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Was Shelley v. Kraemer Incorrectly Decided - Some New Answers

Mark D. Rosen

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Was *Shelley v. Kraemer* Incorrectly Decided? Some New Answers

Mark D. Rosen†

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Was *Shelley v. Kraemer* Incorrectly Decided? Some New Answers

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**INTRODUCTION**

*Shelley v. Kraemer*,¹ the unanimous 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.² *Shelley* did not purport to alter this. Instead, the Court reasoned that the restrictive covenants themselves were legal,³ but that judicial enforcement of the covenants violated the Fourteenth Amendment's Equal Protection Clause⁴ 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 this Article refers to as *Shelley*'s "attribution rationale"—courts could only enforce contractual provisions that could have been enacted into general law.⁵ Because a law that banned African Americans from purchasing real property would violate the Equal Protection Clause, it followed from *Shelley*'s analysis that it was unconstitutional for the Court to enforce racially restrictive covenants.⁶

*Shelley*'s attribution logic threatened to dissolve the distinction between state action, to which Fourteenth Amendment limitations apply, and private action, which falls outside the Fourteenth Amendment. After all, *Shelley*'s approach, "consistently applied, would require individuals to conform their private agreements to constitutional standards whenever individuals might later seek the security of judicial enforcement, as is often the case."⁷ This Article shows that, primarily for this reason, neither the Supreme Court nor lower courts have applied *Shelley*'s attribution rationale. Courts routinely enforce contracts whose substantive provisions could not have been constitutionally enacted by government. For instance,

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1. 334 U.S. 1 (1948). Though the decision was unanimous, three Justices recused themselves. *Id.* at 23.
3. *See* *Shelley*, 334 U.S. at 13.
5. *See generally id.* at 21.
courts regularly enforce settlement agreements that limit the settling party’s ability to speak publicly, although statutory limitations on identical speech would be unconstitutional.\(^8\) Similarly, courts have enforced testamentary provisions that condition inheritance on an heir’s marrying within a particular faith, even though the Establishment Clause would preclude states from enacting an identical provision.\(^9\) This Article then explains why eschewing Shelley’s rationale and respecting the distinction between public and private acts are both desirable.

Given that Shelley’s rationale has not survived, can its holding be justified? This Article shows that, perhaps surprisingly, neither courts nor scholars have yet been able to provide a satisfying answer to this question. The many scholarly efforts to explain Shelley, which include an assortment of proposals to narrow the Court’s Fourteenth Amendment holding, have deep flaws. Furthermore, courts have not made serious efforts to reconcile Shelley’s holding with the contracts they regularly enforce. The Article offers a wholly new rationale for Shelley that explains both Shelley and post-Shelley case law. By arguing that Shelley should have been decided on the basis of nonconstitutional federal law that emerged from the Thirteenth Amendment, however, it diverges more radically from the Shelley Court’s rationale than have scholarly and judicial proposals to date.

As the Article explains, an early Supreme Court decision held that the Thirteenth Amendment applies to individuals as well as states, and concluded that section two of the Thirteenth Amendment grants Congress the power to abolish the badges and incidents of slavery, which the Court understood to include “disability to hold property [or] to make contracts.”\(^10\) Racially restrictive covenants implicate both property and contract rights and hence fall within Congress’s section two powers. Furthermore, two federal statutory provisions enacted in the nineteenth century under Congress’s section two powers could have been applied to racially restrictive covenants. The Civil Rights Act of 1866 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.”\(^11\) A second statutory provision 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 . . .”\(^12\) The Article

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8. See cases discussed infra at Part I.B.1.
9. See id.

Supreme Court Justices have vigorously disagreed as to whether this provision originally was part of the Civil Rights Act of 1866, see Runyon v. McCrory, 427 U.S. 160, 168 (1976), or whether it derives
explains how these statutory provisions could have been used to strike down racially restrictive covenants, establishes that these provisions were known to the Shelley Court, and considers why the Court eschewed them as a basis for its holding.

The Article then responds to two potential objections to grounding Shelley in statutory law. First, the Article establishes the legitimacy of reconceptualizing cases primarily by showing that the Court does so regularly. Second, the Article answers the objection that, under its statutory approach, racially restrictive covenants would have been legal and enforceable absent the enactment of the two civil rights statutes mentioned above.

Then, the Article identifies seven benefits of reconceptualizing Shelley. First, a Thirteenth Amendment basis for the decision is more conceptually sound because the Thirteenth Amendment targets what really made racially restrictive covenants problematic: their substantive content, which can be best understood as the product of individual rather than state action. 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. A Thirteenth Amendment approach hence eliminates a particularly noxious byproduct of the Shelley Court’s analytics: the conclusion that racially restrictive covenants themselves are perfectly legal.13 Not only has the covenants’ legality been an embarrassment to American jurisprudence, but a recent study concluded that unenforceable restrictive covenants played an important role in entrenching racially segregated housing markets in the northern part of the country.14

Third, this Thirteenth Amendment approach is 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. Thus, this Article furnishes legal principles that explain a large body of case law that seems mystifying under the Shelley Court’s Fourteenth Amendment approach.

Fourth, reconceptualizing Shelley as a Thirteenth Amendment-based decision may permit the creation of a more principled state action doctrine. The Thirteenth Amendment approach wholly removes Shelley from the state action context, thereby freeing the state action doctrine from the hopeless task of identifying state action on Shelley’s facts. Fifth, and more

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broadly, reorienting Shelley relieves stress on the distinction between public and private that Shelley engendered. Shelley's muddling of the distinction between public and private has fueled some scholars' suggestions that the distinction is hopelessly unclear and ought to be discarded, a position that has implications beyond state action doctrine.

Sixth, understanding Shelley as a Thirteenth Amendment-based decision has important institutional consequences. Whereas the Fourteenth Amendment approach to Shelley allocated the determination of what contracts should be enforceable solely to courts, an approach grounded in section two of the Thirteenth Amendment would invite Congress and the President to participate in determining what restrictive covenants qualify as incidents or badges of slavery. This Article then analyzes what constitutes incidents and badges of slavery, and shows that the legislative and executive branches appropriately play a more proactive role than the courts in this decision-making process.

Finally, Shelley helped solidify a constitutional culture that overlooks the Thirteenth Amendment and instead relies primarily on Fourteenth Amendment due process and equal protection principles. This Article suggests that reconceptualizing Shelley may revive Thirteenth Amendment principles that have been dormant, and identifies some potential outcomes of such a revival.15

The Article is in four parts. Part I shows that post-Shelley case law has almost universally rejected Shelley's attribution rationale without offering a principled explanation for doing so. Part II shows the inadequacy of the existing efforts to reconceptualize Shelley, none of which has gone beyond understanding the case as a constitutional decision grounded in the Fourteenth Amendment. Part III first establishes the legitimacy of reconceptualizing Supreme Court decisions and then argues that Shelley can be readily understood as a Thirteenth Amendment-based decision. Part IV explains the benefits of grounding Shelley in the largely overlooked Thirteenth Amendment.

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15. This Article, accordingly, is part of the small set of recent scholarly efforts to revitalize the largely forgotten Thirteenth Amendment. See Akhil Reed Amar and Daniel Widawsky, Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney, 105 Harv. L. Rev. 1359 (1992); Andrew Koppelman, Forced Labor: A Thirteenth Amendment Defense of Abortion, 84 Nw. U. L. Rev. 480 (1990); Alexander Tsesis, A Civil Rights Approach: Achieving Revolutionary Abolitionism Through the Thirteenth Amendment, 39 U.C. Davis L. Rev. 1773 (2006).
I

Shelley’s Analytical Shortcomings
and its Narrowing in the Case Law

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

A. The Case: Shelley v. Kraemer

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. The agreement was a restrictive covenant, which provided that a condition precedent to the sale of any and all of the forty-seven 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, an African-American couple, received a warranty deed to one of the parcels of land subject to the restrictive covenant. Mr. Kraemer, an owner of one of the other parcels of land, sued the Shelleys in state court, asking the court to enforce the covenant and divest title out of the Shelleys. The Supreme Court of Missouri ruled that the covenant should be enforced.

The United States Supreme Court reversed, holding that judicial enforcement of the restrictive covenant would violate the Equal Protection Clause of the Fourteenth Amendment. But it was not doctrinally simple to arrive at such a normatively attractive outcome. The chief obstacle in reaching this outcome was 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” and “[the] 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 of the Fourteenth Amendment if imposed by state statute or local ordinance,” the restrictive covenant in Shelley did “not involve action by state legislatures or city councils.” The Court accordingly held that the covenants alone did not violate 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 was not an “action by the State” triggering the Fourteenth

\[ \text{Id. at 13.} \]
Amendment, the Court ruled that "the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment." After all, "the full coercive power of government [was being used 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 Court needed to determine what aspects of the enforcement order were attributable to the state. Without explanation, the Court determined that the contract's substantive provisions themselves constituted state action. Hence, under what I call Shelley's "attribution rationale," the question became whether a state could constitutionally enact the substantive provision of the contract into general law. Because the state could not have enacted the provision at issue in Shelley, it followed that court enforcement of the restrictive covenant also violated the guarantee of equal protection.

B. Post-Shelley Case Law

Part B.1 explains that courts have not followed Shelley's attribution rationale. With only a few exceptions, courts have not extended Shelley beyond the context of racial discrimination, but instead have regularly enforced private agreements containing substantive provisions that the state could not have enacted into general law. Even more surprisingly, Part B.2 demonstrates that the Supreme Court has repeatedly refused to apply Shelley even in situations of racial discrimination. Part B.2 then reviews the limited circumstances where courts appear to have applied Shelley, and argues that even these cases are often better explained by alternative rationales. Both Parts show that neither the courts that have extended Shelley nor those that have limited Shelley have satisfactorily explained the Shelley principle they embrace.

I. Limiting Shelley

In a number of contexts, courts have upheld enforcement of agreements that the state could not have constitutionally enacted into law. First consider court enforcement of private agreements that curtail speech.

23. Id. at 14.
24. Id. at 19.
25. Id. at 19-20.
26. See generally id. at 21.
27. Id. at 20-21.
Cases where a party has sought to judicially enforce a settlement agreement limiting speech are particularly instructive, given that settlement agreements always involve courts. Courts have held that enforcement of these agreements do not constitute state action, even where settlement agreements have been entered into the docket by a court order. For instance, in *United Egg Producers v. Standard Brands, Inc.*, 28 two companies signed a settlement stipulation, which a court order had entered into the docket, in which both agreed to restrict their advertisements and thereby to limit their “First Amendment rights on commercial speech.” 29 The Eleventh Circuit concluded that “court enforcement of that agreement is not governmental action for First Amendment purposes.” 30 The Eleventh Circuit 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.” 31

Similarly, in *State v. Noah*, a state appellate court 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. 32 Even though the court deemed the party’s speech to be in the public interest and found that “one party’s free speech rights [were] restricted by that agreement,” 33 the court ruled that enforcement did not constitute state action and upheld the agreement. 34

Courts have also enforced agreements limiting speech 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 newsletters. 35 The California Supreme Court held that enforcing the provision would not constitute state action under *Shelley*, 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.” 36 Similarly, the Kansas Supreme Court ruled that judicially enforcing a restrictive covenant that barred the posting of signs did not qualify as state action.

28. 44 F.3d 940, 943 (11th Cir. 1995).
29. Id.
30. Id.
31. Id. ("[W]here 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.").
32. Id. (quoting Edwards v. Habib, 397 F.2d 687, 691 (D.C. Cir. 1968)).
34. Id. at 871.
35. Id.
37. Id. at 810.
action. In finding Shelley 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 eschewing Shelley's attribution rationale.

Courts have also rejected Shelley's attribution rationale outside the context of private agreements limiting speech. For example, the Establishment Clause unquestionably would preclude a state from enacting testamentary rules that condition inheritance on an heir 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

39. Id.
41. See, e.g., Shapira v. Union Nat'l Bank, 315 N.E.2d 825, 827-28 (Ohio Ct. Com. Pl. 1974); Gordon v. Gordon, 124 N.E.2d 228, 235 (Sup. Jud. Ct. Mass. 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, Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices, 1999 U. Ill. L. Rev. 1273, 1315 (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.

Davis v. Prudential Sec., Inc., 59 F.3d 1186, 1190 (11th Cir. 1995) (citing Lee v. Chica, 983 F.2d 883, 889 (8th Cir. 1993)).
43. Id. at 1191-92.
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.44

As the decision above exemplifies, both federal and state courts have limited the Shelley rule to the racial discrimination context.45 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, courts have made ipse dixit assertions that race is different.46 If anything, the courts’ paens to preserving the distinction between public and private are a critique of Shelley, rather than an explanation of 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 holdings with the Shelley decision.

Furthermore, although courts often assert that Shelley has been limited to the context of racial discrimination, an analysis of post-Shelley Supreme Court jurisprudence shows that this is not accurate. Apart from a case decided only five years after Shelley, the Court has declined to extend Shelley even to situations of racial discrimination that raise state action questions very similar to Shelley. As the next Part demonstrates, it is more accurate to say that the Supreme Court has narrowed Shelley to its facts.

