuperscript{159} Finally, Pollak’s approach threatened to significantly erode the public/private distinction, for much of the time discriminatory contracts would be unenforceable. For instance, Pollak argues that although “an employer may freely contract with a union to maintain a lily-white shop, . . . the provision is one which fails whenever” the employer wishes to hire an African-American because “the union cannot coerce compliance through an injunction or an award of damages.”\textsuperscript{160} Because the real-world value of unenforceable contractual provisions is negligible, Pollak’s approach in effect extends constitutional limitations to private contractual relations with regard to matters of discrimination (racial, religious, and otherwise\textsuperscript{161}), for all such provisions would be frequently unenforceable under Pollak’s approach.

Several other scholars have sought to confine \textit{Shelley}’s rule more narrowly still to the context of race discrimination. Professor Tribe has argued that enforcement of the racial covenant was racially discriminatory because restraints on alienation typically were unenforceable under common law.\textsuperscript{162} The implication of Tribe’s argument is that it would have been perfectly constitutional to enforce racially restrictive covenants if states generally enforced restraints on alienation.\textsuperscript{163} The unattractiveness of this implication is evidence of the explanation’s weakness. Moreover, the factual predicate of Tribe’s argument is questionable: many restraints on alienation were enforced


\textsuperscript{158}Henkin, supra note 129.

\textsuperscript{159}Pollak acknowledges that, under his approach, a purchaser of a lot in a private cemetery that limited interment to Caucasians could not sue in court under the Fourteenth Amendment to compel the cemetery to bury an African-American. See id. at 14 & n. 57. Similarly, a homeowner could refuse to allow an African-American into her house simply because she was an African-American, and the police could enforce the laws of trespass on her behalf, without triggering the Fourteenth Amendment. See id. at 14.

\textsuperscript{160}See Pollak, supra note 157, at 13.

\textsuperscript{161}A further complication with Pollak’s approach is determining what precisely is encompassed within the term “discrimination,” though his description is helpful: “the line sought to be drawn is that beyond which the state assists a private person in seeing to it that others behave in a fashion which the state could not itself have ordained.” Id. at 13.

\textsuperscript{162}LAURENCE TRIBE, \textit{CONSTITUTIONAL CHOICES} 260 (1985).

at the time.\textsuperscript{164}

Other scholars also have tried to justify \textit{Shelley} as a race-specific holding. Professor David Strauss has argued that “much private action was for all practical purposes indistinguishable from government action” in the Jim Crow South because discrimination was the result of a complex interaction between both the private and public systems.\textsuperscript{165} Consequently, Strauss concludes, “it [did] not make a lot of sense to distinguish between state action and private action.”\textsuperscript{166} In a similar vein, Professor Carol Rose has sought to justify \textit{Shelley} on the basis of race:

we could easily interpret \textit{Shelley}’s watchword of “judicial enforcement as state action” as something that is intimately connected to the law of property, and to property law’s insistence that ownership rights and obligations fall into easily anticipated patterns – patterns that are relatively simple and limited, and that a court can justifiably regard as having some more than idiosyncratic value for landowners . . . [Racially restrictive covenants] concerned not the occupants’ land uses, but rather the occupants themselves, \textit{and their value rested critically on the culture and customs of prejudice against those occupants.}\textsuperscript{167}

Drawing on the norms literature, which understands that “norms and customs may be so widespread and so powerful that they have the practical force of law,” Rose argues that judicial enforcement of racially restrictive covenants would have been tantamount to judicial enforcement of norms that for all practical purposes have the force of law.\textsuperscript{168} The authors of a leading constitutional law casebook similarly explain \textit{Shelley} as a race-specific decision, suggesting that “state action questions in race cases should be resolved by overall considerations of equal protection, rather than by some unified theory of state action that applies to all cases, including those outside the equal protection arena.”\textsuperscript{169}

Professor Strauss’ and Professor Rose’s explanations are powerful indeed, but they too are not immune from strong criticism. Both in effect resolve \textit{Shelley}’s public/private conundrum by confessing that the distinction

\textsuperscript{164}See Tushnet, supra note 113, at 386-87 & n. 25. Similarly, Carol Rose has identified several state law doctrines that could have been relied upon to find racially restrictive covenants unenforceable – such as horizontal privity and touch and concern, the rule against perpetuities, and the doctrine of “changed circumstances.” See Rose, supra note 128, at 177-94.

\textsuperscript{165}David A. Strauss, \textit{State Action After the Civil Rights Era}, 10 CONST. COMMENT. 409, 414 (1993). Professor Strauss does not conclude that today the “private” actions of individuals are not appropriately subject to constitutional limitations, but sketches a novel approach under which activities that are the joint result of governmental and individual action may be subjected to looser constitutional limitations than typically are applied to pure governmental action. See id. at 418-20; cf. Mark D. Rosen, \textit{The Surprisingly Strong Case for Tailoring Constitutional Principles}, 153 U. PA. L. REV. 1513 (2005).

\textsuperscript{166}Strauss, supra note 163, at 412.

\textsuperscript{167}Rose, supra note 128, at 198 (emphasis supplied).

\textsuperscript{169}\textit{Daniel A. Farber, William N. Eskridge, Jr., Philip P. Frickey, Cases and Materials on Constitutional Law: Themes for the Constitution’s Third Century} 224 (3\textsuperscript{rd} ed. 2003).
was irrelevant, at least at that time and in that context. These explanations hence confront the doctrinal obstacle that the Court’s jurisprudence at all times has maintained the significance of the public/private distinction in the Fourteenth Amendment. There are more problems still. Two functional explanations Professor Strauss provides fall short of justifying the disregard of the public/private distinction he advocates. Strauss explicitly defends Shelley on the basis that expanding state action by disregarding the public/private distinction “was a way of bypassing Congress; it was functionally equivalent to getting a range of civil rights legislation enacted before Congress was willing to do so.” To begin, the factual predicate behind Strauss’ analysis is absent in respect of Shelley because, as this Article argues in Part III, there were federal statutes that addressed racially restrictive covenants. Second, even if no such federal statutes had existed, the functional need to which Strauss points does not justify the creation of a constitutional rule because (as Part III also argues) the same result could have been brought about as a matter of federal common law. In short, the existence of non-constitutional solutions undermines Strauss’ functional defense of Shelley’s constitutional ruling.

These, then, are among the most famous scholarly efforts to reconceptualize Shelley. The efforts to rationalize Shelley while retaining the

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177 Indeed, if Professor Rose is correct that the norms and customs of discrimination had the practical force of law, it is not clear why a determination of unconstitutionality needed to await the effort to judicial enforce the covenants; the covenants themselves should have been unconstitutional.

178 Professor Strauss apparently would respond that he does not mean to suggest that the Court jettisoned the state action doctrine and its distinction between public and private, but only that the Court’s approach in the Shelley era was a “plausible adaptation of the doctrine to particular historical conditions.” Strauss, supra note 163, at 414. I would respectfully disagree insofar as it seems that the “adaptation” Strauss advocates is more susceptible to being characterized as a rejection of the public/private distinction that is the foundation of the state action doctrine.

179 Strauss, supra note 163, at 413. The next sentence in Professor Strauss’ article reads “Shelley v. Kraemer anticipated the federal open housing laws by more than twenty years . . .” Id.

180 It might be thought that Shelley’s problematic public/private distinction can be remedied by reconceptualizing it as a case in which the court was enforcing a governmental legal rule that “courts must enforce contracts.” See generally Rosen, supra note 97, at 209-11 (explaining the approach of Molly S. Van Houweling, Enforcement of Foreign Judgments, the First Amendment, and Internet Speech: Notes for the Next Yahoo!, 24 Mich. J. Int’l L. 697, 703-04 (2003), which addressed this analytical issue, though not Shelley in particular). Any such effort at reworking Shelley would require a radical reconstruction of constitutional doctrine. Generally applicable rules that have incidental effects on constitutional rights typically do not generate meaningful constitutional review. This is clearly true of general rules that have incidental effects on equal protection rights, see, e.g., Washington v. Davis, 426 U.S. 229 (1976) (subjecting general governmental rules that disproportionately affect African-Americans to a toothless reasonableness test). There is no basis for suggesting that general rules that have incidental effects on contract or property rights would generate meaningful judicial review insofar as direct regulations of these rights typically lead only to relatively low levels of judicial review. See generally, Walter Dellinger, The Indivisibility of Economic Rights and Personal Liberty, 2 Cato Sup. Ct. Rev. 9, 13-16 (2004). The major exception with regard to constitutional review of generally applicable laws that impose incidental effects concerns free speech rights, see Frederick Schauer in Cuban Cigars, Cuban Books, and the Problem of Incidental Restrictions on Communications, 26 WM. & MARY L. REV. 779, 789 (1985) (explaining that time, place and manner regulations of traditional public fora are a form of constitutional review of incidental effects of general regulations), which have no application here. Furthermore, it would be highly undesirable to treat a rule that “courts must enforce contracts” as triggering constitutional scrutiny, for doing so would reproduce the very dangers of constitutionalizing all private action that Shelley posed. See Rosen, supra note 97, at
public/private distinction all share four important characteristics: all (1) understand Shelley as announcing a constitutional rule, (2) assume that the constitutional rule is grounded in the Fourteenth Amendment, (3) demand a highly context-sensitive analysis, and (4) have significant analytic deficiencies. One might conclude that nearly sixty years of scholarly efforts to generate a convincing rationale for Shelley means that the effort to find a rationalization that preserves the public/private distinction should be abandoned, but there are strong reasons to resist such a reconceptualization of Shelley.

These considerations provide a predicate for the more radical reconceptualization of Shelley that this Article proposes in Part III. Furthermore, the benefits to reconceptualizing Shelley as a Thirteenth Amendment-based decision that are discussed in Part IV shed light on yet additional disadvantages of the scholarly approaches examined in this Part II.