2. Applying Shelley

This Section reviews the limited contexts in which the Supreme Court has applied Shelley’s holding and examines the handful of lower court opinions that have done so. This Part also shows that many of the cases that appear to apply Shelley are often better explained by alternative grounds.

44. Id.
45. See, e.g., Casa Marie, Inc. v. Superior Court of Puerto Rico, 988 F.2d 252, 259-60 (1st Cir. 1993); Davis v. Prudential Securities, Inc., 59 F.3d at 1191 (11th Cir. 1995) (“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. 1977) (holding that there is no state action where state courts enforce private rights that are permitted but not compelled by law); Lebron v. Nat’l R.R. Passenger Corp., 12 F.3d 388, 392 (2d Cir. 1993) rev’d on other grounds, 513 U.S. 374 (1995) (reflecting that race is treated differently under the state action doctrine); Cable Invest. Inc. v. Woolley, 680 F. Supp. 174, 177 (M.D. Pa. 1987); Golden Gateway Ctr. v. Golden Gateway Tenants Ass’n, 29 P.3d 717, 810 (Cal. 2001) (explaining 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”).
46. See, e.g., Gordon, 124 N.E.2d at 235 (upholding judicial enforcement of will conditioning gift on beneficiary marrying a Jewish woman and explaining that Shelley “seem[s] . . . to involve quite different considerations from the right to dispose of property by will.”); Golden Gateway Ctr., 29 P.3d at 810.
a. Supreme Court Decisions

The Supreme Court has applied Shelley's attribution rationale in only one case, Barrows v. Jackson. In Barrows, the Court held that the Equal Protection Clause prohibited a state court from awarding damages for breach of contract against a signer of a racially restrictive covenant who nonetheless sold his property to African Americans. Indeed, Barrows actually extended Shelley’s holding in two significant respects.

Scholars sometimes describe a handful of other Supreme Court cases as applying Shelley. Careful analysis of these cases, however, reveals that they were decided on different grounds. Indeed, the Court has systematically refused to analyze fact patterns similar to Shelley's by means of Shelley's analytics, suggesting the Court's unwillingness to apply Shelley's attribution rationale.

i. The Charitable Trust Cases

Consider first the 1966 case of Evans v. Newton, where the Supreme Court ruled that a will conveying land in charitable trust to the city of Macon, Georgia, for the creation of a public park for the exclusive use of white people, violated the Fourteenth Amendment. Newton could be construed as extending Shelley, even though a private will laid down the racial restriction, this did not insulate the city’s implementation of the will from constitutional scrutiny. Indeed, legal scholars frequently discuss Newton in conjunction with Shelley. Newton is best understood, however,

47. 346 U.S. 249 (1953). One other case 1 found can be said to have utilized an attribution rationale, though the case did not cite to Shelley. See Griffin v. State of Maryland, 378 U.S. 130 (1964). The Court found state action when a person purporting to exercise authority as a deputy sheriff arrested African Americans who were asked to leave a private amusement park on account of their race. The Court ruled that “to the extent that the State undertakes an obligation to enforce a private policy of racial segregation, the State is charged with racial discrimination and violates the Fourteenth Amendment.” Id at 136. The opinion is not a paragon of clarity, as it supported this proposition by relying on state action cases that, as a concurring opinion correctly noted, found state action where the state is deemed to be a “joint participant” with the private party. See id. at 136-37 (Clark, J., concurring).

48. Though both Shelley and Barrows involved racially restrictive covenants, two significant differences between the two cases support the conclusion that Barrows actually represents an extension of Shelley. First, Shelley held injunctive relief to constitute state action, and the award of injunctive relief plausibly could be said to involve more state action than the award of monetary damages. Second, Shelley disallowed judicial enforcement against innocent third parties (the African-American couple who purchased the property), whereas Barrows disallowed judicial enforcement against one of the covenantors. Indeed, Chief Justice Vinson, the author of Shelley, dissented in Barrows on the basis of this latter distinction. See Barrows v. Jackson, 346 U.S. 249, 262 (1953) (Vinson, C.J., dissenting).


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.’”\(^5\)

Notably, the majority opinion in *Newton* did not cite to *Shelley*.\(^2\) Subsequent Supreme Court decisions likewise refer to *Newton* in terms of the “public function” principle, not as an application of *Shelley*.\(^5\)

Perhaps, the most persuasive evidence that the Court did not understand *Newton* in terms of the *Shelley* attribution rationale can be found in the successor case of *Evans v. Abney*, which analyzed the constitutionality of Macon’s response to the *Newton* decision. After the Court decided *Newton*, Georgia state courts held that the trust had failed; hence, it reverted back to the estate. The Supreme Court in *Abney* upheld this reversion.\(^4\) Understandably, commentators 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.”\(^5\) Under a *Shelley* analysis, state court application of a law that effectively excluded African Americans through privately devised racial restrictions should have triggered the Equal Protection Clause.\(^5\) The Court’s holding in *Abney* thus suggests that the Court did not understand *Shelley* to mean that judicial involvement in private action renders that private action attributable to the state for purposes of the state action doctrine.\(^5\) A careful analysis of *Abney* shows that the Court relied solely on the “public function” conception of state action found in *Newton* when it upheld the reversionary clause. Though the Court in *Abney* did not articulate its

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\(^{52}\) *See Newton*, 382 U.S. at 321 & n.4 (Harlan, J., dissenting).

\(^{53}\) *See, e.g.*, Brentwood Acad. v. Tennessee Secondary School Athletic Ass’n., 531 U.S. 288, 296 (2001) (describing *Newton* as an instance where a “nominally private entity” is “entwined with governmental policies” or government is “entwined in its management or control”); Rendell-Baker v. Kohn, 457 U.S. 830, 842 n.7 (1982) (describing *Newton* as an instance where “the State has attempted to avoid its constitutional duties by a sham arrangement which attempts to disguise provision of public services as acts of private parties”); *accord* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 160 & n.8 (1978).

\(^{54}\) *See Abney*, 396 U.S. at 447-48.

\(^{55}\) Shelley Ross Saxer, *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 Abney*, 396 U.S. at 442-43. 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.

\(^{56}\) *See Abney*, 396 U.S. at 457 (Brennan, J., dissenting). It should be noted that while *Abney* indeed is difficult to reconcile with *Shelley’s* attribution principle, it is perfectly consistent with the public functions principle.

\(^{57}\) *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.
understanding of Shelley’s principle, Abney’s holding suggests a narrowing of Shelley, even in the context of racial discrimination.

The Supreme Court has also eschewed reliance on Shelley’s attribution rationale in other cases concerning judicial enforcement of racially restrictive wills. Consider the case of Pennsylvania v. The Board of Directors of City Trusts of City of Philadelphia.58 Girard College was established pursuant to a testamentary will that by its terms disallowed admission of African Americans. When the United States Supreme Court held that the operation of Girard College was unconstitutional, it cited to Brown v. Board of Education, not Shelley. It explained 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 . . . was discrimination by the State.”59 Akin to the Supreme Court’s analysis of the segregated public park 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.60

ii. The Sit-In Cases

The Court’s effort to contain Shelley’s principle also appears in the sit-in cases of the 1960s. In the first case, Peterson v. City of Greenville,61 police arrested a group of African Americans 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 had a law that proscribed restaurants from serving African Americans and whites together. Even though police arrested the defendants on the basis of Greenville’s trespass statute, and even though the city argued that the department store’s management would have asked the African-American patrons to leave even if there had not been a segregation ordinance, the Court reasoned that the “convictions had the effect . . . of enforcing the [segregation] ordinance,”62 and thus ran afoul of the Fourteenth Amendment. Hence, the Peterson Court did not have to use

60. In the follow-up case, the district court found that the Board’s operation of the college was unconstitutional under Shelley. See Pennsylvania v. Brown, 270 F. Supp. 782 (E.D. Pa. 1967). The Third Circuit reaffirmed the district court’s holding, relying both on public functions and Shelley-enforcement rationales. See Pennsylvania v. Brown, 392 F.2d 120, 123-25 (3d Cir. 1968). One of the concurring judges upheld the district court’s decision by relying solely on Shelley. See id. at 125-27 (Kaldonner, J., concurring in result).
61. 373 U.S. 244, 245 (1963).
62. Id. at 248.
Shelley’s attribution principle to impute private discrimination to the state because the segregation ordinance itself 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, police arrested African Americans under a state criminal mischief statute for refusing to vacate a refreshment counter per the restaurant manager’s request. In Lombard, no statute or ordinance proscribed integration. In the absence of state or city regulation that could qualify as state action, Shelley’s attribution rationale was an obvious approach to finding state action: the Court could have imputed the manager’s discriminatory intent to the judiciary that enforced his discriminatory desires. Indeed, Justice Douglas, in his concurring opinion, offered just such a Shelley analysis. However, the majority opinion by Chief Justice Warren declined to find state action by means of Shelley attribution, but instead 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. The Court interpreted the Mayor’s words as if the city had an ordinance prohibiting integrated service in restaurants. The point for present purposes is not to decide whether Lombard’s reasoning was plausible, but to show that the Court clearly avoided applying Shelley’s attribution rationale.

The Court’s reluctance to rely on Shelley is most striking in the case of Adickes v. S. H. Kress & Co. The facts in Adickes were similar to those in Peterson and Lombard, with one essential difference: there were no ordinances or statements by state officials concerning segregation. Therefore, the Court could not connect the restaurateur’s refusal to serve the plaintiff to any positive state law. Under such circumstances, Shelley’s attribution rationale was the most obvious approach for locating state action. Nevertheless, although the Adickes Court was aware of Shelley and referenced Shelley throughout its opinion, the Court eschewed Shelley’s analytics. Rather than apply Shelley to find state action by attributing the restaurateur’s discrimination to the state, the Adickes Court

64. Id. at 268.
65. See id. at 278-80 (Douglas, J., concurring).
66. Id. at 271, 273-74.
67. Id. at 273.
69. See id. at 146-47.
70. 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., concurring in part and dissenting in part). What matters for present purposes is that the majority did not embrace this characterization of state law and still located state action.
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."\(^{71}\) This was a
radical approach. The Court accorded custom the status of state law.\(^{72}\)
Adickes's analysis eliminated the predicate for Shelley's approach: the
private party's discriminatory decision need not be attributed to the state by
means of judicial enforcement; instead the private individuals'
discriminatory practices themselves are reconstituted as discriminatory
state law. The Court's decision not to ground its holding in Shelley's
attribution approach was clear.

The sit-in cases share a common approach that bespeaks the Court's
unwillingness to rely on Shelley. The Court found state action in these
cases by purporting to locate state policies that "compelled the act"\(^{73}\) of
refusing to serve African Americans, not by adopting the Shelley rationale
of attributing private discriminatory decisions to the state when the state
enforces facially neutral laws. In short, the Court consistently has refused
to utilize Shelley's approach, even in race discrimination cases analogous
to Shelley.

b. Lower Court Decisions

The vast majority of cases, including the lower court decisions
discussed in Part I.B.1, have refused to extend Shelley. As this Part shows,
however, in some rare instances courts have applied Shelley. Like their
counterparts refusing to apply Shelley, the reasoning in these decisions is
inadequate because the decisions do not locate a principle that preserves
the public/private distinction. Furthermore, the handful of decisions
applying Shelley cite to the case without explaining how they fit into the
large body of case law that has limited Shelley's principle.

Spencer v. Flint Memorial Park Association, decided in 1966, applied
the Shelley attribution rationale.\(^{74}\) In Spencer, the plaintiff purchased burial
rights in a cemetery, subject to the condition that only whites should be
buried there, and sought to bury an African American. The 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

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71. Id. at 171.
72. Carol Rose recently has made a similar argument, which I explain and then critique later in
this paper. See infra note 125.
73. Adickes, 398 U.S. at 170.
analysis applies to more conventional property interest. The 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." The court failed to explain why the judicial enforcement of religious conditions was constitutionally different from the judicial enforcement of racial conditions.

Testamentary restrictions are one field where it may at first appear that courts have applied Shelley's principle, even outside the context of racial discrimination. Although courts have enforced religion-based testamentary conditions, in some jurisdictions courts 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 re Crichfield Trust, for example, a New Jersey court reformulated a trust that had established a yearly college scholarship for "worthy boys of Summit High School" so that the trust benefited 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." A federal district court similarly held that "the State cannot require compliance with [a racial] testamentary restriction because that would constitute State action barred by the Fourteenth Amendment." While these decisions may appear to apply the Shelley rationale to testamentary restrictions, they all involved charitable trusts in which state administration of the trust resulted in the state providing public services, thereby bringing the cases under the established "public functions" component of the state action doctrine. Two of the cases involved land granted for creating public colleges, and the other two involved trusts for college scholarships to be awarded to graduates of public high schools. So, for example, Virginia's implementation of the will of Fletcher Williams, which established Sweet Briar College, required the rejection of applications from those who were not "white girls and young women." Implementation of the will of Stephen Girard required a Board of Trusts, which had been created by the State of Pennsylvania to run Girard College,

75. Id. at 628.
76. Id. at 629.
77. See supra note 46.
79. 426 A.2d at 88.
80. Id. at 90.
82. See Brown, 392 F.2d at 120-21; Sweet Briar, 280 F. Supp. at 312.
83. Sweet Briar, 280 F. Supp. at 312.
to refuse admission to all African-American candidates. Similarly, 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. The "public functions" component of these cases (that is, that the implementation of these wills required the state to provide services similar to those ordinarily provided by government) may have played a role in the courts' decisions, as was true when the Supreme Court held Philadelphia's operation of Girard College to be unconstitutional and struck down Macon's operation of a racially segregated park.

Only a handful of other reported cases have applied the Shelley principle. A few older cases cited to Shelley and ruled that judicial enforcement of nonracial restrictive covenants constituted state action. Though there are not enough 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, and less apt to find state action based on general restrictions on property use. For example, some courts have found state action when asked to enforce restrictions excluding children or barring houses of worship. Virtually all courts, however, have ruled that judicial enforcement of restrictions regarding property use do not constitute state action. Unfortunately, none of these decisions has explained how the

84. See Brown, 392 F.2d at 120.
85. See In re Crichfield Trust, 426 A.2d 88, 89 (Super. Ct. N.J. 1980). Likewise, implementing the will of Frank A. Wright meant that only boys graduating from Keene High School were eligible for the Wright college scholarship. See In re Certain Scholarship Funds, 575 A.2d 1325, 1325-26 (N.H. 1990).
86. A similar point was made by the state court in Shapira v. Union Nat'l Bank, 315 N.E.2d 825, 827-28 (Ohio Ct. Com. Pl. 1974); cf In re Certain Scholarship Funds, 575 A.2d at 1327 (deciding under the 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').
90. See Abbate, 261 N.E.2d at 200.
91. See Ireland v. Bible Baptist Church, 480 S.W.2d 467, 470 (Tex. Ct. App. 1972) (holding that judicial enforcement of a covenant restricting use of land to single-family residential purposes and thereby excluding houses of worship was not state action); Langley v. Monumental Corp., 496 F. Supp. 1144, 1151 (D. Md. 1980) (finding no state action in the use of judicial system to evict a renter who lived in an apartment with children, contrary to an age restriction on those permitted to reside in the apartments).
holding fits with post-Shelley jurisprudence. The cases finding state action cite to Shelley without explaining whether their approach threatens the stability of the public/private distinction,\(^\text{92}\) whereas the cases finding no state action tend to limit Shelley to the racial context without justifying such a context-specific constitutional rule.\(^\text{93}\)

In one context, courts have uniformly applied the Shelley principle: foreign judgments based on foreign laws that could not have been constitutionally enacted by the U.S. polity. For instance, British defamation law is more pro-plaintiff than the First Amendment allows. When asked to enforce British defamation judgments, U.S. 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 have neglected to account for the post-Shelley case law that has narrowed Shelley. The logic of these court opinions would lead to the conclusion that the Constitution precludes judicial enforcement of settlement agreements or condominium bylaws that limit speech, something that the case law wisely has not done.\(^\text{94}\)

3. Summary of Post-Shelley Case Law

Shelley's attribution rationale has not fared well. With only one exception decided shortly after Shelley-Barrows-the Supreme Court has refused to extend Shelley's principle, even in other racial contexts. Lower courts have also almost uniformly refused to extend Shelley, regularly enforcing private agreements whose substantive terms would trigger constitutional review if they had been enacted by the state. Only a handful of lower court opinions have applied Shelley's principle. Furthermore, the largest set of such cases, those concerning state enforcement of restrictive testamentary gifts, can be justified on alternative grounds. Finally, with regard to nonracial restrictive covenants and foreign judgments, the other contexts where Shelley has been applied, courts have cited to Shelley without reconciling their holdings with the post-Shelley case law and without locating a principle for the distinguishing between the public and private.

The cases limiting Shelley also deserve criticism. While many have explained Shelley's threat to the distinction between public and private

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\(^{92}\) See, e.g., Franklin, 358 So. 2d at 1089 (reasoning that "[w]hen [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").

\(^{93}\) See, e.g., Ireland, 480 S.W.2d at 470; Langley, 496 F. Supp. at 1151.

\(^{94}\) Elsewhere, 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) [hereinafter Rosen, Exporting the Constitution].
action, none has provided a principled justification for only applying the Shelley attribution rationale in the racial context. The logic of these cases indicts rather than vindicates the Court’s holding in Shelley, and they are best understood as attempts to limit Shelley to its facts.

II

PRIOR SCHOLARLY EFFORTS TO RECONCEPTUALIZE SHELLEY

Scholarly explanations of Shelley fall into two broad camps. A small band of scholars understands Shelley’s problematic analytics as a reflection of the inherent weakness of the distinction between public and private action. These scholars advocate the elimination of the public/private distinction, arguing that constitutional limitations ought to apply to both government and individual actions.95 Other scholars have sought to justify Shelley by grounding the decision in the Fourteenth Amendment in a way that preserves the public/private distinction. While many of these justifications are ingenious, none enjoys widespread acceptance. Part II first explains why explanations of Shelley that reject the public/private distinction should be eschewed. It then shows that the second camp’s Fourteenth Amendment explanations of Shelley have significant shortcomings. To be clear, I do not claim that all efforts to rationalize Shelley under the Fourteenth Amendment are flatly illogical or are wholly unpersuasive. Rather, the wisdom of reconceptualizing Shelley turns on showing that, by comparison, it is superior to a Fourteenth Amendment approach. The reader thus should consider the weaknesses of the Fourteenth Amendment approaches documented in Part II in conjunction with the benefits to reconceptualizing the case that are discussed in Part IV in answering for herself whether this Article has demonstrated the superiority of a Thirteenth Amendment approach.

A. Rejecting the Public/Private Distinction

One approach to rationalizing Shelley has been embraced by a small group of esteemed scholars, including Professors Erwin Chemerinsky,96 Paul Schiff Berman,97 and Richard Kay.98 This approach invokes Shelley as

95. These scholars include Professor Erwin Chemerinsky, Paul Schiff Berman, and Richard Kay. See discussion infra Part II.A.
evidence that the distinction between public and private is incoherent, as legal realists and other critics have argued for generations. The classical critique of the private/public distinction 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." Kay observes that "explicit government actions on such things as fiscal and monetary policy, licensing of occupations, zoning, and education, among many other subjects, . . . determine, in significant degree, the costs and benefits of alternative personal choices." In short, critics argue that it does not make sense to draw a line between public and private action because the two are intimately and irreversibly intertwined.

An analysis 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." The durability of the public/private distinction is not the result of courts having been deaf to logic. On the contrary, its durability reflects an aspect of U.S. culture of which courts and legal analysts ought to take account.

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99. See generally Berman, Cultural Value, supra note 97, at 1279.
101. Berman, Cultural Value, supra note 97, 146, at 1279.
102. Id.
103. See Kay, supra note 98, at 334.
104. Berman, Cultural Value, supra note 97, at 1279.
105. Kay, supra note 98, at 334-35.
106. See, e.g., Chemerinsky, supra note 96, at 505.
107. Berman, Cultural Value, supra note 97, at 1278. Others have made similar observations concerning the doctrine's durability. See, e.g., Horwitz, supra note 100, at 1427 (noting that the distinction between public and private is "still . . . alive and, if anything, growing in influence").
108. See Horwitz, supra note 100, at 1427; cf. Chemerinsky, supra note 96, at 504-05 (concluding that early scholars were "successful in demonstrating the incoherence of the state action doctrine").
109. Cf. Mark Tushnet, Shelley v. Kraemer and Theories of Equality, 33 N.Y.L. SCH. L. REV. 383, 391 (1988) ("When the courts continue to invoke a legal doctrine [of state action] in the face of almost universal criticism, where the doctrine could be replaced by one that eliminates the grounds of
A two step argument illustrates the classical critique's shortcomings. First, the classical critique establishes that government agency is always involved in individuals' decision making. This, however, is only half the story, for it may still be meaningful to identify individual agency. When individuals interact with the law, they have constrained autonomy, insofar as they operate subject to a set of rules that they have not chosen. Common sense nevertheless suggests that individual agency is present when an individual's action is deliberate and the individual can predict how her action will interact with laws to produce a result, even when she has not chosen to be governed by those laws. For example, although people have not chosen to be governed by the laws of gravity, no one presumably would conclude that a person who jumped into the air and rapidly returned to the ground did not act autonomously. Rather, we typically attribute human agency to a person's decision to act in accordance with physical laws, as long as the person knows the physical laws and can readily predict the consequence of her action.

Second, advocates of the classical critique typically believe that erasing the distinction between public and private action ineluctably follows from the understanding that government agency is always present. This conclusion, however, assumes that it is jurisprudentially unsound to use a binary scheme when the object being categorized has elements of both the private and public. The critics thus appear to assume that sharp legal categories are appropriate only when working with "pure" objects that readily fit into only one category. But the critics ask too much of law. Our world is complex, and the reality that the law seeks to characterize is seldom, if ever, pure in composition. At the same time, law is a social institution that seeks to simplify decision making by identifying as legally relevant only a handful of the infinite considerations that characterizes any given circumstance. As a result of these two things—the reductive nature of law and the complex character of life—a given legal category is seldom, if ever, coterminous with a pure reality in the world. Rather, reality is complex, and legal categories shoe-horn complex phenomena into simplified categories. Doing so is bound to distort reality, but we as a society appear to be content to do so all the time.
Because every individual action has elements of both government and individual agency, the law could logically categorize it as either private or public. Thus, while the case law's conclusion that the component of individual agency virtually always predominates in the context of judicial enforcement of contracts entered into by private citizens is not logically necessary, it also is not illogical.

What really drives the conclusion, it would seem, are political and cultural values in this country, not logic. Accordingly, critics of the public/private distinction must advance a normative argument, not a logical one: they must convince people that a court's enforcement of a contract is more plausibly construed as state action than as private action. As even several contemporary critics of the public/private distinction agree, these arguments are not likely to sway the majority. While I agree with their conclusion, I do not share their implicit criticism that the American people are simply unwilling to listen to logic. Rather, the distinction's resilience reflects an important part of American political culture.

To see this, it is necessary to identify the cultural values behind the distinction. Judicial opinions have identified several benefits of the public/private distinction. The first concerns autonomy: maintaining the distinction retains a larger sphere for individuals to order their lives as they choose. For example, the distinction allows for sectarian private schools in a constitutional culture in which public schools cannot advance sectarian religious education. The public/private distinction thus allows for a broader array of social institutions. Further, in the First Amendment context, erasing the distinction between public and private threatens citizens' freedom to discriminate on the basis of viewpoint. In this sense, ignoring the distinction between public and private threatens what many consider to be the core concern of the First Amendment: the protection against a

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 on many if not most judgments.

112. See Berman, Cultural Value, supra note 97, 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 98 (trying to explain the durability of the public/private distinction notwithstanding the "persuasive" critiques of the distinction that critics have provided).


government-created orthodoxy. In this context, extending constitutional restrictions to all individuals limits rather than expands freedom, and thus is "disquietingly totalitarian."

The other justifications courts have proffered for the distinction between public and private reflect the democratic ideal of judicial restraint. In a jurisprudential world with hearty federal constitutional doctrines and strong judicial review, the absence of a strong public/private distinction would dramatically increase the power of courts in relation to the other branches of the federal government and to the states. This is so because 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 various pernicious effects, including, paradoxically, inhibiting the evolution of American political culture insofar as premature judicial proactivity can lead to backlashes in popular culture.

In short, popular opposition to erasing the distinction between public and private action-making, for example, all contract claims subject to constitutional limitations-is not illogical, for both individual agency and state agency are present in the making and enforcing of all contracts. The widespread tendency to view contracts as part of the private realm reflects deeply held values that favor individual autonomy and judicial restraint. That the public/private distinction reflects deeply held cultural values without violating norms of logic are strong reasons for resisting a reconceptualization of Shelley that jettisons the state action doctrine.

B. Preserving the Public/Private Distinction

Although a few scholars have suggested abandoning the state action doctrine, most scholars who have analyzed Shelley have sought to identify a limiting principle that preserves the distinction between public and private action. These scholarly approaches fall into three


117. Michael Klarman recently has suggested that the great case of Brown v. Bd. Of Education led to such a backlash. See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004). It is possible that Massachusetts's Supreme Judicial Court created a similar backlash dynamic when it found a right to gay marriage in that state's constitution. See Mark D. Rosen, Why the Defense of Marriage Act is Not (Yet?) Unconstitutional: Lawrence, Full Faith and Credit, and the Many Societal Actors that Determine What the Constitution Requires, 90 MINN. L. REV. 915, 927-31 (2006) [hereinafter Rosen, Defense of Marriage Act].

118. In any event, the analysis that follows in Parts III and IV may be convincing even to those who believe that the public/private distinction is analytically unsound. After all, rejection of the distinction does not rule out the possibility that Shelley can be justified on grounds outside of the Fourteenth Amendment.
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 the context of racial discrimination.