III. POSITIVE ANALYSIS: THE CASE FOR RECONCEPTUALIZING SHELLY AS A THIRTEENTH AMENDMENT DECISION

Parts I and II showed that the Shelley Court relied on the Fourteenth Amendment and that subsequent case law and scholarly efforts to narrow Shelley have remained within the Fourteenth Amendment. The Article’s next two parts instead seek to situate Shelley’s holding under the Thirteenth Amendment. As a matter of positive analysis, this Part III elaborates two plausible Thirteenth Amendment-grounded approaches to Shelley: one based on federal statute, the other on a form of quasi-federal common law that I dub “constitutional preemption.” Part IV makes the normative argument for conceptualizing Shelley in Thirteenth rather than Fourteenth Amendment terms.

A. The Legitimacy of Reconceptualizing Earlier Decided Cases. Before arguing how and why Shelley should be reconceptualized, it is necessary to establish the threshold proposition that reconceptualizing earlier decided cases is a legitimate form of constitutional argumentation. A full defense of this proposition is beyond the scope of this Article, for the notion of legitimacy in respect of constitutionalism itself is an exceedingly complex and contested subject. A comprehensive discussion also would entail careful consideration of other intricate topics, including the nature of precedent and stare decisis.

Even a brief discussion, however, can establish the prima facie validity of reconceptualization. First, no one doubts that the Court has power to
overrule its precedent under appropriate circumstances, and the reconceptualization of earlier decided cases can usefully be understood as a limited form of overruling. Moreover, the reconceptualization of earlier decided cases is a deeply entrenched aspect of the practice of American constitutional law.\textsuperscript{177} For example, all the scholarly approaches to Shelley discussed above in Part II.B are efforts to reconceptualize the decision. It is true that these approaches all remained squarely within the Fourteenth Amendment, but it cannot be said that this is a \textit{sine qua non} of legitimacy for reconceptualizing earlier decided cases. Indeed, the Supreme Court on many occasions has reconceptualized precedent, deciding that an earlier decision rested on a different constitutional principle than the case itself had identified. To provide just a few examples, Griswold’s famous effort to ground the constitutional right to privacy in penumbras emanating from the Bill of Rights\textsuperscript{178} was reoriented to understanding privacy as an aspect of the liberty that is protected by the first section of the Fourteenth Amendment.\textsuperscript{179} The doctrinal grounding for the right to travel provides yet another example. The “right to travel throughout the length and breadth of our land” that led the Court to strike down durational requirements for welfare in \textit{Shapiro v. Thompson}\textsuperscript{180} was grounded in the Equal Protection Clause.\textsuperscript{181} In \textit{Saenz v. Roe},\textsuperscript{182} however, the Court determined that the “right of the newly arrived citizen” to receive the same welfare benefits that long term residents receive instead rested on the Citizenship Clause of the Fourteenth Amendment.\textsuperscript{183}

Having established that reconceptualization is a part of contemporary constitutional practice, it remains to be shown that the particular decision of \textit{Shelley v. Kraemer} can and should be reconceptualized.

\textbf{B. Shelley As a Statutory Decision.} Shelley can plausibly be recast as a decision that is grounded in the Thirteenth rather than the Fourteenth Amendment. To see this, let us look more closely at the Thirteenth Amendment. That Amendment’s first section states that “[n]either slavery nor involuntary servitude . . . shall exist within the United States . . .”\textsuperscript{184} By its terms it is self-executing. In the \textit{Civil Rights Cases} the Supreme Court provided a narrow construction of the first section, announcing that it “simply abolished slavery.”\textsuperscript{185} The first Justice Harlan famously disagreed, expressing his view in the case of \textit{Hodges v. United States} that section 1 “by its own force . . . destroyed

\begin{footnotesize}
\begin{enumerate}
\item Professor Fallon’s account provides a full theoretical defense of the proposition that constitutional legitimacy is a function of public acceptance. See Fallon, supra note 175, at 1824-25. On this sophisticated view of legitimacy, the fact that reconceptualization is a deeply entrenched and uncontested methodology is strong evidence that it is publicly accepted and accordingly legitimate.
\item 394 U.S. 618 (1969).
\item See id. at 638 (concluding that the waiting period “clearly violates the Equal Protection Clause”).
\item 526 U.S. 489 (1999).
\item See id. at 506. For a more recent example of the phenomenon of reconceptualization, see Lingle v. Chevron U.S.A. Inc., 73 U.S.L.W. 4343, 4347 (2005) (deciding that the “substantially advances” test formerly understood to be an aspect of takings doctrine in fact is a component of due process analysis).
\item U.S. CONST. AMEND. XIII, §1.
\item 109 U.S. 3, 30 (1883).
\end{enumerate}
\end{footnotesize}
slavery and all its incidents and badges, and established freedom.” On this approach, the racially restrictive covenants in *Shelley* could have been held to be in violation of the first section of the Thirteenth Amendment if racially restrictive covenants were to be deemed incidents or badges of slavery. Although this is not an illogical approach to reconceptualizing *Shelley*, stare decisis and institutional considerations make it a second-best approach.

*Shelley* is more plausibly grounded, however, in the legislative powers that are created by the second section of the Thirteenth Amendment, which provides that “Congress shall have power to enforce this article by appropriate legislation.” The Court stated in the *Civil Rights Cases* that Congress’ enforcement powers under section 2 extend beyond abolition of slavery itself to include the power to address the “incidents” of slavery. Furthermore, when Congress acts to “eradicate all forms and incidents of slavery and involuntary servitude,” its regulations “may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not.” This is particularly significant for present purposes, for this means that legislation enacted pursuant to section 2 of the Thirteenth Amendment is not limited to state actors, but instead can directly regulate individuals.

But what precisely is included within Congress’ section 2 powers to address the “incidents” of slavery? The Supreme Court in *The Civil Rights Cases* was quite specific. The Court explicitly stated that “disabilities” with regard to the making of contracts and the holding of property so qualify. Said the Court,

[the long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master’s will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities were]

180 Hodges v. United States, 203 U.S. 1, 27 (Harlan, J., dissenting) (emphasis provided).
181 It is true that the Court on more than one occasion has implied that it might be willing to revisit the *Civil Rights Cases*’ narrow construction of section 1, indicating that it would “leave the question open” of whether section 1 of the Amendment by its own terms did anything more than abolish slavery. See City of Memphis v. Greene, 451 U.S. 100, 125-26 (1980) (“In *Jones*, the Court left open the question whether Section 1 of the Amendment by its own terms did anything more than abolish slavery. It is also appropriate today to leave the question open . . .”) (footnote omitted); see also General Bldg. Contractors Assoc’n v. Pennsylvania, 102 S. Ct. 3141 at n. 17 (1982) (same). Nonetheless, it seems likely that the stare decisis inertia that accompanies so hoary a case will resist its being overruled. This conclusion is not inconsistent with this Article’s effort at reconceptualizing *Shelley*. Overruling the *Civil Rights Cases*’ interpretation of section 1 does more violence to stare decisis and rule of law values than does reconceptualizing *Shelley* such that its ultimate holding (that courts cannot enforce racially restrictive covenants) remains in tact. For a discussion of the institutional reasons against concluding that racially restrictive covenants violate Section 1, see infra Part IV.G.
182 U.S. CONST. AMEND. XIII, §2.
183 The Civil Rights Cases, 109 U.S. 3, 30 (1883).
184 Id.
185 This is in contradistinction to section 5 of the Fourteenth Amendment, which empowers Congress to regulate only state actors. See United States v. Morrison, 529 U.S. 598, 621-24 (2000) (affirming this holding from the Civil Rights Cases, 109 U.S. 3, 11 (1883)).
186 Civil Rights Cases, 109 U.S. at 29.
the inseparable incidents of the institution.”

The racially restrictive covenant at issue in Shelley, of course, purported to disable African Americans from entering into contracts to purchase property and for that reason would qualify as being part of the class of “necessary incidents” of slavery.

Moreover, two federal statutes that were enacted in the late nineteenth century prohibited racial discrimination with regard to property and contract. Section 1 of the Civil Rights Act of 1866, which today can be found at 42 U.S.C. § 1982, provides that “all persons born in the United States and not subject to any foreign power . . . shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to . . . purchase . . . real and personal property.” What today is known as 42 U.S.C. § 1981 provides that “[a]ll person within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens.” As we shall see, the Court has concluded that both these statutory provisions were enacted pursuant to Congress’ powers under Section 2 of the Thirteenth Amendment.

Crucially, these statutory provisions that proclaim that “all persons” have the “same right[s]” enjoyed by white citizens to purchase real property and to make and enforce contracts were in effect when the Court heard the Shelley decision (and, indeed, they still are in effect today): what today is § 1982 was codified at 8 U.S.C. § 42 at the time of Shelley, and § 1981 was found at 8 U.S.C. § 41. The statutory language of both these provisions readily could have been applied to racially restrictive covenants. Such covenants could have been said to deprive Blacks of the “same right . . . as is enjoyed by white citizens . . to purchase . . . real property” in violation of § 42. Similarly, racially restrictive covenants interfere with Black citizens’ abilities to “make and enforce contracts” for the purchase of homes – abilities that are “enjoyed by white citizens” – thereby violating § 41.

Indeed, since Shelley was decided, both statutory provisions have been construed by the Supreme Court in ways that would make them applicable to racially restrictive covenants. In the leading case of Jones v. Alfred H. Mayer Co., the Court held that a white citizen’s refusal to sell a home in a private subdivision to African-Americans solely because of their race violated § 1982. Insofar as racially restrictive covenants constitute multiple private citizens’ refusals to sell their homes to African-Americans, it would follow a fortiori under Jones’ holding that restrictive covenants would run afoul of § 1982. With

193 Id. (emphasis provided).
195 See Act of April 9, 1866, c. 31, §1, 14 Stat. 27 (emphasis supplied). The 1866 Act was re-enacted by § 18 of the Enforcement Act of 1870, Act of May 31, 1870, c. 114, § 18, 16 Stat. 140, 144. At the time that Shelley was decided, this provision was codified as 42 U.S.C. § 1982. See Jones v. Alfred H. Mayer Co., 392 U.S. 409, 422 & n. 28 (1968).
197 See Shelley, 334 U.S. at 11.
respect to §1981, the Court in *Runyon v. McCrary* held that a private school’s denial of admission to Black children solely on the basis of race violated §1981’s requirement that Blacks have the same right to make and enforce contracts enjoyed by Whites. Racially restrictive covenants interfere with Black citizens’ ability to make contracts in the same manner that a denial of admission interferes with an African-American’s ability to contract.