Each of these scholarly approaches to rationalizing *Shelley* encounters significant analytical obstacles. Further, while differing in important details, the approaches taken to date share two crucial characteristics. First, all conceptualize *Shelley* as articulating a constitutional rule growing out of the Fourteenth Amendment. Second, the proposals implicitly reject the notion that state action is a transsubstantive principle, that is, a broadly applicable principle, as opposed to a narrow principle that applies in only select doctrinal contexts. Instead, each of these scholars concludes that the analysis of whether enforcement triggers constitutional scrutiny is highly context-dependent. As I shall argue in Part IV, this scholarly consensus constitutes additional support for this Article’s effort to reconceptualize *Shelley* as a Thirteenth Amendment-based decision: courts can best undertake this context-sensitive analysis 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. Private Parties Acting in the State’s Role

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’s approach is determining what private actions are sufficiently akin to sovereign powers to trigger constitutional scrutiny. 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

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121. *Id.* at 1116.

122. On this view, the covenants themselves presumably would be violative of the Fourteenth Amendment, not just judicial enforcement of the covenants. Lewis explicitly embraces 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.”).

123. *Id.* at 1115. Justice Douglas appeared to embrace this approach. See Reitman v. Mulkey, 387 U.S. 369, 384-85 (1967) (“Leaving the zoning function to groups which practice racial discrimination and are [state licensed] constitutes state action in the narrowest sense in which *Shelley* v.
and charitable trusts similarly allow a party to determine how property is to be used even after that party no longer owns the property, and Lewis equivocates on whether these are also subject to Fourteenth Amendment limitations. Lewis's conclusion that Fourteenth Amendment limitations might properly attach to some of these entities' activities\textsuperscript{2} betrays the context-sensitive analysis his proposal requires, and suggests that Lewis has not identified satisfactory criteria for distinguishing between private and public activity.\textsuperscript{125}

2. Proposals to Balance Competing Constitutional Rights

Two of the best known approaches to rationalizing Shelley advocate that the decision licensed courts to balance competing considerations to determine when judicial enforcement of a contract appropriately triggers constitutional review. In a famous article, Professor Louis Henkin argued that the phrase "state action" does not "contribute[] to clarity," and instead suggested that the Fourteenth Amendment appropriately applies when the state is responsible for a "denial of rights."\textsuperscript{2} Henkin proposed two interlocking principles for deciding when the state is appropriately deemed "responsible" for "enforcing private discrimination."\textsuperscript{127} First, the state is generally responsible when it could have proscribed the discrimination.\textsuperscript{128} Second, though the state almost always has the power to proscribe the private discrimination, the state lacks the power to proscribe private discrimination in a few circumstances, namely, when the constitutional rights of liberty and property "that remain[] in the due process clause" outweigh the constitutional right of equal protection.\textsuperscript{129}

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 are small, as Henkin himself recognized.\textsuperscript{130} Thus, there is little functional difference between Henkin's approach and the classical critique of the public/private

\textsuperscript{124} See Lewis, supra note 120, at 1119-20.

\textsuperscript{125} Professor Carol Rose has recently argued that "[w]idespreadness and inescapability" were the aspects of restrictive covenants that "made them seem so much like a private takeover of governmental functions." Carol Rose, Property Stories: Shelley v. Kraemer, in PROPERTY STORIES 169, 195 (Gerald Komgold & Andrew P. Morriss eds., 2004). There is much wisdom to these criteria, but they underscore how narrow and context specific Shelley's principle becomes under such an approach.


\textsuperscript{127} Id. at 491-92.

\textsuperscript{128} See id. at 492.

\textsuperscript{129} See id. at 493.

\textsuperscript{130} See id. at 489-90.
distinction discussed above, and so Henkin's argument merits the same
criticisms.

Second, to the extent that Henkin left 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.\textsuperscript{131} He acknowledges that the conflict between competing
constitutional commitments "can only be decided in the light of a complex
set of considerations of varying import and relevance."\textsuperscript{132} For instance, he
tentatively concluded 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{133} More precisely, Henkin
embraced a jurisprudence of "balancing" the competing liberty and
equality interests.\textsuperscript{134} Henkin's later writings persuasively identified the
pitfalls of this methodology.\textsuperscript{135} The way in which a decision maker
balances and harmonizes competing constitutional commitments is highly
subjective and simultaneously reflects and defines the decision maker's
very character.\textsuperscript{136} For this reason, a doctrinal approach that assigns such
decision making exclusively to courts—as Henkin's Fourteenth
Amendment approach does—is undesirable.\textsuperscript{137}

Fifteen years after Professor Henkin's article, Professors Robert
Glenno and John Nowak put forward yet another balancing proposal to

\begin{itemize}
    \item \textsuperscript{131} David Currie has leveled a similar criticism. \textit{See} David P. Currie, \textit{The Constitution in
    \item \textsuperscript{132} \textit{Id.} at 494.
    \item \textsuperscript{133} \textit{See} Henkin, \textit{Notes for a Revised Opinion}, \textit{supra} note 126, at 500.
    \item \textsuperscript{134} \textit{See} id. at 491-92.
    \item \textsuperscript{135} \textit{See} Louis Henkin, \textit{Infallibility Under Law: Constitutional Balancing}, \textit{78 Colum. L. Rev.}
discretion, frees it substantially from the need to justify and persuade. Together with related phenomena
—tiers of scrutiny in the application of equal protection, levels of fundamentality of rights there and
elsewhere—it gives a view of judicial review that is intuitional, if not incomprehensible."). For other
discussions of balancing, \textit{see} T. Alexander Aleinikoff, \textit{Constitutional Law in the Age of Balancing}, \textit{96}
    \item \textsuperscript{136} \textit{See} Henkin, \textit{Infallibility Under Law, supra} note 135, at 1048-49. For more on this point
        concerning the subjectivity of balancing competing constitutional commitments, \textit{see infra} notes 293-97.
    \item \textsuperscript{137} I do not believe that the balancing Professor Henkin calls for in this context is different in
        kind from the sort of balancing that the Court undertakes in many other doctrinal contexts, and I
        appreciate that my conclusion above has ramifications outside the present context of reconceptualizing
        Shelley. I still am working out my precise views concerning the appropriate roles that nonjudicial
        institutions play in constitutional interpretation, but I can say that my concerns with regard to balancing
        provide added support to my overarching view that institutions other than courts play very significant
        roles in determining what the Constitution requires. \textit{See generally} Mark D. Rosen, \textit{Modeling
\end{itemize}
rationalize *Shelley* (as well as the Court’s other state action decisions). Their famous article attacked the notion that the quantum of state involvement explains the doctrine of state action.\(^{138}\) They instead argued that every case (except those in which the government is a party) is a “battle for supremacy between the asserted rights of private persons.”\(^{139}\) What really drives the Court’s state action decision making, they said, is a court’s determination of 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 value of that asserted right.”\(^{140}\) 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.”\(^{141}\)

There are important difficulties with Glennon’s and Nowak’s approach. First, though their argument purported to protect the state action doctrine, at its core it denies the constitutional significance of the distinction between governmental and individual action. In their view, any “nongovernmental practice”\(^{142}\) is properly subject to constitutional limitations so long as the practice sufficiently “impairs certain fundamental [constitutional] values.”\(^{143}\) Glennon and Nowak do not reject the public/private distinction as completely as either Henkin or the classical critics, but they nonetheless reject the notion that private activity is beyond the scope of the Fourteenth Amendment. Accordingly, Glennon’s and Nowak’s thesis is also subject to the criticisms leveled against the classical critique.\(^{144}\)

Second, Glennon and Nowak assume without explanation that the prohibitions they defend have constitutional status. They appear to accept the understanding, dating back to the *Civil Rights Cases*, that the Fourteenth Amendment limits state but not private power, and they treat state action as performing the prophylactic function of outlawing “those private activities whose existence so endanger Fourteenth Amendment values that the Amendment itself forbids them.”\(^{145}\) But even if they are

138. Glennon & Nowak, *supra* note 57, at 221 (arguing 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.)

139. *See id.* at 230.

140. *Id.* at 259.

141. *See id.* at 227.

142. *See, e.g., id.* at 259.

143. *Id.* (“[State action is] a tool for separating out those nongovernmental activities whose existence so impairs certain fundamental values that they are proscribed by the Constitution.”).

144. *See supra* Part II.A.

145. *See Glennon & Nowak, supra* note 57, at 261.
correct that constitutional values require prophylactic protections to be
effective, it does not ineluctably follow that the prophylactic measures
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? The
Supreme Court has not answered this question. A plausible alternative
Glennon and Nowak did not consider is that these court-fashioned
prophylactic measures have the status of federal common law.

Understanding the precise legal source and status of the prophylaxis is
important for at least two reasons. First, it is vital to assessing whether the
prophylaxis is legitimate. Second, it has crucial institutional implications.
Whereas Congress can displace federal common law, the general view is
that it cannot displace Court-articulated constitutional rules. In today’s
world of judicial supremacy in constitutional interpretation, Glennon’s and
Nowak’s approach thus allocates the responsibility for creating
prophylactic rules to courts. This is unfortunate for several reasons. First,
the balancing process that Glennon and Nowak identified as the core of
their prophylactic conception of the state action doctrine is highly
subjective. This process both reflects and constitutes the character of the
decision maker, and therefore is better suited to the popularly elected and
accountable legislative and executive branches of government on standard
theories of democratic legitimacy. The involvement of the legislative and
executive branches is also desirable because changing circumstances or
evolving social science appropriately inform prophylactic rules.

Congress and the executive branch are better situated than courts to take
account of such factors and to alter the prophylactic rules accordingly, both

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146. See Dickerson v. United States, 530 U.S. 428, 446 (2000) (Scalia, J., dissenting). Although
the Supreme Court overruled 18 U.S.C. § 3501 in Dickerson, it 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 also Mitchell N. Berman, Constitutional Decision Rules, 90 VA. L. REV.
1, 28 (2004) [hereinafter Berman, Constitutional Decision Rules].

147. See Berman, Constitutional Decision Rules, supra note 146, 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’s view—that “‘prophylactic’ rules are not exceptional
measures of questionable legitimacy, but are 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, Constitutional Decision Rules, supra note 146, at 23 & n.76.

(1975). I discuss this possibility in greater detail infra in Part III.C.

149. See id.


151. David Currie’s critique of Henkin’s approach would appear to be equally applicable here. See
Currie, supra note 131, at 359 & n.176.

152. See Susan R. Klein, Identifying and (Re)formulating Prophylactic Rules, Safe Harbors, and
general discussion concerning prophylactic rules that bears on the discussion in the text, see Mark D.
because they have superior tools for gathering information and can more readily alter the rules as circumstances change insofar as they are not burdened by the judicial branch’s inherent conservatism, a product of such doctrines as stare decisis.\textsuperscript{153} For these reasons, the political branches properly play the lead role in formulating prophylactic rules.\textsuperscript{154}

3. Limiting Shelley to the Context of Discrimination

A third group of scholarly approaches seek to limit Shelley’s approach to the context of discrimination. An early effort at reconceptualizing Shelley, advanced by Judge (then Professor) Louis Pollak, suggested that state action was present only when judicial enforcement would require discrimination by a person who did not wish to discriminate.\textsuperscript{155} Pollak’s approach took into account both the nature of the legal right and the type of judicial enforcement sought. Under this view, 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 approach. Henkin rightly criticized the notion that the presence of state action is a function of the mental state of an individual.\textsuperscript{156} 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{157} 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 argued 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{158} Pollak’s approach in effect extended constitutional limitations

\textsuperscript{153} See Rosen, Defense of Marriage Act, supra note 117, at 926-27.

\textsuperscript{154} For more on this point, see infra Part IV.G.


\textsuperscript{156} Henkin, Notes for a Revised Opinion, supra note 126, at 478 & n.10.

\textsuperscript{157} See Pollak, supra note 155, at 13-14 (“Judicial refusal to interfere [by compelling abandonment of a discriminatory contract is ... a sovereign decision to leave private prejudice alone.”). Pollak acknowledges that, under his approach, a purchaser of a lot in a private cemetery could not sue in court under the Fourteenth Amendment to compel the cemetery to bury an Indian. See id. at 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{158} See Pollak, supra note 155, at 13.
to private contractual relations with regard to discrimination, for all such provisions would be frequently unenforceable.

Some scholars have sought to confine Shelley’s rule more narrowly still to the context of race discrimination. Professor Laurence Tribe argued that enforcement of the racial covenant was racially discriminatory because restraints on alienation were typically unenforceable under common law. Tribe’s argument implies that it would have been constitutional to enforce racially restrictive covenants if states generally enforced restraints on alienation. This implication is unattractive for obvious reasons: is it desirable for the enforceability of racially restrictive covenants to turn on whether other sorts of restraints on alienation are enforced? Moreover, the factual predicate of Tribe’s argument is questionable: many restraints on alienation were enforced at the time Shelley was decided.

Other scholars have also tried to justify Shelley as a race-specific holding. Professor David Strauss 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. Consequently, Strauss concluded that “it d[id] not make a lot of sense to distinguish between state action and private action.” In a similar vein, Professor Carol Rose sought to justify Shelley on the basis of race:

we could easily interpret 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

159. Id. 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.


162. See Tushnet, supra note 109, at 386-87 & n.25 (noting that under the Restatement of Property of 1944, “a wide range of restraints on alienation” were permitted). Similarly, Carol Rose has identified several state law doctrines that the Court could have 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 125, at 177-94.

163. David A. Strauss, 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 inappropriately 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. Rosen Tailoring Constitutional Principles, supra note 152.

164. Strauss, supra note 163, at 412.
not the occupants’ land uses, but rather the occupants themselves, and their value rested critically on the culture and customs of prejudice against those occupants.\textsuperscript{165}

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 argued that judicial enforcement of racially restrictive covenants would have been tantamount to judicial enforcement of norms with the force of law.\textsuperscript{166}

Strauss’s and Rose’s explanations are powerful indeed, but they too merit strong criticism. Both in effect resolve Shelley’s public/private conundrum by confessing that the distinction was irrelevant, at least at that time and context. However, the Court’s jurisprudence at all times has maintained the significance of the public/private distinction in the Fourteenth Amendment.\textsuperscript{167} In addition, Strauss’s explanations fall short of justifying disregard for the public/private distinction. Strauss explicitly defended 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.”\textsuperscript{168} To begin, the factual predicate for Strauss’s analysis is absent in Shelley because, as this Article argues in Part III, federal statutes already addressed racially restrictive covenants at the time Shelley was decided. Furthermore, even if no such federal statutes had existed, this functional need does not justify the creation of a constitutional rule because, as Part III argues, the same result could have been brought about as a matter of federal common law. The existence of nonconstitutional solutions undermines Strauss’s functional defense of Shelley’s constitutional ruling.

These are among the most famous scholarly efforts to reconceptualize Shelley.\textsuperscript{169} The efforts to rationalize Shelley while

\textsuperscript{165} Rose, supra note 125, at 198 (emphasis added).

\textsuperscript{166} Id. at 48-49.

\textsuperscript{167} 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.

\textsuperscript{168} See Strauss, supra note 163, at 413. (noting that “Shelley v. Kraemer anticipated the federal open housing laws by more than twenty years”).

\textsuperscript{169} 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, Exporting the Constitution, supra note 94, 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. There is no basis for
retaining the public/private distinction 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.

These considerations provide a predicate for the more radical reconceptualization of Shelley proposed in Part III.

III
RECONCEPTUALIZING SHEELLY
AS A THIRTEENTH AMENDMENT DECISION

The next two Parts situate Shelley’s holding under the Thirteenth Amendment. This Part 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 then sets forth seven benefits of reconceptualizing Shelley.

A. The Legitimacy of Reconceptualizing 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. Although a full defense of this proposition is beyond the scope of this Article, a brief discussion of the issue can establish the prima facie validity of reconceptualization.

suggesting that general rules that have incidental effects on contract or property rights would generate meaningful 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). Free speech is the predominant doctrinal area where generally applicable laws with incidental effects trigger constitutional review. See Frederick Schauer, 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). 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 created by Shelley of subjecting all private action to constitutional norms. See Rosen, Exporting the Constitution, supra note 94, at 224-26.

170. My use of this term differs from that of Professor Alfred Hill, who famously introduced it. See infra note 220.

It is uncontroversial that the Court can overrule its precedent under appropriate circumstances. The reconceptualization of earlier-decided cases can be understood as a limited form of overruling. Moreover, the reconceptualization of earlier-decided cases is deeply entrenched in the practice of constitutional law. 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. For example, \textit{Griswold} famously grounded the constitutional right to privacy in penumbras emanating from the Bill of Rights, but the \textit{Roe} court later understood privacy as an aspect of the liberty that is protected by the first section of the Fourteenth Amendment. Similarly, 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} was grounded in the Equal Protection Clause. In \textit{Saenz v. Roe}, however, the Court determined that the "right of the newly arrived citizen" to receive the same welfare benefits that long-term residents receive rested on the Citizenship Clause of the Fourteenth Amendment.

\section*{B. Shelley as a Statutory Decision}

\textit{Shelley} can plausibly be recast as a decision grounded in the Thirteenth rather than the Fourteenth Amendment. The Thirteenth Amendment's first section states that "[n]either slavery nor involuntary servitude \ldots shall exist within the United States \ldots." In the \textit{Civil Rights Cases}, the Supreme Court provided a narrow construction of the first section, announcing that it "simply abolished slavery." Justice John Marshall Harlan famously disagreed, expressing his view in the case of \textit{Hodges v. United States} that section one "by its own force \ldots destroyed slavery and all its incidents and badges, and established freedom." On this approach, the Court could have found the racially restrictive covenants in \textit{Shelley} in violation of the first section of the Thirteenth Amendment if

\footnotesize

172. Professor Fallon's account provides a full theoretical defense of the proposition that constitutional legitimacy is a function of public acceptance. \textit{See Fallon, supra note 171, at 1824-27.}

173. \textit{See Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (holding that the right to privacy precluded Connecticut from prohibiting married couples from using contraceptives).}


176. \textit{See id. at 638 (concluding that the waiting period "clearly violates the Equal Protection Clause").}


178. \textit{See id. at 506. For a more recent example of the phenomenon of reconceptualization, see Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 530 (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).}


180. 109 U.S. 3, 23 (1883).

181. \textit{Hodges v. United States, 203 U.S. 1, 27 (1906) (Harlan, J., dissenting) (emphasis added).}
they were deemed "incidents" or "badges" of slavery. Although this is a defensible approach to reconceptualizing Shelley, stare decisis\textsuperscript{182} and institutional considerations\textsuperscript{183} make it second best.

Shelley is more plausibly grounded in the legislative powers created by the second section of the Thirteenth Amendment, which provide that "Congress shall have power to enforce this article by appropriate legislation."\textsuperscript{184} The Court stated in the \textit{Civil Rights Cases} that Congress's enforcement powers under section two extend beyond abolition of slavery itself to include the power to address the "badges" and "incidents" of slavery.\textsuperscript{185} 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

\textsuperscript{182} It is true that the Court on more than one occasion has implied that it might be willing to revisit the \textit{Civil Rights Cases}'s narrow construction of section one, indicating that it would "leave that 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 Gen Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375 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 \textit{Civil Rights Cases}'s interpretation of section one likely would suggest that the case's ultimate holding was wrong. This would do 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 intact.

\textsuperscript{183} In our era of judicial supremacy in constitutional interpretation, the institutional considerations relating to the scope of section one boil down to the question of whether courts or Congress are better suited to determining the "badges" and "incidents" of slavery. Cf. Andrew Koppelman, \textit{Forced Labor: A Thirteenth Amendment Defense of Abortion}, 84 Nw. U. L. Rev. 480 (1990); Congress seems far better suited to such determinations, for what qualifies as a badge or incident of slavery likely turns on highly fact-sensitive considerations that are likely to change over time with shifts in communities' socioeconomic status and changes in cultural sensibilities. Such inconstant and context-sensitive matters by their nature seem to be more suited to congressional treatment via statute than court treatment via constitutional doctrine on account of legislatures' superior fact-finding mechanisms and the fact that legislatures are not constrained in the way that courts are by virtue of doctrines as stare decisis and other institutional characteristics. See Rosen, \textit{Defense of Marriage Act, supra} note 117, at 926-27. Professor Koppelman seems to argue that even if Congress is generally better suited to defining the badges of slavery, there may be discrete constitutional determinations that the Court nonetheless is capable of rendering. See Koppelman, \textit{supra}, at 499 & n. 87. It seems highly dubious, however, that the Court would so confine itself if it started down the road of making constitutional determinations as to what qualifies as an incident or badge of slavery. Accordingly, institutional considerations discourage reconceptualizing Shelley as a judicial determination that racially restrictive covenants themselves are unconstitutional badges or incidents of slavery. (This conclusion would not change if congressional determinations of badges and incidents were deemed to constitute congressional constitutional interpretation of section one of the Thirteenth Amendment and the Court were deemed to be institutionally incapable of making such determinations. Cf. Lawrence Sager, \textit{Fair Measure: The Legal Status of Underenforced Constitutional Norms}, 91 Harv. L. Rev. 1212, 1219 n. 21 (1978)). Many thanks to Andy Koppelman for having pressed me on several of these points.

\textsuperscript{184} U.S. Const. amend. XIII, § 2.

\textsuperscript{185} The \textit{Civil Rights Cases}, 109 U.S. at 20, 23.
sanctioned by State legislation or not.” This is particularly significant for present purposes, for this means that legislation enacted pursuant to section two of the Thirteenth Amendment is not limited to state actors, but instead can directly regulate individuals.

But, precisely what powers does Congress have to address the badges and incidents of slavery under section two? The Supreme Court in the Civil Rights Cases explicitly stated that “disabilities” in the making of contracts and the holding of property qualify. The Court reasoned:

"[t]he 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 the inseparable incidents of the institution." The racially restrictive covenant at issue in Shelley, of course, disabled African Americans from entering into contracts to purchase property and for that reason could qualify as a necessary incident of slavery or badge of slavery. Moreover, two federal statutes enacted in the late nineteenth-century prohibited racial discrimination with regard to property and contract. Section one of the Civil Rights Act of 1866, now codified at 42 U.S.C. section 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.” Another late nineteenth-century statute, today codified at 42 U.S.C. section 1981, provides 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 Court has concluded that Congress enacted both of these statutory provisions pursuant to its powers under section two of the Thirteenth Amendment.

186. Id.
187. Id. at 22.
188. Id. (emphasis added). To be clear, my argument in this Article builds on, but does not wholly adopt, the Supreme Court’s reasoning in the Civil Rights Cases. See infra note 280.
189. See Act of April 9, 1866, c. 31, § 1, 14 Stat. 27 (emphasis added). The 1866 Act was re-enacted by section eighteen 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 section 1978 of the Revised Statutes of 1874. It presently is codified as 42 U.S.C. § 1982 (2000). See Jones v. Alfred H. Mayer Co., 392 U.S. 409, 422 & n.28 (1968).
190. See supra note 12.
192. See Jones, 392 U.S. at 413; Runyon v. McCrary, 427 U.S. 160 (1976). Both cases are discussed in greater detail below.
Crucially, these provisions proclaiming 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 Shelley. The statutory language of these provisions could have been applied to racially restrictive covenants. Such covenants could have been said to deprive African Americans of the “same right . . . as is enjoyed by white citizens . . . to purchase . . . real property” in violation of section 1982. Similarly, racially restrictive covenants interfere with African-American citizens’ abilities to “make and enforce contracts” for the purchase of homes, abilities that are “enjoyed by white citizens,” and thereby violate section 1981.

Since deciding Shelley, the Supreme Court has construed both section 1981 and 1982 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 section 1982. Insofar as racially restrictive covenants constitute multiple private citizens’ refusals to sell their homes to African Americans, it follows from Jones’s holding that restrictive covenants also would run afoul of section 1982.

With respect to section 1981, the Court in Runyon v. McCrary held that a private school’s denial of admission to African-American children solely on the basis of race violated section 1981’s requirement that African Americans have the same right to make and enforce contracts as Whites. Racially restrictive covenants similarly interfere with African American’s ability to make contracts.

The Shelley Court’s failure to ground its decision in these statutes was not an oversight by the Court. The parties invoked these statutes 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 1981 and 1982. Further, the Supreme Court referenced these statutory provisions in the Shelley opinion. What is more, in Hurd v. Hodge, a case handed down the same day as Shelley, the Court relied on section 1982 when concluding that

194. 427 U.S. at 172-71.
195. 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 (“Questions Presented: (1) Whether the restrictive agreement involved in this case . . . is void by reason of being contrary to the provisions of Section 41 and 42 of Title 8 of the United States Code . . .”). Notwithstanding the caption of this last document, this is what served as the appellant’s petition for certiorari before the United States Supreme Court.
In light of the known availability of sections 1981 and 1982 to address the legality of racially restrictive covenants, why did the Court not provide an alternative basis for its holding grounded in these federal statutes? Why did the Court reach to resolve a difficult constitutional question when it could have resolved the question by means of statutory interpretation? It is difficult to answer these questions definatively, as neither transcripts of the oral argument nor conference notes are available. The Justices' biographies and general histories of the Vinson Court also do not appear to provide an answer. Nevertheless, there are several likely explanations. If the Court had decided Shelley on statutory grounds, it would have had to reject dicta in several earlier cases that suggested that sections 1981 and 1982 applied to state action but not to private action. In Corrigan v. Buckley, for instance, where the plaintiff brought suit to enjoin a threatened violation of racially restrictive covenants, the Supreme Court stated that sections 1981 and 1982 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 was not 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 had referred to the above language as a holding. Dictum from

198. See id. at 30-33.
199. Indeed, the Court relied upon this very canon of avoiding constitutional questions in Hurd. See id. at 30 & n.6.
200. This information was provided to my research assistant when he contacted the Library of Congress, the Supreme Court Library and the National Archives.
201. Although I do not claim to have undertaken a comprehensive analysis of the existing historical materials, my research assistant and I have examined all biographies of the Justices who were on the Court in 1948, including the three Justices who recused themselves from Shelley, as well as many books that examine the Vinson Court era (list of books on file with the California Law Review). We read all pages that the indexes indicated as referencing Shelley, and in none of these nearly fifty books did we find an explanation as to why the Court eschewed reliance on the statute to invalidate the restrictive covenants. Nor is any light on this question shed in an article about Shelley that was written by one of the law clerks of Chief Justice Vinson, the author of Shelley v. Kramer, when the case was decided. See Francis A. Allen, Remembering Shelley v. Kraemer: Of Public and Private Worlds, 67 WASH. U. L.Q. 709 (1989).
202. 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.
203. 271 U.S. 323 (1926).
204. Id. at 331.
the *Civil Rights Cases* also suggested that the Court believed 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 language. Be that as it may, the *Shelley* Court may not have wished to confront the precedential hurdles to relying on these federal statutes. Indeed, the *Shelley* opinion went out of its way to show that its holding was consistent with past decisions, *Corrigan* in particular. There is evidence that the author of *Shelley*, Chief Justice Vinson, strongly desired a unanimous opinion and not disturbing precedent may have been necessary to accomplishing this.