The *Shelley* Court’s failure to ground its decision in these statutes was not mere oversight. Both these statutes had been invoked in the course of the Supreme Court litigation. Indeed, the very first question presented in the petition for certiorari granted by the Court was whether the restrictive covenants violated sections 41 and 42.\(^{200}\) Moreover, the Supreme Court referenced these statutory provisions in the course of the *Shelley* opinion.\(^{201}\) Furthermore, in *Hurd v. Hodge*,\(^{202}\) a companion case that was handed down the same day as *Shelley*, the Court relied on section 42 in its conclusion that courts in the District of Columbia could not enforce racially restrictive covenants.\(^{203}\)

In light of the known availability of sections 41 and 42 to address the legality of racially restrictive covenants, why didn’t the Court provide an alternative basis for its holding grounded in these federal statutes? The question can be sharpened: why did the Court reach to resolve a difficult constitutional question when it could have resolved the question solely by means of statutory interpretation?\(^{204}\)

It is difficult to definitively answer these questions, for there neither are transcripts of the oral argument in *Shelley* nor conference notes from the Justices themselves.\(^{205}\) There nevertheless are several prime candidate explanations. Perhaps most importantly,\(^{206}\) deciding *Shelley* on statutory grounds would have required that the Court reject dictum in several earlier cases that suggested that §§41 and 42 applied to state action but not to the


\(^{200}\) See *Shelley v. Kraemer*, 331 U.S. 803 (1947) (granting cert); Petition for a Writ of Certiorari to the Supreme Court of Missouri, en Banc and Brief in Support Thereof, at 18. Notwithstanding the caption of this last document, this is what served as the appellant’s petition for certiorari before the United States Supreme Court.

\(^{201}\) See *Shelley v. Kraemer*, 334 U.S. 1, 11 (1948).

\(^{202}\) 68 S.Ct. 847 (1948).

\(^{203}\) See id. at 850-53.

\(^{204}\) Indeed, the Court relied upon this very canon of avoiding constitutional questions in *Hurd*. See id. at 850 & n.6.

\(^{205}\) I contacted the Library of Congress, the Supreme Court Library and the National Archives. An extremely small number of transcripts exist prior, and according to these sources Shelley is not one of them. I have not checked the biographies of all the sitting Justices for an account of the Court’s reasoning in *Shelley*, but any such writing would be imperfect evidence in any event on account of its being the recollection of a single (or at best several) Justices. Such an inquiry nevertheless would be interesting to undertake.

\(^{206}\) It is interesting to speculate as to what other factors may have led the Court to incline in a constitutional rather than a statutory direction. The parties challenging the restrictive covenants certainly preferred a constitutional ruling and for that reason may have emphasized that approach. The Court itself had recently decided an important state action decision, see *Marsh v. Alabama*, 326 U.S. 501 (1946), and may have been inclined for that reason to further develop the state action doctrine.
actions of private individuals. In Corrigan v. Buckley, where suit had been brought to enjoin a threatened violation of racially restrictive covenants, the Supreme Court stated that 8 U.S.C. §§41 and 42 did “not in any manner prohibit or invalidate contracts entered into by private individuals in respect to the control and disposition of their own property.” While this language is not properly considered a holding because “no claim that the covenants could not validly be enforced against the appellants had been raised in the lower courts, and no such claim was properly before” the Supreme Court, a case decided after Corrigan nonetheless referred to the above language as a holding. Dictum from The Civil Rights Cases also suggested to some that the Court was of the view that the Civil Rights Act of 1866 only applied to governmental action, though a close reading suggests that this is not the best understanding of that dictum. Be that as it may, the point remains that there were precedential hurdles to relying on these federal statutes that the Shelley Court may not have wished to jump. Indeed, the Shelley opinion went out of its way to show that its holding was consistent with past decisions, including Corrigan in particular.

In addition to precedential hurdles, there appears to have been a conceptual obstacle as well to Shelley’s reliance on sections 41 and 42. A fair reading of Hard v. Hodge, Shelley’s companion case, conclusively shows that the Court at that time thought that Congress had enacted section 42 pursuant to its powers under section 5 of the Fourteenth Amendment, not section 2 of the

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207 271 U.S. 323.
208 Id. at 331.
209 Jones v. Alfred H. Mayer, 392 U.S. 409, 420 (1968). For a contrary view, see id. at 452 & n. 8 (Harlan, J., dissenting).
211 See, e.g., Jones, 392 U.S. at 451 (Harlan, J., dissenting).
212 To begin, the language from The Civil Rights Cases concerning §42 unquestionably is dictum because the holding in that case concerned the 1875 civil rights act, an entirely different statute. The language thought by some to indicate the Court’s view that the 1866 Act applied only to governmental action is as follows: after reciting the entirety of the 1866 Act, the Court wrote that “[his] law is clearly corrective in its concept. . .” The Civil Rights Cases, 109 U.S. 3, 16 (1883). The Court explained this limitation on the ground that “civil rights . . . cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws [or] customs . . .” Id. at 17. In the very next paragraph, however, the Court stated that “[o]f course, these remarks do not apply to those cases in which congress is clothed with direct and plenary powers of legislation over the whole subject . . .” Id. at 18. Notably, later in the Civil Rights Cases the Court observed that Congress has the power under section 2 of the Thirteenth Amendment to regulate individuals as well as governments. See id. at 20.
From this, it follows that the language thought by some to express the view that all of the 1866 Act applies only to governmental action instead applies only to those aspects of the 1866 Act (which since had been re-enacted in 1870 under the Fourteenth Amendment) that could not have been enacted under section 2 of the Thirteenth Amendment. Because the Civil Rights Cases itself recognizes that Congress had power under the Thirteenth Amendment to regulate race-based disabilities to enter contracts and hold private property, see id. at 22, the dictum that the 1866 Act applies only to governmental action is best construed as not applying to the Act’s proscriptions regarding contracts and property.
Thirteenth Amendment. The *Hard* Court interpreted the scope of section 42 by “reference . . . to the scope and purposes of the Fourteenth Amendment; for that statute and the Amendment were closely related both in inception and in the objectives which Congress sought to achieve;”216 the Court made no such reference, however, to the Thirteenth Amendment. As a result of conceptualizing section 42 as growing from the soil of the Fourteenth Amendment, the Court read a state action requirement into the statute: “The action toward which the provisions of the statute under consideration is directed is governmental action . . . . [T]he statute does not invalidate private restrictive agreements . . . .”217

As high as these precedential and conceptual hurdles may have been, however, they certainly were not insurmountable. Indeed, the Court rejected the dicta and analysis discussed immediately above and held that these statutory provisions applied to private parties as well as public authorities in the *Jones* and *Runyon* cases. The *Jones* Court concluded that (what by then was) 42 U.S.C. §1982 had been enacted by Congress under section 2 of the Thirteenth Amendment,218 and then determined on the basis of section 1982’s statutory language219 and legislative history220 that Congress had intended the provision to regulate private individuals as well as governmental entities. As well, the *Jones* Court noted that opponents of the 1866 objected that the Act would directly regulate private citizens and that defenders of the Act “did not deny the accuracy of those characterizations.”221 Relying on the Court’s reasoning in *Jones*, the *Runyon* Court held that §1981 likewise applied to private as well as governmental conduct.222 The statutory language and legislative histories of

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216See id. at 32.
217See id. at 31.
218See *Jones*, 392 U.S. at 413(concluding that section 1982 “is a valid exercise of the power of Congress to enforce the Thirteenth Amendment”); see also id. at 433-34 (quoting Representative Thayer as explaining his support for the 1866 Civil Rights Act as follows: “When I voted for the amendment to abolish slavery . . . I did not suppose that I was offering . . . a mere paper guarantee. And when I voted for the second section of the amendment, I felt . . . certain that I had . . . given to Congress ability to protect . . . the rights which the first section gave . . .”). Indeed, there is no plausible basis for concluding that Congress relied on any of its powers apart from section 2 of the Thirteenth Amendment when it enacted the 1866 Civil Rights Act; Congress clearly could not have relied on authority granted in section of the Fourteenth Amendment insofar as that Amendment had not yet been adopted in 1866. As described above, however, Congress re-adopted the 1866 Civil Rights Act in 1870, after passage of the Fourteenth Amendment, to confirm the Act’s applicability against States, because some questioned whether Congress had the power to regulate the states under section 2 of the Thirteenth Amendment. See supra note 195. The Court’s analysis of section 42 in *Hard* would be correct only on the unlikely assumption that the Congress that re-adopted the 1866 Act to eliminate doubts concerning the act’s constitutional intent to limit the Act’s scope by eschewing its powers under section 2 of the Thirteenth Amendment.
219See id. at 420-26.
220See e.g., id. at 427(showing that Congress “had before it an imposing body of evidence pointing to the mistreatment of Negroes by private individuals and unofficial groups, mistreatment unrelated to any hostile state legislation” at the time it enacted the Civil Rights Act of 1866); see also id. at 427-435.
221Id. at 433.
222See *Runyon* v. *McCrary*, 427 U.S. 160, 173 (1976) (the view that §1981 addresses only governmental actors “is wholly inconsistent with Jones’ interpretation of the legislative history of section 1 of the Civil Rights Act of 1866 . . .”). In fact, the statutory question raised in *Runyon* may have been importantly different from the question in *Jones* because there was nontrivial evidence that §1981, unlike §1982, was
these statutes were equally available to the Court in 1948 when Shelley was decided. It follows that the Court could have decided Shelley on statutory grounds. For this reason, it is perfectly plausible to reconceptualize Shelley as having been decided on statutory grounds.  

C. Shelley as Quasi-Federal Common Law. To the suggestion made above that Shelley can be grounded in federal statutory law, the objection might be posed that this means that racially restrictive covenants would have been legal and enforceable in the event Congress had not enacted the Civil Rights Act of 1866. To this objection there are two responses. First, the mere fact that legislative inaction leads to an undesirable state of affairs does not mean that the Constitution necessarily provides the problem’s solution; the solution instead may lie exclusively with the legislature. Second, be that as it may, in this particular context the Court could have generated a non-constitutional solution enacted under Congress’ §5 powers under the Fourteenth Amendment rather than Congress’ §2 powers under the Thirteenth Amendment. See Runyon, 427 U.S. at 195-198 (White, J., dissenting). This precise scope of section 1982 does not matter for present purposes, of course, because the racially restrictive covenant in Shelley would have been invalid under federal law even if only 42 U.S.C. section 1982 applied to it.

It may seem remarkable that neither the Court nor scholarly commentators have advanced the argument made here that Shelley can be reconceptualized on statutory grounds, but that indeed appears to be the case. Though a cursory reading of Justice Black’s dissenting opinion in Bell v. Maryland, 378 U.S. 226, 331 (1964) (Black, J., dissenting), might appear to argue that Shelley could have been decided under the Civil Rights Act of 1866, a fair reading of Justice Black’s discussion in Bell reveals that he was not arguing that the racially restrictive covenants themselves violated federal statutory rights granted by the Civil Rights Act, but that the Act prohibited judicial enforcement of racially restrictive covenants and somehow transformed enforcement into state action for purposes of the Fourteenth Amendment. Here are Justice Black’s words:

It seems pretty clear that the reason judicial enforcement of the restrictive covenants in Shelley was deemed state action was not merely the fact that a state court had acted, but rather that it had acted ‘to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell.’ 334 U.S., at 19, 68 S.Ct. at 845. In other words, this Court held that state enforcement of the covenants had the effect of denying to the parties their federally guaranteed right to own, occupy, enjoy, and use their property without regard to race or color. Thus, the line of cases from Buchanan through Shelley establishes these propositions: (1) When an owner of property is willing to sell and a would-be purchaser is willing to buy, then the Civil Rights Act of 1866, which gives all persons the same right to ‘inherit, purchase, lease, sell, hold, and convey’ property, prohibits a State, whether through its legislature, executive, or judiciary, from preventing the sale on the grounds of the race or color of one of the parties. Shelley v. Kraemer, supra, 334 U.S., at 19, 68 S.Ct. at 845.  

Bell, 378 U.S. at 331 (Black, J., dissenting). In other words, Justice Black still conceptualized Shelley as having been decided on the basis that judicial enforcement violated federal law, not that the covenant itself violated federal law.

Nor has the Court sought to reconceptualize Shelley on statutory grounds in other cases. The most obvious place one would expect to find a reconceptualization of Shelley on statutory grounds would be the Jones decision. One noted constitutional law casebook cites to Jones to support the claim that “[i]t has been urged that Shelley can be explained on the basis of 42 U.S.C. §1982.” Sullivan and Guntier, supra note 49, at 882. A careful reading of the opinion, however, reveals no such thing. The Shelley decision is referenced only twice in the opinion, see Jones, 392 U.S. at 419 & n.24; id. at 445, and neither time does the Court suggest that Shelley could have been decided on the basis of federal statutory law.

\[2006\] Reconceptualizing Shelley 40
to the problem of racially restrictive covenants even had Congress not acted. Grounded once again in the Thirteenth Amendment, the Court could have relied on a form of quasi-federal common law that I shall call “constitutional preemption” to hold that the Constitution itself preempts either state regulation or private action of the sort involved with racially restrictive covenants.223 As I will soon explain, constitutional preemption is distinguishable from classic federal common law insofar as the federal court does not create a governing federal rule in place of the state rule that is preemted.224 Importantly, this deflects the challenges that some scholars and judges have identified in respect of federal courts’ powers to create federal common law.

1. **Distinguishing Federal Common Law From the Quasi-Federal Common Law of Constitutional Preemption.** Showing the precedential basis for understanding *Shelley* as an instance of quasi-federal common law first requires a clear understanding of the difference between classic federal common law and constitutional preemption. To begin, although *Erie v. Tompkins* declared that “[t]here is no federal general common law,”225 federal courts still create what has been called “specialized” federal common law under certain conditions.226 Post-*Erie* federal common law is binding on both federal and state courts,227 but it does not have the status of constitutional law and hence may be overturned by Congress.228

The legitimacy and appropriate scope of post-*Erie* federal common law has been widely discussed in the scholarly literature.229 Scholars have identified two considerations that cast doubt on the legitimacy of federal common law, both which can be traced to *Erie* itself. The first is the federalism-based concern grounded in the Tenth Amendment of displacing regulatory authority

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223 Although Professor Alfred Hill famously created the phrase “constitutional preemption,” see Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024 (1967), I am using the term differently than he does. For Hill, federal judicial power to fashion federal rules appears to be coterminous with the areas that have been preempted by the Constitution. See id. at 1025 (“There are areas of federal preemption, created by force of the Constitution, in which the federal courts formulate rules of decision without guidance from statutory or constitutional standards . . .”); see Paul J. Mishkin, *Some Further Last Words on Erie – The Thread*, 87 HARV. L. REV. 1682, 1683 & n. 9 (1974)(criticizing this aspect of Hill’s argument).


227 See id. at 405.

228 Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 10-11 (1975). This is particularly important for present purposes, because it means that contemporary federal common law does not displace congressional participation, but instead holds the potential of opening a “dialogue” with Congress. Id. at 29. This is especially significant in contexts where the normatively attractive outcomes are highly context-dependent, for Congress has several well-known institutional advantages vis-a-vis courts in generating complex codes that account for multiple variables, as will be discussed at greater length below in Part IV.G.

that properly belongs to the States. This relates to the source of judicial power to create federal common law rules. These two considerations are analytically distinct: even if states are without power to regulate a particular matter that falls within Congress’ regulatory authority, it does not follow that federal courts have the power to fill in the regulatory vacuum. This latter question concerning if and when federal courts have power to fashion federal common law rules is an instantiation of the separation-of-powers principle that federal law-making is assigned to Congress, not the federal courts.

Keeping in mind these two distinct concerns, there is an important difference between federal common law and the quasi-federal common law that I have dubbed “constitutional preemption.” Constitutional preemption is a federal court’s determination that states are without regulatory authority in a particular field. Accordingly, while constitutional preemption may implicate the first obstacle to federal common law under Erie, it does not implicate the second. To illustrate, in adopting a rule of federal common law in the case of Clearfield Trust Co. v. United States, the Court both displaced state law that otherwise would have governed rights under commercial paper and then “fashioned the governing rule of law according to [its] own standards.” Contrast this with what happens when the Court undertakes constitutional preemption, as in the dormant commerce clause cases. When the Court struck down the Commerce Clause grounds a Connecticut law requiring out-of-state shippers of beer to affirm that their posted prices for products sold in

20See Erie, 304 U.S. at 79-80 (holding that federal court creation of general federal common law has “invaded rights which in our opinion are reserved to the Constitution to the several states,” language that mirrors the Tenth Amendment).

21See id. at 78 (“[N]o clause in the Constitution purports to confer such a power upon the federal courts” to “declare substantive rules of common law applicable in a state whether they be local in their nature of ‘general’ . . . “).

22See Paul J. Mishkin, Some Further Last Words on Erie – The Thread, 87 HARV. L. REV. 1682, 1683 & n. 9 (1974) (making this point). For a partial defense of the contrary view, see Field, supra note 229, at 983 (arguing that federal courts can make federal common law “whenever federal interests require a federal solution.”).

23Both of these concerns are statutorily addressed by the Rules of Decision Act, which provides that “[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.” 28 U.S.C. §1652. After Erie was decided, the Court typically relied on this statute, rather than constitutional analysis. See John Hart Ely, The Irrepressible Myth of Erie, 87 HARV. L. REV. 693, 704 (1974) (noting that on account of the Rules of Decision Act “[i]t therefore is not the least bit surprising that the Court did not mention the constitutional basis of the Erie decision again for eighteen years”)

24Cf. Clark, supra note 224, at 1374-75 (justifying the case of Boyle v. United Technologies Corp., in similar terms).

25318 U.S. 363 (1943).

26Id. at 366 (holding that “[t]he rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law”).

27Id. at 367. At issue in that case was whether the United States could recover for a check it had issued, but which had been fraudulently cashed, where 2½ months had passed between the forgery and notification of Clearfield Trust. Pennsylvania law provided that “unreasonable delay” in providing notice of forgery barred recovery, and Clearfield Trust defended on this ground. The United States Supreme Court displaced Pennsylvania law, creating in its place a rule under which the federal government’s failure to give prompt notice of forgery operated as a defense only if the delay resulted in damage. Id. At 367-69.
Connecticut were no higher than the prices at which the products were sold in bordering States, the Court ruled that Connecticut "exceeded the inherent limits of [its] authority" but did not craft an alternative rule in its place. This always is true of dormant commerce clause jurisprudence: it displaces state law but does not replace it with a federal substantive rule. And this is true of constitutional preemption, as well.

Understanding constitutional preemption’s relation to federal common law implies two things. First, constitutional preemption is less difficult to doctinally justify than federal common law because the federal court is not fashioning a governing federal rule, but is only ruling that states are without the power to regulate. Second, constitutional preemption is one component of many federal common law decisions. Those federal common law decisions hence are instructive vis-a-vis the conditions that must pertain for constitutional preemption to be found.

2. *Shelley* as Constitutional Preemption. This subsection shows that the *Shelley* case readily can be conceptualized as an instance of constitutional preemption. The dormant commerce clause and federal common law case law provide precedent for understanding *Shelley* in this fashion. Indeed, careful analysis shows that treating *Shelley* as a quasi-federal common law decision is even less problematic vis-a-vis *Erie* concerns than is either dormant commerce clause doctrine or federal common law. If dormant commerce clause and federal common law are doctrinally legitimate, it follows *a fortiori* that a constitutional preemption approach to *Shelley* is legitimate.