In addition to precedential hurdles, the Court also faced a conceptual obstacle, at least with respect to relying on section 1982. A fair reading of *Hurd v. Hodge*, *Shelley*'s companion case, shows that the Court at the time thought that Congress had enacted section 1982 pursuant to its powers under section five of the Fourteenth Amendment, not section two of the Thirteenth Amendment. The *Hurd* Court interpreted the scope of section 1982 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,” the Court made no such reference, however, to the Thirteenth Amendment. Because the Court conceptualized section 1982 as growing out of the Fourteenth Amendment, it read a state action requirement into the statute

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207. See, e.g., Jones, 392 U.S. at 451-53 (Harlan, J., dissenting).
208. To begin, the language from the *Civil Rights Cases* concerning section 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 “[t]his law is clearly corrective in its character, intended to counteract and furnish redress against state laws and proceedings, and customs having the force of law, which sanction the wrongful acts specified.” *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... In these cases Congress has power to pass laws for regulating the... conduct and transactions of individuals....” *Id.* at 18.

209. See *Shelley v. Kraemer*, 334 U.S. 1, 8 (1948).
211. 334 U.S. at 32-33.
212. See *id.* at 32.
in *Hurd*. The (erroneous) belief that section 1982 contained a state action requirement accordingly deprived the statute of its primary advantage vis-à-vis the Fourteenth Amendment basis that the Court adopted in *Shelley*.

As high as these precedential and conceptual hurdles may have been, however, they were not insurmountable. Indeed, the Court rejected the dicta and analysis discussed 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 section 1982 had been enacted by Congress under section two of the Thirteenth Amendment, and then determined on the basis of section 1982’s statutory language and legislative history that Congress had intended the provision to regulate private individuals as well as governmental entities. The *Jones* Court also noted that opponents of the Civil Rights Act of 1866 objected that the Act would directly regulate private citizens and that defenders of the Act “did not deny the accuracy of those characterizations.” Relying on the Court’s reasoning in *Jones*, the *Runyon* Court held that section 1981 likewise applied to private as well as governmental conduct. The

213. *See id.* at 31 (emphasis added).
214. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968) (concluding that § 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 two of the Thirteenth Amendment when it enacted the 1866 Civil Rights Act; Congress clearly could not have relied on authority granted in section five 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 two of the Thirteenth Amendment. *See supra* note 208. The Court’s analysis of § 42 in *Hurd* would be correct only on the unlikely assumption that the Congress that re-adopted the 1866 Act to eliminate doubts concerning the Act’s constitutionality intended to limit the Act’s scope by eschewing its powers under section two of the Thirteenth Amendment.
216. *See 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.
217. *Id.* at 433.
218. *See 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 one 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 section 1981, unlike section 1982, was enacted under Congress’s section five powers under the Fourteenth Amendment rather than Congress’s section five powers under the Thirteenth Amendment. *See id.* at 195-198 (White, J., dissenting). The precise scope of § 1981 does not matter for present purposes insofar as the racially restrictive covenant in *Shelley* would have been invalid under federal law even if only 42 U.S.C. § 1982 applied to it.
statutory language and legislative histories of these statutes were equally available to the Shelley Court. It follows that the Court could have decided Shelley on statutory grounds. For this reason, it is plausible to reconceptualize Shelley as having been decided on statutory grounds.\footnote{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 \textit{Bell v. Maryland}, 378 U.S. 226, 331 (1964) (Black, J., dissenting), might suggest that Justice Black was arguing that Shelley could have been decided under the Civil Rights Act of 1866, a fair reading of Justice Black’s discussion in \textit{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:

\begin{quote}
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, \textit{supra}, 334 U.S., at 19. \textit{Bell}, 378 U.S. at 330-31 (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.
\end{quote}

\textit{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.’ \textit{Sullivan & Guntther, supra} note 50, at 882. This is an aggressive reading of the opinion. The Shelley decision is referenced only twice in the opinion, see Jones, 392 U.S. at 419 & n.24, 445, and neither time does the Court state that Shelley could have been decided on the basis of federal statutory law. Although there admittedly is some ambiguity as to how the opinion understands Shelley, the most plausible interpretation is that the Court references Shelley only because Shelley had explained the case of \textit{Harmon v. Tyler} as establishing that race-based purchasing restrictions could not have been imposed directly by state statute or local ordinance. In any event, the Jones case discusses Shelley in relation to a legal principle that is inconsistent with what would have been the legal consequence of actually applying § 1982 to the restrictive covenants: Shelley was referenced as a case where ‘an arm of the Government ... had assisted in the enforcement of’ the covenant, Jones, 392 U.S. at 419, whereas application of § 1982 would have obviated the need to locate governmental assistance because, as this Article explains, that section prohibits individuals themselves from making such contracts.}
of affairs is not a reason to conclude that the Constitution provides the solution; the solution may instead lie exclusively with the legislature. Second, the Court could have generated a nonconstitutional solution to the problem of racially restrictive covenants even if Congress had not acted. As discussed below, the Court could have relied on a form of quasi-federal common law that I will call “constitutional preemption” to hold that the Constitution itself preempts both state regulation and private action of the sort found in racially restrictive covenants.

1. Constitutional Preemption as a Variety of Federal Common Law

Even if Congress had not enacted statutes that proscribed racially restrictive covenants, the Supreme Court in *Shelley* could have held that such covenants were illegal. For the reasons discussed above, Congress had the power under section two of the Thirteenth Amendment to proscribe racially restrictive covenants. The Court could have held that racially restrictive covenants were impermissible as a matter of substantive law in the absence of congressional action in much the same way that the dormant commerce clause declares certain state regulations impermissible in contexts where Congress unquestionably could have regulated but has not regulated. As I explain immediately below, dormant commerce clause is usefully conceptualized as a doctrine in which courts hold that unexercised congressional power presumptively preempts state regulatory authority. As such, the constitution itself preempts state regulatory power. For reasons I explain below, such “constitutional preemption” is best understood as a type of federal common law rather than a constitutional ruling. It is a relatively modest form of federal common law, however, that does not pose the type of needlessly questions of legitimacy that are presented by the usual run-of-the-mill types of federal common law. For all these reasons, *Shelley* readily could have been grounded in “constitutional preemption.”

To begin, although *Erie v. Tompkins* declared that “[t]here is no federal general common law,” post-*Erie* federal courts still create what has been called “specialized” federal common law under certain conditions. Post-*Erie* federal common law is binding on both federal and

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state courts, but it does not have the status of constitutional law and hence may be overturned by Congress.  

Scholarly literature has widely discussed the legitimacy and scope of post-\textit{Erie} federal common law. Scholars have identified two considerations that cast doubt on the legitimacy of federal common law, both of which can be traced to \textit{Erie}. The first is the federalism-based concern, grounded in the Tenth Amendment, that federal common law may displace regulatory authority that properly belongs to the states. The second concern is that federal courts do not have the power to create federal common law rules. These two considerations are analytically distinct. Even if states do not possess the power to regulate a matter that falls within Congress’s regulatory authority, it does not follow that federal courts have the power to fill the regulatory vacuum. After all, federal law making is generally the responsibility of Congress, not the federal courts.

Keeping in mind these two distinct concerns, there is an important difference between federal common law and what I am dubbing “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

\begin{itemize}
\item 223. See \textit{id.} at 405.
\item 224. Henry P. Monaghan, \textit{Foreword: Constitutional Common Law}, 89 \textit{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. \textit{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-à-vis courts in generating complex codes that account for multiple variables, as will be discussed at greater length below in Part IV.G.
\item 226. See \textit{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 by the Constitution to the several states,” language that mirrors the Tenth Amendment).
\item 227. See \textit{id.} at 78 (reasoning that “no 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’”).
\item 228. See Paul J. Mishkin, \textit{Some Further Last Words on Erie—The Thread}, 87 \textit{Harv. L. Rev.} 1682, 1683 & n. 9 (1974) (criticizing this aspect of Hill’s argument). For a partial defense of the contrary view, see Field, \textit{supra} note 225, at 983 (arguing that federal courts can make federal common law “whenever federal interests require a federal solution”).
\item 229. Both 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 \textit{Erie} was decided, the Court typically relied on this statute, rather than constitutional analysis. See John Hart Ely, \textit{The Irrepressible Myth of Erie}, 87 \textit{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 \textit{Erie} decision again for eighteen years”).
\end{itemize}
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 created an alternative rule. Contrast this with constitutional preemption. When the Court, based on dormant commerce clause grounds, struck down a Connecticut law requiring out-of-state beer shippers to affirm that their posted prices for products sold in Connecticut were no higher than the prices in bordering states, the Court ruled that Connecticut exceeded its authority, but did not craft an alternative rule in its place. This is always true of dormant commerce clause jurisprudence: it displaces state law but does not replace it with a federal substantive rule. More generally, this always is true of constitutional preemption.

The relationship of constitutional preemption to federal common law thus has two salient features. First, constitutional preemption is less difficult to justify doctrinally 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 in a given area. Second, constitutional preemption is a component of almost all the federal common

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231. 318 U.S. 363 (1943).

232. Id. 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”).

233. Id. at 367. At issue in *Clearfield Trust Co.* was whether the United States could recover for a check it had issued, but which had been fraudulently cashed, where two and a half months had passed between the forgery and the United States’ notification of the forgery to 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 366-69.


235. Id. at 336.

236. One of the country’s foremost constitutional law scholars, Professor Henry Monaghan, has argued that dormant commerce clause jurisprudence is a type of federal common law. See Monaghan, supra note 224, 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 in the above 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 law-making power is not triggered so long as the operative law that remains has not been created by federal courts. See also infra note 229.
law decisions that displace state law with a judicially created alternative. Those decisions are hence instructive regarding the conditions that must pertain for a court to find constitutional preemption.

2. Shelley as Constitutional Preemption

Shelley can be characterized as an instance of constitutional preemption. Because the Court did not prescribe a substantive rule that governed the parties, Erie's second concern, that a federal court does not have the power to fashion substantive rules, is not present. Shelley simply decided that race-based obstacles to contracting or property ownership are impermissible. Furthermore, Shelley may not even implicate Erie's first concern of disrupting state autonomy. Shelley did not displace any state law; after all, for more than twenty 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. Unlike run-of-the-mill constitutional preemption cases, then, the Shelley decision did not displace any state regulatory authority whatsoever. Instead, Shelley merely determined that what had been thought to be a realm of individual decision making was not.

But what legitimate basis was there for the Court to displace individual 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.

237. Many but not all: constitutional preemption may not be part of those decisions where federal courts fashion federal common law for the purpose of giving effect to a federal statute and there is no otherwise applicable state law that is displaced. See, e.g., Textile Workers Union of Am. v. Lincoln Mills of Alabama, 353 U.S. 448 (1957). I discuss some of the many federal common law cases that contain “constitutional preemption,” see infra note 243 and accompanying text.

238. Shelley could have been decided as a “constitutional preemption” decision under either of two circumstances: if (1) Congress had not enacted 42 U.S.C. sections 1981 and 1982 or if (2) sections 1981 and 1982 had been enacted, but these provisions had been construed such that they did not apply to racially restrictive covenants. With regard to the latter, the mere fact that Congress has created a statute has not been understood to displace federal courts’ powers to generate federal common law. See, e.g., Illinois v. City of Milwaukee, 406 U.S. 91, 103 (1972) (creating federal common law remedy of abatement of nuisance for water pollution despite the fact that the Water Pollution Control Act regulated water pollution and provided a set of remedies that did not include injunctions for abatement).

239. As the Shelley opinion itself noted, racial zoning by municipalities had been struck down as early as 1917. See Shelley v. Kraemer, 334 U.S. 1, 11-12 (1948) (discussing Buchanan v. Warley, 245 U.S. 60 (1917) and Harmon v. Tyler, 273 U.S. 668 (1927)).

Dormant commerce clause doctrine is particularly helpful at this point in the analysis. Congress clearly has the power under section two of the Thirteenth Amendment to proscribe race-based obstacles to contract and property, and to apply such proscriptions directly to private individuals. Shelley can thus be seen as a Thirteenth Amendment analogue to dormant commerce clause jurisprudence: even though Congress had not acted pursuant to its section two powers, Shelley applied proscriptions that Congress could have legislated to entities that Congress could have reached. And, like dormant commerce clause jurisprudence, the proscription was not a federal rule that directly regulated behavior, but instead was a determination that nonfederal actors (in this case, individuals) could not act in certain ways.

The final question is whether the circumstances in Shelley were appropriate for constitutional preemption. Guidance can be found in other instances where federal courts have found constitutional preemption. Although courts have found preemption only in cases that were not factually similar to racially restrictive covenants, the Court has explained that preemption is found where there are "uniquely federal interests." This understanding plausibly encompasses racially restrictive covenants.

Let us look first to federal common law. 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, United States v. Standard Oil Co. of California, the Court reasoned that Erie limitations on federal court powers do not extend to matters of federal character. The Court explained, "The 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,

241. See id., discussed supra at Part III.B.
242. To be clear, this entire discussion in Part III.C is based on what I believe to be a counterfactual hypothetical, namely that federal legislation did not already proscribe racially restrictive covenants. In my view, 42 U.S.C. sections 1981 and 1982 did just that, for the reasons discussed above in Part III.B. Thus, Part III.C simply establishes that the Shelley Court could have declared the racially restrictive covenants illegal even if Congress had not yet acted.
244. See Boyle, 487 U.S. at 504 (quoting Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981)).
245. 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.")
powers and relations of the Federal Government as to require uniform national disposition rather than diversified state rulings. In *Standard Oil Co. of California*, the Court held state negligence law did not apply to a lawsuit by the United States for alleged negligence by a defendant whose truck had injured a soldier. The case implicated “essentially federal matters,” the military and the power of the purse, and therefore state law was displaced. More recently, the Court has explained that matters involving “uniquely federal interests . . . are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced.”

In contrast, the Court has not sought to explain the source of federal judicial power to displace state law in modern dormant commerce clause cases. This is likely due to the fact that dormant commerce clause case law is longstanding and extensive. The early cases in which the Court fashioned dormant commerce clause doctrine, however, did consider the source of judicial power to supplant state law. In the seminal case of *Cooley v. Board of Wardens of the Port of Philadelphia*, the Court ruled that, although states generally had legislative authority over areas where Congress had constitutional authority, states did not have regulatory authority over certain subject matters, even absent congressional regulation. The Court referred to these as subjects that are “in their nature national.” Thus, 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 determined that federal courts can displace state law if the subject matter is in its “nature national” and “essentially national.” Although the factual circumstances in which the Court has found such national interests sufficient to uproot state law are not similar to racially restrictive covenants, one can easily argue that matters tending to

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246. *Id.*
247. *Id.* at 307.
250. 53 U.S. 299 (1851).
251. *See id. at 318.*
252. *Id.* at 319.
253. *Id.*
254. *Id.* at 318.
reinforce slavery or its badges and incidents are “uniquely federal interests.”

The text of the Thirteenth Amendment supports this proposition. The Thirteenth Amendment is one of the only constitutional limitations that applies directly to private citizens, and this constitutional exception 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. The Thirteenth Amendment’s limitation on both states and private individuals reflects an unusual choice for nationwide uniformity across not only polities but across the private sector as well. This uniformity provides a textual basis for concluding that matters tending to reinforce slavery or its badges and incidents are uniquely federal interests.

IV
THE NORMATIVE CASE FOR RECONCEPTUALIZING Shelley

The previous Part demonstrated that the Shelley decision could have plausibly rested on grounds other than the Fourteenth Amendment. This Part identifies and explains seven advantages to reconceptualizing Shelley as a Thirteenth Amendment-based decision.

A. A More Compelling Conceptualization

First, the Thirteenth Amendment framework provides a more compelling conceptual account of what made racially restrictive covenants wrongful. It was not judicial enforcement of restrictive covenants that was troublesome, but the substance of the covenants themselves. Restrictive covenants reproduced legal disabilities that characterized slavery. Because the Thirteenth Amendment applies to individuals, it targets the genuine

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255. The existence of federal regulatory power in relation to matters that reinforce slavery or its badges and incidents does not necessarily mean that states lack regulatory power to attack badges and incidents of slavery. Because the federal and state governments have significant swaths of overlapping regulatory jurisdiction, see, e.g., Theodore W. Ruger, Preempting the People: The Judicial Role in Regulatory Concurrency and its Implications for Popular Lawmaking, 81 CHI.-KENT L. REV. 1029, 1030 (2006) (“A central topographical feature of the nation’s regulatory landscape is the fact of concurrent federal and state jurisdiction”), the existence of federal regulatory power does not imply the total absence of state regulatory power in relation to slavery and its badges or incidents. It is only state regulation or private activity that reinforces slavery or its badges and incidents that would be displaced by unexercised federal regulatory authority. Dormant commerce clause jurisprudence similarly takes a narrow approach to ousting state regulatory powers; only state regulations that discriminate or fail a balancing test are proscribed, not all state regulations that have effects on interstate commerce. See City of Philadelphia v. New Jersey, 437 U.S. 617, 624-25 (1978) (laying out this modern dormant commerce clause test); H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 531-32 (1949) (noting that there is “broad power in the State to protect its inhabitants against perils to health or safety... even by use of measures which bear adversely upon interstate commerce.”).

256. The Court also has suggested that the right to travel may apply to individuals. See Saenz v. Roe, 526 U.S. 489 (1999).
problem with racially restrictive covenants, which are best understood as the product of individual rather than state action.

B. Relieving Stress on the Public/Private Distinction

Second, reorienting Shelley in the manner advocated here eliminates the jurisprudential perplexity that Shelley created regarding the public/private distinction. 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. However, the considerable threat to the public/private distinction posed by Shelley’s attribution rationale disappears under the Thirteenth Amendment reconceptualization. Under Shelley’s Fourteenth Amendment approach, the Court had to stretch to locate state action, because the Fourteenth Amendment only limits governmental activity. Under the Thirteenth Amendment approach here, by contrast, there is no need for the Court to identify state action, because the Amendment applies directly to individuals.

C. Facilitating the Creation of a More Principled State Action Doctrine

Third, and closely related to the point immediately above, reconceptualizing Shelley may facilitate the creation of a more principled state action doctrine. This benefit is distinct from the advantage discussed above because the state action doctrine is not coterminous with the public/private distinction; rather, the public/private distinction is a pervasive concept that is expressed through a variety of doctrines. Because Shelley is so well known and is universally regarded as a state action case, the case undoubtedly has influenced how the legal community thinks about state action: Shelley is a case that most law students study and most attorneys remember, and so helps to constitute lawyers’ lodestar intuitions about state action. Therefore, efforts to devise principles that

257. 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 113; Eule & Varat, supra note 115.
258. See supra p. 2.
261. See, e.g., Council of Orgs. & Others for Educ. about Parochiad, Inc. v. Engler, 566 N.W.2d 208 (Mich. 1997) (determining whether a particular educational establishment was a “public school academy” or a “private . . . school” for purposes of Michigan’s state constitution, which provided that “[n]o public monies . . . shall be . . . paid . . . to aid or maintain any private . . . school”).
explain state action currently must accommodate Shelley's fact pattern. As is demonstrated by the legal community's inability to date to generate a widely accepted rationale for Shelley, the case poses a considerable challenge to the formulation of a conceptually sound state action doctrine. Reconceptualizing Shelley as a Thirteenth Amendment-based decision removes the case from the state action context, thereby liberating the state action doctrine from what perhaps we finally can admit is the hopeless task of identifying state action on Shelley's facts. This may help create a more conceptually sound state action doctrine.

D. Making Racially Restrictive Covenants Themselves Illegal

Fourth, the Thirteenth Amendment's direct application to individuals solves the deeply disturbing byproduct of Shelley's Fourteenth Amendment approach: that the restrictive covenants themselves were perfectly legal. In a pre-Shelley decision, the Court stated in dictum that racially restrictive covenants were not themselves illegal, and the Shelley Court transformed this into an express holding.

The fact that racially restrictive covenants remained legal indicted the logic and appeal of Shelley's approach for at least three reasons. First, on an intuitive level, it is an outrageous embarrassment for racially restrictive covenants to be permissible. Second, it is very odd for a contract to be legal but its enforcement to be unconstitutional. This runs against the norm that the violation of a legal right requires a legal remedy. Legal scholars have harshly rebuked deviations from that norm.

Third, the Court's legalization of the covenants themselves may have had very real, very bad, consequences. A recent study by Richard Brooks, a professor at Yale Law School, concluded that "Northern residential segregation . . . was maintained and perpetuated in large part through racial restrictive covenants" notwithstanding the fact that such covenants were judicially unenforceable. Brooks argued that "[c]ovenants were . . . valued signals that served to coordinate the behavior of a variety

263. See Corrigan v. Buckley, 271 U.S. 323, 323, 330 (1926). As to why this was dictum, see supra text and accompanying note 205.
265. See, 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 legal remedy").
266. 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. 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. See, e.g., Alden v. Maine, 527 U.S. 706, 759 (1999). Several scholars have 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).
of private and institutional actors—signals that remained effective despite their later legal unenforceability.\textsuperscript{268} Shelley's Fourteenth Amendment approach, which required \textit{state} action, did not permit the conclusion that the racially restrictive covenants themselves were illegal because a covenant was merely the product of individual actions that did not qualify as state action. This Article's Thirteenth Amendment approach, in contrast, operates directly against the restrictive covenants themselves, because the Thirteenth Amendment's section two extends to private action that constitutes a badge or incident of slavery. Under the Thirteenth Amendment-based statutes discussed earlier in this Article,\textsuperscript{269} racially restrictive covenants themselves accordingly are illegal as a matter of federal law.

\textit{E. Consistency with Post-Shelley Case Law}

A fifth benefit to reconceptualizing Shelley is that a Thirteenth Amendment approach better explains the post-Shelley case law. As shown in Part I, courts have almost uniformly rejected Shelley's attribution rationale; they have not deemed judicial enforcement of individuals' agreements to qualify as state action that would trigger the Fourteenth Amendment.\textsuperscript{270} What are we to make of the disjunction between Shelley's Fourteenth Amendment attribution rationale and subsequent case law? There are two possibilities: 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 in favor of the latter approach stem from common law methodology, a methodology that prefers inductive reasoning from concrete examples over deductive reasoning from first principles.\textsuperscript{271} Under this inductive methodology, the pattern of post-Shelley case law simultaneously indicts 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—what was the result of the deductive process of identifying a preliminary "first principle" to solve the matter at hand—does not accurately explain its holdings. Recall that Shelley demanded state action, found it in the judicial enforcement of a private covenant, and made the state responsible for the covenant's substantive content by means of the

\begin{itemize}
  \item \textsuperscript{268} \textit{Id.} at 4.
  \item \textsuperscript{269} See supra Part II.B.
  \item \textsuperscript{270} See Part I.B.1.
\end{itemize}
Court’s attribution rationale. If later courts had followed the attribution rationale, then judicial enforcement of contracts limiting speech would have triggered constitutional review, as would testamentary wills that condition inheritance on a child’s marriage to a person of a specified religious faith. But, as documented above, these outcomes have not materialized.

This Article’s Thirteenth Amendment approach far better explains the post-Shelley case law. Under this alternative rationale for Shelley, restrictive covenants are illegal, not because their enforcement constitutes state action, but because they violate statutes passed pursuant to the Thirteenth Amendment insofar as the covenants constitute badges or incidents of slavery. The logic that renders racially restrictive covenants illegal accordingly has no bearing on covenants that limit speech or testamentary provisions that restrict a beneficiary’s religious choices. The post-Shelley case law thus is fully consistent with a Thirteenth Amendment conceptualization of Shelley.

The many judicial opinions that have suggested that Shelley is limited to instances of “race discrimination” provide additional evidence that a Thirteenth Amendment approach is consistent with post-Shelley case law. Though these cases did not explain why the attribution rationale properly applied only to race, a Thirteenth Amendment approach explains why Shelley’s interference with private ordering is properly limited to the racial context: the Thirteenth Amendment’s proscription against slavery is appropriately focused on differential treatment on the basis of ancestry or ethnic characteristics.

A Thirteenth Amendment approach also provides a principled basis for critiquing reasoning in some of the post-Shelley case law. As discussed above, the Supreme Court was unwilling to extend Shelley’s holding to the sit-in cases. The Court did not rely on Shelley, presumably because the

272. See supra at pp. 7-8.
273. See supra note 41.
274. See supra Part I.B.1.
275. See Davis v. Prudential Sec., Inc., 59 F.3d 1186, 1191 (11th Cir. 1995); see supra Part I.B.1.
276. See supra Part I.B.
277. See St. Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987) (holding that anti-discrimination provision in statute enacted pursuant to section two of the Thirteenth Amendment applies to person of Arab ancestry; Congress’s powers under section two of the Thirteenth Amendment extend to addressing “discrimination solely because of [a person’s] ancestry or ethnic characteristics”). One is hard-pressed to argue that contracts that interfere with an individual’s ability to speak publicly as she wishes constitutes discrimination on the basis of ancestry or ethnic characteristics, though it would seem that a testamentary provision conditioning benefits on whether a beneficiary marries a person of a particular religious tradition plausibly could be said to run afoul of 42 U.S.C. section 1981.
278. See supra Part I.B.2.b.
279. Under Shelley’s approach, a store owner’s discriminatory animus behind requesting that the police enforce a trespass ordinance and remove an unwanted (African American) visitor would be attributed to the state, triggering Fourteenth Amendment limitations.
Court could not identify a principled stopping point to the attribution rationale. A store's refusal to do business with a person solely because of that person's race, however, is plausibly characterized as a race-based refusal to contract that constitutes 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 commitments embodied in 42 U.S.C. section 1981, 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, reconceptualizing Shelley in Thirteenth Amendment terms may help to give new life to the Thirteenth Amendment's antislavery principle, which both courts and scholars have largely overlooked. Reconceptualizing Shelley in this fashion would serve as a correction, insofar as that decision helped solidify a political culture that largely ignores the Thirteenth Amendment.