*Shelley* readily can be characterized as an instance of constitutional preemption. To begin, the Court did not prescribe a substantive rule that governed the parties. *Erie’s* second obstacle pertaining to federal court power to fashion substantive rules accordingly does not arise. *Shelley* can be

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238 See Healy v. the Beer Institute, 491 U.S. 324, 326 (1989).
239 Id. at 336.
240 One of the country’s foremost constitutional law scholars, Professor Henry Monaghan, has argued that dormant commerce clause is a type of federal common law. See Monaghan, supra note 228, at 15-17. There is much that recommends his view insofar as the dormant commerce clause involves federal court creation of complex rules without statutory directive (and in this way is of a “common law” character), which are “wholly subject to congressional revision” (as is the case with post-*Erie* federal common law). Id. at 17. Monaghan hypothesizes that dormant commerce clause doctrine has not been conceptualized as a form of federal common law because the result is “Marbury-like invalidation and does not ‘look like’ the affirmative creation of federal regulatory rules.” Id. Monaghan dismisses the significance of this distinction, see id. at 17-18, but the analysis provided above in text shows that this is of great import in respect of the legitimacy of federal common law. It is true, as Professor Monaghan notes, that dormant commerce clause displacement of state law frequently leaves some operative law in place, see id. at 17, but *Erie’s* second concern with regard to the source of federal court-lawmaking power is not triggered so long as the operative law that remains has not been created by federal courts. See also infra note 241.
241 Among other things, this explains why the Supreme Court has not had to explain why its dormant commerce clause jurisprudence is consistent with the Rules of Decision Act; the terms of the Act do not appear to be even potentially applicable insofar as a federal court that strikes down a state statute on the basis of the dormant commerce clause does not fashion a federal rule to take the stricken state law’s place. See supra note 233 (explaining the Rules of Decision Act).
242 Many but not all constitutional preemption is not part of those decisions where federal courts fashion federal common law for the purpose of giving effect to a federal statute. See, e.g., Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448 (1957).
understood as a limitation on what is permissible for individuals to do under state contract and property law. Akin to what Congress enacted in the form of sections 1981 and 1982, Shelley can be understood as a judicial determination that race-based obstacles to contracting or property ownership are impermissible.

So understood, Shelley poses less of a threat to Erie’s first obstacle of disrupting state autonomy than does the dormant commerce clause doctrine. This is so because Shelley did not displace any state law. More than 20 years before Shelley the Court had ruled that racial zoning – state or municipal legislation to bar African Americans from living in particular areas – was beyond state legislative authority on account of the Equal Protection Clause. The Shelley decision accordingly did not displace any state regulatory authority whatsoever. Instead, on the constitutional preemption view advanced here, Shelley simply determined that what had been thought to be a realm of individual decisionmaking autonomy was not. In fact, because Shelley displaced no state legislative authority, but only private citizens’ decision making authority, Shelley does not even implicate Erie’s first concern.

But what legitimate basis was there for the Court to displace individual decision making autonomy? This question is particularly pressing in relation to constitutional preemption, for the Constitution virtually always limits governments, not individuals. The answer is that the source of constitutional preemption in Shelley is the Thirteenth Amendment, one of the few constitutional provisions that directly limits private citizens as well as governments. Dormant commerce clause doctrine is particularly helpful at this point in our analysis. Assuming for present purposes that Section 1 of the Thirteenth Amendment proscribes slavery but not its badges and incidents, it is incontestable that Congress has the power under Section 2 of the Thirteenth Amendment to proscribe race-based obstacles to contract and property, and to apply such proscriptions directly to private individuals. Shelley thus can be seen as a Thirteenth Amendment analogue to dormant commerce clause jurisprudence: even though Congress had not acted pursuant to its Section 2 powers, Shelley applied proscriptions that Congress could have legislated to entities that Congress had the power to reach. And, like dormant commerce clause jurisprudence, the proscription was not a federal rule that directly regulated behavior, but instead was a determination that a given subject was beyond the regulatory competence of non-federal actors (in this case, individuals).

The final question is whether the circumstances in Shelley were appropriate for constitutional preemption. Guidance can be provided by considering other instances where federal courts have found constitutional preemption.

244 See supra note 44 and accompanying text.
245 See Civil Right Cases, 109 U.S. at 30, discussed supra at p. 3.
preemption (though even the complete absence of analogous precedent would not be fatal since all doctrines must start somewhere). Relevant precedent includes not just dormant commerce clause, but also federal common law case law. Although the contexts where preemption has been found are not similar to racially restrictive covenants, a general principle identified by the Court as explaining where preemption is found – where there are “uniquely federal interests” – quite plausibly encompasses racially restrictive covenants.

To see this, let us look first to federal common law. The modern case law has taken pains to explain the basis on which state law is displaced. For instance, in a decision one year before Shelley, the case of United States v. Standard Oil Co. of California, the Court reasoned that Erie limitations on federal court powers do not extend to what are “essentially federal matters.” Said the Court,

[T]he Erie decision had no effect, and was intended to have none, to bring within the governance of state law matters exclusively federal, because made so by constitutional or valid congressional command, or others so vitally affecting interests, powers and relations of the Federal Government as to require uniform national disposition rather than diversified state rulings.

In that case, the Court held state negligence law did not apply to a lawsuit by the United State for alleged negligence by a defendant whose truck had injured a soldier. The case implicated “essentially federal matters,” and state law accordingly was displaced, because the litigation concerned the military and affected the power of the purse. The more recent judicial formulations in the federal common law context are much the same. Matters involving “uniquely federal interests” it is said “are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced.”

In the modern dormant commerce clause cases, by contrast, the Court has not sought to explain the source of federal judicial power to displace state law. This undoubtedly is due to the fact that dormant commerce clause case law is longstanding and extensive; the Court is content to refine the doctrinal rules that have been developed in piecemeal case law fashion and to disregard foundational questions as to the constitutional authority to displace state law. The early cases in which the Court fashioned dormant commerce clause

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248 United States v. Standard Oil Co. of California, 332 U.S. 301, 307 (1947). See also id. (“There was no purpose or effect [in Erie] for broadening state power over matters essentially of federal character or for determining whether issues are of that nature.”)
249 Id.
250 Id. at 307.
251 Boyle, 487 U.S. at 504.
doctrine, however, did consider the source of judicial power to supplant state law, and they rationalized displacement of state law much as the Court has done one hundred years later in its federal common law jurisprudence. Thus, in the seminal case of *Cooley v. Board of Wardens of the Port of Philadelphia,* the Court ruled that although states were not generally deprived of legislative authority over those areas (such as commerce) that Congress had constitutional authority to regulate, there were certain subject matters with respect to which state regulatory power was excluded even absent congressional regulation. The Court referred to these as subjects that are “in their nature national . . .” Matters that “may justly be said to be of such a nature as to require exclusive legislation by Congress” accordingly “require[] that a similar authority should not exist in the states.”

In short, in both the federal common law and dormant commerce clause contexts, the Court has explained displacement of state law in similar ways: by determining that the subject matter is in its “nature national” and “essentially national.” It must be acknowledged that the contexts in which the Court has found such overwhelming national interests sufficient to uproot state law are not similar to racially restrictive covenants: unique federal interests in the federal common law have been held to include “obligations to and rights of the United States under its contracts,” the “priority of liens stemming from federal lending programs,” “civil liability of federal officials for actions taken in the course of their duty,” and certain questions touching on foreign relations, and *Cooley,* the important early dormant commerce clause case, spoke of subjects that “admit only of one uniform system, or plan of regulation.”

Nonetheless, a strong argument can be mounted that matters pertaining to slavery similarly amount to a “uniquely federal interest” that justifies the displacement of state regulatory authority. The proposition that the absolute rejection of slavery, as well as its incidents and badges, is a uniquely federal interest likely is self-evident to many. Doctrinal support for this proposition is that the Thirteenth Amendment’s prohibition against slavery extends not only to states, but also applies directly to individuals. As well, Congress has powers under section 2 of the Thirteenth Amendment to regulate not only states, but also individuals. The Thirteenth Amendment is one of the only constitutional limitations that applies directly to private citizens, and this

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253 U.S. 299 (1851).
254 See id. at 318.
255 Id. at 319.
256 Id.
257 Id. at 318.
259 Boyle, 487 U.S. at 504-05 (collecting cases).
261 Cooley, 53 U.S. at 319.
262 The Court also has suggested that the right to travel may apply to individuals. See Saenz v. Roe, 526 U.S. 489 (1999).
constitutional exception plausibly can be understood to mean that slavery is of such significance that it cannot be permitted to exist even outside the formal state-defined legal framework. That is to say, not only must state law be displaced by the anti-slavery imperative, but so must private ordering. The Thirteenth Amendment’s limitation of both states and private individuals thus reflects an unusual choice of opting for nationwide uniformity: uniformity across not only polities but across informal private practices. The wide-ranging uniformity created by the Thirteenth Amendment thus amounts to an explicit textual basis for concluding that matters relating to slavery constitute a uniquely federal interest.

IV. NORMATIVE ANALYSIS: THE CASE FOR RECONCEPTUALIZING SHELLEY AS A THIRTEENTH AMENDMENT DECISION

Having shown in the previous Part that there were plausible grounds aside from the Fourteenth Amendment on which the Shelley decision could have rested, this Part IV identifies and explains seven advantages to reconceptualizing Shelley as a Thirteenth Amendment-based decision. These seven benefits comprise the normative case for reconceptualizing Shelley. In addition, these seven benefits constitute seven additional drawbacks to the scholarly approaches examined above in Part II.B that seek to explain Shelley as a Fourteenth Amendment-based decision.

A. A More Compelling Conceptualization. Reconceptualization in the manner advocated here is sensible because the Thirteenth Amendment framework provides a more compelling conceptual account of what made racially restrictive covenants wrongful. At bottom, it was not judicial enforcement that was troublesome, but the substance of the covenants themselves. The legal disabilities imposed by blocs of restrictive covenants – interference with African-Americans’ abilities to enter into contracts and hold real property by virtue of their racial identity – reproduced several of the core legal disabilities that characterized slavery. Because the Thirteenth Amendment (unlike the Fourteenth Amendment) applies to individuals, it (but not the Fourteenth Amendment) targets the genuine problem with racially restrictive covenants – not judicial enforcement but the covenants themselves, which are best understood as the product of individuals’ activities rather than action of the state and hence fall outside the Fourteenth Amendment’s purview.

B. Relieving Stress on the Public/Private Distinction. Reorienting Shelley in the manner advocated here eliminates the jurisprudential perplexity regarding the public/private distinction that Shelley created. It is important to be clear about what I am claiming here. The public/private distinction is subtle and controversial even without Shelley, and this Article does not purport to provide a full-fledged defense of the distinction. What I do claim is that the

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264 Cf. Hills, supra note 121, at 150.
265 This Article’s defense of retaining the distinction is based on the claim that the distinction reflects American cultural values, but is not a comprehensive defense of the public/private distinction. See supra Part II.A. For some other defenses of maintaining the public/private distinction, see Marshall, supra note
considerable threat to the public/private distinction posed by *Shelley’s* attribution rationale. It disappears entirely under the Thirteenth Amendment reconceptualization advocated here. The necessity of identifying state action arose in *Shelley* only because the Court relied on the Fourteenth Amendment, which long has been understood as limiting governmental, but not private, activity. There would have been no need for the Court to identify state action under a Thirteenth Amendment approach because that constitutional provision has been held to apply directly to individuals. In short, there is no reason to identify an activity as “public” or “private” under a Thirteenth Amendment approach because the Thirteenth Amendment applies to both.

C. **Facilitating the Creation of a More Principled State Action Doctrine.** Closely related to the point immediately above, reconceptualizing *Shelley* may facilitate the creation of a more principled state action doctrine. Because *Shelley* is so well known, and is universally regarded as a state action case, the case undoubtedly has exerted an important influence on how the legal community thinks about state action. Indeed, *Shelley* is one case that virtually every law student studies and, more so than virtually any other, a case that almost all attorneys seem to remember. *Shelley* accordingly is a case that helps to constitute people’s “loadstar” intuitions about state action, and efforts to devise principles that explain state action accordingly must accommodate *Shelley’s* fact pattern. That poses a considerable challenge to the formulation of a conceptually sound state action doctrine for the reasons long identified by courts and commentators: if judicial enforcement attributes a contract’s substantive provisions to the government, then individuals must “conform their private agreements to constitutional standards whenever, as almost always, the individuals might later seek the security of potential judicial enforcement.”

Reconceptualizing *Shelley* as a Thirteenth Amendment-based decision takes the case outside of the state action context, thereby liberating the state action doctrine from the hopeless task of identifying state action on *Shelley’s* facts. This might aid the creation of a more conceptually sound state action doctrine.

D. **Making Racially Restrictive Covenants Illegal.** Fourth, the Thirteenth Amendment’s direct application to individuals solves a deeply disturbing byproduct of *Shelley’s* Fourteenth Amendment approach. Under *Shelley*, the restrictive covenants themselves were perfectly legal. A pre-*Shelley* decision had held that racially restrictive covenants did not violate the Fourteenth Amendment since the covenants themselves involved no state action, and
Shelley expressly confirmed this holding.272

The fact that racially restrictive covenants remained legal indicts the logic and appeal of Shelley’s approach for at least three reasons. First, it is an outrageous embarrassment for racially restrictive covenants to be permissible in our country. Second, it is very odd for a contract to be legal but its enforcement to be unconstitutional. This runs against the strong norm in our country’s legal culture that legal rights are accompanied by legal remedies when those rights are violated.273 Deviations from that norm typically are subject to harsh rebuke by legal scholars. Consider the criticism that attends contemporary Eleventh Amendment doctrine, under which Congress may grant individuals rights against states but the individuals may not sue in either federal or state court if states violate these rights.274 Much of the scholarly critique of the Eleventh Amendment equally applies to what Shelley created: contractual legal rights that are legal but not judicially enforceable.

Third, a recent study by Richard Brooks, a professor at Yale Law School, concludes that Northern residential segregation . . . was maintained and perpetuated in large part through racial restrictive covenants” notwithstanding the fact that such covenants were judicially unenforceable.275 Brooks argues that “[covenants were valuable signals that served to coordinate the behavior of a variety of private individual and institutional actors – signals that remained effective despite their later legal unenforceability.”276 The legality of restrictive covenants was the result of Shelley’s Fourteenth Amendment approach, which required the location of state action and therefore could not intervene before the point of judicial enforcement. This Article’s Thirteenth Amendment approach, by contrast, operates directly against the restrictive covenants themselves; because the Thirteenth Amendment applies to individuals, “private” action that constitutes a badge or incident of slavery – such as depriving African-Americans of the ability to contract or hold property through the use of racially restrictive covenants – runs afoul of Thirteenth Amendment principles. Indeed, under the Thirteenth Amendment based statutes discussed earlier in this Article,277 racially restrictive covenants themselves are illegal as a matter of federal law.

E. Consistency with Post-Shelley Case Law. A fifth reason for reconceptualizing Shelley is that a Thirteenth Amendment approach better explains the post-Shelley case law. As shown in Part I, courts almost uniformly have rejected Shelley’s attribution rationale; courts have not deemed judicial

273See, e.g., Marbury v. Madison, 5 U.S. (Cranch) 137, 163 (1803)(quoting Blackstone that “where there is a legal right there is also a remedy”).
274See, e.g., Alden v. Maine, 527 U.S. 706, 759 (1999). A long list of scholars has criticized the Court’s Eleventh Amendment decisions for creating a legal regime in which citizens may have valid legal rights that are not judicially enforceable. See, e.g., Carlos Manuel Vazquez, What is Eleventh Amendment Immunity?, 106 YALE L.J. 1683 (1997); Vicki C. Jackson, The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity, 98 YALE L.J. 1, 3 (1988).
275See Brooks, supra note 4 at 3-4.
276Id. at 4.
277See supra Part III.B.
enforcement of individuals’ agreements to qualify as state action that triggers the application of the Fourteenth Amendment’s limitations to the substance of the agreements.\textsuperscript{278} What are we to make of the disjunction between Shelley’s Fourteenth Amendment attribution rationale and the decided case law? Two possibilities suggest themselves: either (1) Shelley’s principle can be used to critique the post-Shelley case law, or (2) the post-Shelley case law can be used to indict Shelley. The considerations that favor the case law method favor the latter approach. Underwriting the case law methodology is a preference for inductive reasoning from the concrete over deductive reasoning from first principles.\textsuperscript{279} The choice between the two ultimately is driven by epistemology: is knowledge of this sort more likely to be identified in the abstract, or through examination of a series of context-specific outcomes?\textsuperscript{280} Case law reasoning is a form of inductive reasoning that is based on the expectation that principles will emerge over time from a careful examination of the pattern that is produced by case-by-case decisionmaking.

To the extent that the case law method’s inductive approach is superior to deductive reasoning in this context, the pattern of post-Shelley case law simultaneously indictcs Shelley’s Fourteenth Amendment approach and recommends this Article’s Thirteenth Amendment approach. To begin, the virtually uniform rejection of Shelley’s Fourteenth Amendment approach documented in Part I is evidence that the Shelley Court’s rationale does not accurately capture the principle that appropriately grounds the decision’s holding. Recall that Shelley’s Fourteenth Amendment approach necessitated the location of state action, and state action in the enforcement of a private covenant was identified by virtue of Shelley’s “attribution” rationale.\textsuperscript{281} So, for example, if the attribution rationale had been followed, then judicial enforcement of contracts limiting speech would have triggered constitutional review, as would judicial enforcement of arbitral awards of punitive damages that were assessed absent the procedures that courts constitutionally must utilize before assessing punitive damages. Similarly, under the attribution approach, courts should have refused to enforce testamentary wills that condition inheritance on a child’s marriage to a person of a specified religious faith.\textsuperscript{282} But, as documented above, these outcomes have not materialized.\textsuperscript{283}

Rather, the consistent pattern across case law over a period of more than fifty years across a wide array of courts and Supreme Court Justices is far better explained by the Article’s Thirteenth Amendment approach. Under this alternative rationale for Shelley, the refusal to judicially enforce racially

\textsuperscript{278}See Part I.B.1.
\textsuperscript{281}See supra at p. 7.
\textsuperscript{282}See supra note 40.
\textsuperscript{283}See supra Part I.B.1.
restrictive covenants is not predicated on judicial enforcement constituting state action. Rather, what happens to the covenants is a consequence of the racial content of the covenants themselves and the fact that the covenants sought to reproduce some of the legal disabilities that characterized slavery. On this approach, the logic that renders racially restrictive covenants illegal has no bearing on covenants limiting speech or testamentary provision that aim to influence a beneficiary’s religious choices. Accordingly, the post-*Shelley* case law is fully consistent with a Thirteenth Amendment conceptualization of *Shelley*.

Additional evidence that a Thirteenth Amendment approach is consistent with post-*Shelley* cases law are the many judicial opinions that have suggested that *Shelley* is limited to instances of “race discrimination.” Though these cases did not explain why the attribution rationale properly applied only to race, a Thirteenth Amendment approach answers why *Shelley*’s interference with private ordering appropriately is properly limited to the racial context: the Thirteenth Amendment’s proscription against slavery quite understandably is race-focused.

A Thirteenth Amendment approach also provides a principled basis for critiquing some of the post-*Shelley* case law. As shown above, the Supreme Court was unwilling to extend *Shelley* in the sit-in cases. The Court did not explicitly explain its unwillingness to rely on *Shelley*, but this presumably was because the Court could not identify a principled stopping-point to the attribution rationale; under *Shelley*’s approach, after all, an individual’s discriminatory animus behind requesting that the police enforce a trespass ordinance and remove an unwanted (Black) visitor would be attributed to state, triggering Fourteenth Amendment limitations. A store’s refusal to do business with a person solely on the basis of that person’s race, however, is plausibly characterized as a race-based refusal to contract that accordingly could constitute an incident of slavery. The sit-in cases thus could have been decided on the ground that the storekeepers’ refusal to serve African-Americans ran afoul of Thirteenth Amendment principles, without threatening to apply the Fourteenth Amendment to a bigoted homeowner who asked the police to remove an unwanted house guest.

F. *Reviving a Largely Neglected Constitutional Amendment*. Sixth,

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284Davis v. Prudential Sec., Inc., 59 F.3d 1186, 1190 (11th Cir. 1995); see supra Part I.B.1.
285See supra Part I.B.
286This is not to suggest that the Thirteenth Amendment’s purview does not extend beyond African-Americans. Cf. St. Francis College v. Al-Khazraji, 481 U.S. 604 (1987) (holding that anti-discrimination provision in statute enacted pursuant to section 2 of the Thirteenth Amendment applies to person of Arabian ancestry). But one is hard pressed to argue that contracts that interfere with an individual’s ability to speak publicly as she wishes or testamentary provisions that seek to influence a beneficiary’s religious choices fall within a broadly construed notion enslavement based on a person’s ancestry, as the case law requires.
287See supra p. 13 and following.
288See supra at p. 35 (discussing what constitutes an “incident” of slavery).
reconceptualizing Shelley in Thirteenth Amendment terms may help to give life to a constitutional principle – the Thirteenth Amendment’s anti-slavery principle – that has largely been overlooked by both courts and scholars. Reconceptualizing Shelley in this fashion would serve as a correction to Shelley insofar as that decision helped solidify a political culture that largely ignores the Thirteenth Amendment.

A bit of background is important to fully understand these points. The written Constitution contains a large number of provisions, yet at any point in time only a handful of its constitutional principles have salience in the public mind. Moreover, which of the Constitution’s many principles have high salience varies over time. For example, although the Contract Clause was the single most heavily litigated constitutional provision in the nineteenth century,290 few of today’s citizens, lawyers, or government officials are familiar with it. Conversely, what is among today’s most salient constitutional principles – free speech – received little public or judicial attention as recently as the early twentieth century.291 And some constitutional principles have never enjoyed significant salience; consider, for example, the Fourteenth Amendment’s privileges or immunities clause.

Although the consequences of what subset of the Constitution’s principles has high salience can readily escape notice, they are significant. The constitutional principles that are dominant likely help to set the public’s conception of justice and, ultimately, legislative agendas. Additionally, dominant constitutional principles shape the legislative and executive branches’ understanding of the limits of their powers in ways that overlooked principles do not. For example, it is virtually inconceivable that a state legislature today would enact a statute barring media accounts of an execution “beyond the statement of the fact that such convict was on the day in question duly executed according to law.”292 Yet Minnesota enacted such a law in the early twentieth century, which was upheld by that state’s supreme court in 1907.293 Conversely, whereas the Contract Clause currently plays little role in public discourse or legislative debate, nineteenth century debates in state legislatures were filled with arguments explaining why proposed legislation was consistent with the Contract Clause.294

Returning to the subject at hand, the Thirteenth Amendment does not play a particularly large role in the public mind. Aided by cases such as Shelley, today’s constitutional culture pays little heed to concepts such as slavery and its incidents and badges, but instead conceptualizes justice primarily in Fourteenth Amendment terms of equality and due process. The consequences of refocusing public and governmental attention on the Thirteenth Amendment are a matter of speculation, but they might be significant.

290See HALE, THE CONTRACT CLAUSE.
291See DAVID M. RABBN, FREE SPEECH IN ITS FORGOTTEN YEARS.
292State v. Pioneer Press, 110 N.W. 867, 868 (Minn. 1907).
293See id.
294See HALE, supra note 290, at 12.
“Equality” and “due process” are concepts that skew thoughts about constitutional justice away from particular groups' (i.e., African Americans') experiences. So, for example, grounding the civil rights revolution for African Americans in the rubric of equal protection may have rendered affirmative action vulnerable in ways that a Thirteenth Amendment grounding would not have insofar as there is a plausible argument that affirmative action is in tension with equal protection commitments. Similarly, it is possible that a constitutional culture more attuned to slavery would have been more receptive to arguments for reparations. Perhaps a culture in which the Constitution’s anti-slavery principle had been more salient would be more outraged by the human trafficking that still occurs and more receptive to arguments that certain working conditions qualify as modern-day slavery.

While it admittedly is difficult to know how our country would have been different had the Constitution’s anti-slavery principle been more salient, there are good reasons to believe that the principle’s marginalization indeed has had concrete effects. Reconceptualizing Shelley in the manner advanced here may help to revitalize the largely neglected constitutional principles that inhere in the Thirteenth Amendment.

G. Institutional Implications. A seventh advantage of reconceptualizing Shelley in Thirteenth Amendment terms is institutional in nature: under both the Thirteenth Amendment grounded statutory and constitutional preemption approaches advocated here, solving the problem of racially restrictive covenants falls not only to the Supreme Court, but also to Congress and the President. Under Shelley’s Fourteenth Amendment approach, by contrast, solving the problem of restrictive covenants falls to the courts, and especially the Supreme Court; Shelley concluded that judicial enforcement would have been unconstitutional, and constitutionality determinations fall almost exclusively to courts under contemporary American practice.

The institutional implications of grounding Shelley in the Thirteenth Amendment are important because there are good reasons to conclude that the legislative and executive branches’ institutional competencies would be useful to the task of determining what private agreements should be illegal. To stave off potential confusion, I do not mean to suggest that courts properly have no role, but only that the other governmental branches also have important functions. In other words, cross-branch collaboration would be beneficial to determining the legality of various private agreements.

Formally establishing the role properly played by the more political

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295 I am indebted to a conversation with Risa Goluboff for this point.

296 Larry Alexander and Fred Schauer have provided a carefully thought out justification for judicial supremacy in the interpretation of the Constitution. See Larry Alexander & Frederick Schauer, On Extrajudicial Constitutional Interpretation, 110 HARV. L. REV. 1359 (1997). As an empirical matter, the conception of judicial review that they defend resonates with most Americans, including governmental officials. While I count myself among the large group of scholars that rejects the view that constitutional interpretation is the exclusive domain of courts, this Article is not the place to elaborate my perspectives on this question. What matters for present purposes is that, under contemporary practice, identifying an issue as constitutional functions as a delegation of it to courts.
branches in solving the problem of racially restrictive covenants requires a three-step analysis. 

First is an assessment of the type of considerations that appropriately inform enforceability determinations. The second step is a consideration of the peculiar institutional competencies of the legislative and executive branches, with an eye to determining whether their special characteristics are particularly suited to tasks identified in the first step. The third and final step is an inquiry as to whether the legislature and/or executive have other characteristics that would imperil the process of solving the restrictive covenant problem.

Analysis at the first step – identifying the considerations that are relevant to determining whether private contracts should be judicially enforceable – is immensely aided by turning to the post-Shelley scholarly articles surveyed above in Part II. Among the enduring contributions of these many fine pieces of scholarship is their identification of considerations that are relevant to determining the status of contracts whose substantive content implicates constitutional principles. Even though these articles housed their normative analyses under the Fourteenth Amendment (mistakenly, in my view), many of their insights are applicable to a Thirteenth Amendment analysis. To be clear, for present purposes I do not intend to defend any particular normative approach to analyzing the judicial enforceability of private contracts, but only to show the range of proposals that have been advanced by scholars (step 1) so as to establish the likelihood (in step 2) that the more political branches have important institutional roles to play under all these proposed approaches.

Let us start with Step 1. Recall Professor Henkin’s argument that determining whether there was state action demands an assessment of the quantum of the competing constitutional values of liberty, property and equal protection that were implicated. Professors Glennon and Nowak similarly argued that there is a “battle for supremacy between the asserted rights of private persons” and that the relevant question is whether the state’s permitting a person to engage in a particular activity undermines another person’s rights to such a degree that the Constitution is appropriately triggered. Professor Strauss argued that it was appropriate to refuse enforcement of “private” contracts in the Shelley era because discrimination at that time was a product of the interaction of government and private individuals. Professor Carol Rose similarly has suggested that applying constitutional limitations to the enforcement of restrictive covenants can be justified on the ground that the value of restrictive covenants turned on “the culture and customs of prejudice” that were “so widespread as to have the practical force of law.”

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297 This is a form of the “comparative institutional analysis” that Neil Komesar astutely has championed. See Neil K. KOMESAR, LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS (2001).

298 See Henkin, supra note 129, at 492, discussed supra Part II.B.

299 See Glennon & Nowak, supra note 141, at 230, discussed supra Part II.B.

300 See Strauss, supra note 163, at 411-14, discussed supra Part II.B.

301 See Rose, supra note 128, at 48-9, discussed supra Part II.B.
Proceeding to step 2, under all the scholars’ approaches discussed just above, the legislative and executive branches’ particular institutional competencies would have been useful to the enterprise of determining the status of restrictive covenants. On Professor Strauss’ and Professor Rose’s accounts, the propriety of unenforceability turns on an assessment of country-wide (or at least state-wide) social facts. Answered must be such questions as: (1) are there cultures and customs of prejudice so widespread as to have the practical force of law? (2) Is discrimination the product of a complex set of governmental and private interactions? These determinations are more readily made through legislative fact-finding than by judges in a single adjudication involving a particular plaintiff and defendant.\footnote{Moreover, the race-conscious inquiries that Professor Strauss and Professor Rose believe to be appropriate supports the plausibility of this Article’s claim that \textit{Shelley} is readily housed under the Thirteenth Amendment.}

The legislative and executive branches also appropriately play an important role under the approaches of Professors Henkin, Glennon and Novak, though demonstrating this is more complex. In the views of Professors Henkin, Glennon and Novak, the determination of whether a private agreement should be judicially enforced turns on a balancing of competing constitutional principles. The more political branches appropriately play an important role in this type of decisionmaking process. On what basis, however, is it to be decided whether the commitment to eliminating vestiges of slavery outweighs, or is outweighed by, commitments to liberty and property? There seems (to me, at least) to be a ready answer, but logic is not what drives the answer. Deciding among these competing constitutional commitments involves what philosophers have called a choice among incommensurable values. Incommensurability concerns choices between (or among) options that cannot be reduced to a single metric that captures everything that matters about the options and that thereby permits comparisons with which all rational agents would agree.\footnote{See, e.g., Joseph Raz, \textit{Incommensurability and Agency}, in \textit{INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON} 110 (Ruth Chang, ed., 1997) (“Incommensurability is the absence of a common measure”); Brett G. Scharffs, \textit{Adjudication and the Problems of Incommensurability}, 42 \textit{W. & MARY L. REV.} 1367, 1390-91 (1991). Some commentators have used the term “incomparability” for the absence of a common metric. See Chang, \textit{Introduction}, in \textit{INCOMMENSURABILITY}, supra, at 1-4. Other commentators have argued that incommensurability and comparability appropriately have two very different meanings. See, e.g., Scharffs, supra at 1390-94.} Incommensurability accordingly describes the arena of choice in which subjective evaluations must be made. Choosing among incommensurables amount to a process of prioritizing competing commitments. As such, it can well be understood as both reflecting and defining the very character of the person or polity that is making the decision.\footnote{For similar accounts of incommensurability, see Elijah Millgram, \textit{Incommensurability and Practical Reasoning}, in \textit{INCOMMENSURABILITY, supra} note 303, at 151-69 (focusing on individual decisionmaking under circumstances of incommensurability); Raz, \textit{Incommensurability and Agency}, in \textit{INCOMMENSURABILITY, supra} note 303, at 110-28 (arguing that choice, not rationality, governs the selection among incommensurables); Charles Taylor, \textit{Leading a Life}, in \textit{INCOMMENSURABILITY, supra} note 303, at 170-83 (justified choice among incomparables can be made by analyzing how the competing goods fit within the “shape” of a persons life). For an instructive general account of incommensurability, see Richard Warner, \textit{Does...}}}
The tradeoffs that Professors Henkin, Glennon and Nowak identify as occupying the core of state action analysis require the choice among incommensurable values because there is no common metric by which the commitments to desegregation, association, and liberty of contract can be measured. As is true of other situations that call for the choice among incommensurables, determining the hierarchy of constitutional commitments and how competing principles are to be harmonized is a subjective process that reflects the very character of the decisionmaker and that shapes the political culture of which the Constitution is a part. There is no basis for concluding that the judiciary has exclusive competence in making such decisions. Indeed, it would seem that the more political branches appropriately play an important role in a decisionmaking process such as this that is so subjective and character-defining.

Turning to step 3 of the analysis, the question is whether the executive and legislative branches have institutional characteristics unsuited to solving the problem of restrictive covenants. The major concern, it would seem, is that the more political branches are more likely to reflect only majoritarian preferences, overlooking minority interests. For example, what if Congress had either preempted or responded to Shelley by passing a law that confirmed the legitimacy of restrictive covenants? On the approach I have advocated here, Congress would have had the power to do this, rendering Shelley’s ban on judicially enforcing racial covenants vulnerable to majoritarian politics. Three considerations, however, considerably soften the force of this critique. First, perhaps there is less need to be so suspicious that the legislative branch will advance only the majority’s interests. In the present context, after all, Congress had spoken, having enacted legislation (sections 1981 and 1982) that protected the minority’s interests by providing a ready basis for ruling that the restrictive covenants themselves violated federal statutory law.

Second, as a pragmatic matter, there are serious doubts to whether the Court alone can bring about change in society absent congressional support. Consider in this regard the new wave of scholarship that questions the extent to which Brown v. Board of Education advanced the cause of racial desegregation. These scholarly works provide data strongly suggesting that

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306Nor does constitutional text answer the question of the appropriate hierarchy as among these constitutional commitments. Indeed, as discussed above in text, there have been radical shifts over time with regard to the hierarchy of constitutional commitments, as evidenced by the fact that the Contract Clause was the most heavily litigated, and arguably most important constitutional commitment, in the early nineteenth century, while Free Speech had virtually no doctrinal bite until well into the twentieth century.

307See supra note 27, at 1048 (noting that balancing “seem[s] emphatically to be the province of competence of the political branches – the weighing or competing social interests and values.”).

desegregation did not diminish until Congress joined in the effort by enacting civil rights legislation in the 1960s.\textsuperscript{308} This is not to deny that the Supreme Court played an important role in placing school desegregation on the nation’s political agenda,\textsuperscript{309} but only to suggest that multi-branch involvement is necessary for concrete change to occur. If this is correct, then the force of the hypothetical mentioned above is largely dissipated: if real societal change requires not only judicial action but also the legislature’s support, then there is not much of a difference between (1) a Court opinion disallowing enforcement of restrictive covenants in the face of Congress’ unwillingness to implement the Court’s declaration and (2) Congress’ embrace of restrictive covenants and the absence of judicial power to reverse the legislature’s decision (as would be the case under this Article’s approach, which argues that the issue of restrictive covenants was properly addressed either through statute or federal common law).

It might be objected that the Court would not have been able to lend its voice to societal debate concerning restrictive covenants if Congress had approved such covenants in accordance with the power this Article suggests that belongs to Congress. This objection is not convincing. Even if the Court had been without power to overturn legislation authorizing the enforcement of restrictive covenants, the Court could have severely criticized the statute as a normatively unfortunate way of harmonizing commitments of liberty to contract and associate (on the one hand) and anti-discrimination commitments (on the other) as the Court bemoaned its own institutional responsibility to defer to Congress’ judgment.\textsuperscript{310} In effect, such a Court opinion could have served as a judicial dissent to Congress’ decision. Although mainstream dissents within judicial opinions do not possess the power to bring their visions into effect at the time they are penned, the dissenting ideas not infrequently remain in the judicial consciousness and become mainstream doctrine at later points in time. The same could well occur to judicial opinions that function as dissents to congressional decisions: they may initiate or solidify public and congressional opinion that rejects the policy judgments undergirding a statute, leading to the statute’s appeal.

Third, a congressional statute authorizing restrictive covenants and their judicial enforcement may be unconstitutional after all. The first question, of course, is whether Congress has authority to enact a statute of this sort in the first place. Even assuming that it does, such a statute might violate the Equal Protection Clause. In view of the widespreadness of racially restrictive covenants at the time, and the result that African-Americans had great

\textsuperscript{308}See id.
\textsuperscript{309}It is not self-evident that this assisted the desegregation effort. Michael Klarman argues that the \textit{Brown} opinion may have helped consolidate the anti-desegregation movement, and in other respects may have slowed the development of a societal consensus that segregation is bad. \textit{See} Klarman, supra note 307, at xx.
\textsuperscript{310}Such unabashedly normative argument on the part of the judiciary is thoroughly appropriate upon understanding that the subjective determination of how to harmonize competing constitutional commitments forms a significant component of constitutional decisionmaking.
difficulty finding communities in which they could live, it plausibly could be argued that a statute authorizing such restrictive covenants would have been the result of invidious discrimination.

CONCLUSION

Nearly sixty years of post-Shelley caselaw and scholarly commentary have failed to provide an adequate rationalization for Shelley v. Kraemer. This Article has suggested that the legal community’s lack of success in explaining Shelley may be attributable to the (until now) universal effort to ground the case in the Fourteenth Amendment. This Article instead has argued that Shelley is best understood as growing from the soil of the Thirteenth Amendment. Shelley readily could have been decided on the basis of two federal statutes that have been in existence since the late nineteenth century. Even if Congress had not enacted sections 1981 and 1982, the Court could have declared the racially restrictive covenants illegal under the quasi-federal common law of “constitutional preemption.”

The Article then catalogued and elaborated the many benefits of reconceptualizing Shelley as a Thirteenth Amendment-based case. The Thirteenth Amendment is more conceptually compelling because what made the racially restrictive covenants troublesome was not their enforcement but the substance of the covenants themselves, which was the result of the decisions of individuals. The Thirteenth Amendment, unlike the Fourteenth, applies to individuals, and hence provides a basis for declaring the racially restrictive covenants themselves to be illegal, not just their enforcement. This solves a long-standing embarrassment of Shelley’s analysis: the Court’s conclusion that racially restrictive covenants themselves were perfectly legal.

Furthermore, the Thirteenth Amendment approach is far more consistent with post-Shelley case law, which virtually never holds that judicial enforcement of individuals’ contracts constitutes sufficient state involvement to trigger the application of constitutional constraints to the contracts’ substantive provisions. Continuing to conceptualize Shelley as a Fourteenth Amendment decision accordingly introduces confusion and inconsistency into state action doctrine. Correlatively, removing the almost universally-known Shelley case from the state action context may permit the creation of a more principled state action doctrine, as that body of law no longer will be obliged to accommodate Shelley’s conceptually-plagued state action holding.

Moreover, understanding Shelley as a Thirteenth-Amendment based decision has important institutional implications. Whereas Shelley’s Fourteenth Amendment approach allocated the determination of what contracts should be enforceable solely to courts, the Thirteenth Amendment approach invites Congress and the President to participate in determining what types of restrictive covenants (or other activities) qualify as incidents or badges of

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311 Any such argument of course would be subject to the retort that Congress was not discriminating against African-Americans but only sought to clarify the appropriate scope of homeowners’ association and property rights.
slavery. The Article’s identification of the highly subjective and character-defining decisionmaking that is involved in such determinations establishes the desirability of the more political branches’ participation in this process.

Finally, Shelley helped create a constitutional culture that largely overlooks the Thirteenth Amendment and instead primarily relies on Fourteenth Amendment due process and equal protection principles in its quest for justice. Reorienting Shelley in the manner advocated here may help revive largely dormant Thirteenth Amendment principles.

To conclude, Shelley’s approach has had unintended and unappreciated pernicious consequences that can be remedied by understanding Shelley’s holding as growing from the Thirteenth rather than the Fourteenth Amendment. For these reasons, even if the Fourteenth Amendment route Shelley adopted were a wise strategy all things considered to have adopted at the time – a complex historical and normative question that this Article does not pursue – there are good reasons for the legal culture to reconceptualize Shelley now.