A bit of background is important to fully appreciate these points. The Constitution contains a large number of provisions, yet at any point in time only a handful of principles seem salient. For example, although the Contract Clause was the single most heavily litigated constitutional provision in the nineteenth century, few of today's citizens, lawyers, or government officials are familiar with it. Conversely, the right to free speech, among today's most salient constitutional principles, received little

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280. See supra Part III.B (discussing what constitutes an "incident" of slavery). The statement above in text admittedly is inconsistent with language in Civil Rights Cases that an innkeeper's refusal to do business with African Americans does not constitute a "badge of slavery" regulable by Congress under the Thirteenth Amendment, see The Civil Rights Cases, 109 U.S. 3, 31 (1883). The position I advocate in this Article accepts the basic contours of Congress's section two powers that Civil Rights Cases outlined but rejects that case's conclusion that race-based refusals to "deal with [African Americans in] matters of intercourse or business" cannot qualify as a badge or incident of slavery. Id. My approach is no different from that taken by the Court in Jones v. Alfred H. Mayer, Co., 392 U.S. 409, 441 & n.78 (1968), where it dismissed The Civil Rights Cases' conclusion that race-based refusals to do business cannot qualify as badges or incidents, see id. at n.78 ("[w]hatever the present validity of the position taken by the majority on that issue...") and proceeded to uphold Congress's power under the Thirteenth Amendment to prohibit race-based refusals to sell property. The Jones Court also expressly overruled a holding from another earlier case that limited Congress's section two power to any activity that "actually enslaves someone." Id. This Article does not take a position on the very important question of what ought to be the precise scope and bounds of Congress's powers under section two of the Thirteenth Amendment beyond arguing that race-based restrictions on property ownership and the right to contract fall under Congress's section two powers.


public or judicial attention as recently as the early twentieth century.\textsuperscript{283} Other constitutional principles have never enjoyed significant salience; consider, for example, the Fourteenth Amendment’s privileges and immunities clause.

Dominant constitutional principles help 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.”\textsuperscript{284} Yet Minnesota enacted such a law in the early twentieth century, which was upheld by that state’s supreme court in 1907.\textsuperscript{285}

Returning to the subject at hand, the Thirteenth Amendment does not currently seem salient. 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 the Fourteenth Amendment terms of equality and due process. Refocusing attention on the Thirteenth Amendment could have significant consequences. For example, grounding the civil rights revolution for African Americans in equal protection may have rendered affirmative action vulnerable in ways that a Thirteenth Amendment grounding would not, for two reasons: (1) there is a plausible argument that affirmative action is in tension with equal protection commitments, and (2) the Thirteenth Amendment’s focus on a particular ethnic group’s experiences may render it more open to accepting special programs for particular groups.\textsuperscript{286} Similarly, a constitutional culture more attuned to slavery might have been more receptive to arguments for reparations. In addition, perhaps a culture in which the Constitution’s antislavery principle had been more salient would be more outraged by human trafficking, and more interested in arguments that certain working conditions qualify as modern-day slavery.

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

\textsuperscript{283} See David M. Rabban, Free Speech In its Forgotten Years (1997).
\textsuperscript{284} See State v. Pioneer Press, 110 N.W. 867, 867 (Minn. 1907).
\textsuperscript{285} Id.
\textsuperscript{286} I am indebted to a conversation with Risa Goluboff for this point.
G. Institutional Implications

A seventh advantage of reconceptualizing Shelley in Thirteenth Amendment terms is institutional: under both the 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, in contrast, the problem falls only to the courts; the Shelley Court concluded that judicial enforcement would have been unconstitutional, and constitutionality determinations fall almost exclusively to the courts under today's jurisprudence.\textsuperscript{287}

The institutional implications of grounding Shelley in the Thirteenth Amendment are important because the legislative and executive branches' institutional competencies would be useful to determining what private agreements should be illegal. A comparative institutional analysis\textsuperscript{288} does not suggest that courts have no role to play, but such analysis does lead to the conclusion that that the legislative and executive branches properly play the lead roles in determining such matters as the legality of private agreements.

Establishing the proper role for the legislative and executive branches in evaluating racially restrictive covenants requires a three-step analysis. The first step requires an assessment of the factors that appropriately inform enforceability determinations. The second step involves 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 the tasks identified in the first step. The final step requires an inquiry into whether the legislature and executive have other characteristics that would imperil their ability to solve the restrictive covenant problem. Because the argument here is that reconceptualizing Shelley as a Thirteenth Amendment-based case is superior to continuing to understand it as grounded in the Fourteenth Amendment, each of these three steps of comparative institutional analysis will be applied to both the Fourteenth Amendment analysis that has been proffered to date as well as to the Thirteenth Amendment alternative that is identified here. The conclusion of this analysis is twofold: (1) the decision-making process identified in scholarly defenses of Shelley
predicated on the Fourteenth Amendment is better undertaken by the legislative and executive branches than the judiciary, and (2) the decision-making process relevant to a Thirteenth Amendment-based approach is best undertaken by a collaboration between the judicial and the other branches in which the legislative and executive branches play the dominant role, as this Article's Thirteenth Amendment approach permits.

Let us start with the first step vis-à-vis the decision-making process that contemporary defenders of Shelley's Fourteenth Amendment approach have identified. Several of these scholars have suggested that deciding what type of contracts appropriately are enforced turns on highly fact-intensive inquiries. For example, 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, and Professor Carol Rose 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." Other scholars have argued that the decision-making process properly demands a complex balancing among incommensurable values. Thus Professor Henkin argued that courts had to assess the competing constitutional values of liberty, property and equal protection. Similarly, Professors Glennon and Nowak 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.

Let us now undertake a step-one analysis of this Article's Thirteenth Amendment-based approach. The appropriate decision-making process consists of a determination as to whether racially restrictive covenants constitute a badge or incident of slavery.

Step two of the analysis, as applied to a Fourteenth Amendment approach to Shelley, suggests that the decision-making identified by the scholars discussed above is better undertaken by the legislature and the executive than by courts. On Professor Strauss's and Professor Rose's accounts, the propriety of unenforceability turns on an assessment of social facts at the state or national level. Relevant considerations include whether (1) the cultures and customs of prejudice are so widespread as to

289. See Strauss, supra note 163, at 412-14, discussed supra Part II.B.
290. See Rose, supra note 125, at 48-49, discussed supra Part II.B.
291. See Henkin, Notes for a Revised Opinion, supra note 126, at 491-93, discussed supra Part II.B.
292. See Glennon & Nowak, supra note 57, at 230, discussed supra Part II.B.
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have the practical force of law and whether (2) discrimination is the product of a complex set of governmental and private interactions. Legislatures would appear to have superior fact-finding capacities to discover this sort of information than judges hearing a dispute between a particular plaintiff and defendant.293 The decision-making processes proposed by Professors Henkin, Glennon and Nowak similarly demand competencies that are more suited to legislatures and the executive than the judiciary. These scholars, it should be recalled, all suggest that the enforceability of racially restrictive covenants turns on a balancing of competing constitutional principles. This process boils down to a decision among incommensurable values because there is no common metric by which the commitments to desegregation, association, and liberty of contract can be measured.294 Trading off among competing incommensurable commitments accordingly is not a "logical" process, but instead requires the decision maker to prioritize competing commitments. Such a decision-making process simultaneously reflects and defines the very character of the decisionmaker.295 The judiciary does not have exclusive competence in making such decisions.296 Indeed, although I cannot hope to fully defend the point here, the considerations of institutional competence and basic democratic commitments together strongly suggest that the more political legislative and executive branches properly play a central, if not the dominant, role in the deeply subjective

293. Moreover, the race-conscious inquiries that Professor Strauss and Professor Rose believe to be appropriate support the plausibility of this Article’s claim that Shelley is readily housed under the Thirteenth Amendment.

294. Incommensurable values are values that cannot be reduced to a single metric that captures everything significant about the values. See, e.g., Joseph Raz, Incommensurability and Agency, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON 110 (Ruth Chang ed., 1997) ("Incommensurability is the absence of a common measure"); Brett G. Scharffs, Adjudication and the Problems of Incommensurability, 42 Wm. & MARY L. REV. 1367, 1390-91(1991). Some commentators have used the term "incomparability" for the absence of a common metric. See Ruth Chang, Introduction, in 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. The choice among competing constitutional values is not solved by the Constitution’s text, for the Constitution provides no hierarchy as among these constitutional commitments. Indeed, as discussed above in the text, there have been radical shifts over time with regard to the hierarchy of constitutional commitments.

295. For similar accounts of incommensurability, see Elijah Millgram, Incommensurability and Practical Reasoning, in INCOMMENSURABILITY, supra note 294, at 151-69 (focusing on individual decision making under circumstances of incommensurability); Raz, Incommensurability and Agency, in INCOMMENSURABILITY, supra note 294, at 110-28 (arguing that choice, not rationality, governs the selection among incommensurables); Charles Taylor, Leading a Life, in INCOMMENSURABILITY, supra note 294, 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, Does Incommensurability Matter? Incommensurability and Public Policy, 146 U. PA. L. REV. 1287 (1998).

296. Cf. Henkin, Infallibility Under Law, supra note 135, at 1048 (noting that balancing “seem[s] emphatically to be the province or competence of the political branches—the weighing of competing social interests and values”).
and value-laden decision-making process of prioritizing among competing constitutional commitments.297

Let us now apply step-two analysis to this Article’s proposed Thirteenth Amendment approach. What decision-making process properly determines what constitutes a badge or incident of slavery? Determining the scope of badges and incidents likely would call on both sorts of inquiries identified by the scholars who have sought to ground Shelley in the Fourteenth Amendment. To begin, the determination likely would require significant factual investigation as to what historically qualified as a badge and incident of slavery and what would so qualify today under present circumstances and consistent with contemporary cultural sensibilities. Congress’s fact-finding tools likely are superior to those of courts. Moreover, Congress’s institutional superiority is only deepened insofar as the meaning of badges and incidents of slavery is subject to change as there are changes of various facts on the ground (such as various ethnic groups’ socioeconomic status and other more general cultural sensibilities); Congress is better suited to updating the meaning of badges and incidents because it does not have the inherent conservativism and backward looking-quality that characterizes the judiciary (in such doctrines as stare decisis and, indeed, more generally). Furthermore, defining the scope of badges and incidents of slavery likely would call on a balancing of competing constitutional commitments. In essence, the definition of badges and incidents would represent Congress’s judgment as to how the commitment to individual liberty and property is to be balanced against the commitment to eliminating the vestiges of slavery. For the reasons discussed above, such balancing of incommensurable commitments is more appropriately undertaken by the more political branches of government than by courts.

Turning to step three of the analysis, the question is whether the executive and legislative branches have institutional characteristics that make them unsuited to evaluating restrictive covenants. My guess is that even if the reader has concurred with my arguments up to this point, this third step in the process of comparative institutional analysis would be counted as favoring the current Fourteenth Amendment approach to Shelley. The concern is that the more political branches are more likely to reflect only majoritarian preferences, overlooking minority interests. For example, what if Congress had responded to Shelley by passing a law that confirmed the legitimacy of restrictive covenants? On the approach I have advocated here, Congress could have done this, rendering Shelley’s ban on judicially enforcing racial covenants vulnerable to majoritarian politics.

Three considerations soften the force of this critique considerably, however. First, as discussed above in Part III.B, in the present context Congress had spoken by enacting sections 1981 and 1982, which protected minority interests. It thus may be simplistic to assume that only the Court is able to stand up to vindicate constitutional principles as against popular sentiments. More generally, Congress may act more responsibly when it is entrusted with serious responsibility; the contemporary culture of judicial review in which courts are deemed to be the sole safe-keepers of constitutional commitments may impede legislators from acting according to their full potential to pursue the public good and guard constitutional principles. On this view, it would be beneficial to take steps that ensure that multiple governmental institutions, and not just courts, are encouraged to pursue the public good and responsibly discharge their duties of upholding the Constitution.

Second, the Court alone may not be able to bring about change in society absent congressional support. Consider the new wave of scholarship that questions the extent to which Brown v. Board of Education advanced the cause of racial desegregation.\(^{298}\) These scholarly works provide data strongly suggesting that desegregation did not diminish until Congress joined in the effort by enacting civil rights legislation in the 1960s.\(^{299}\) This scholarship does not deny that the Supreme Court played an important role in placing school desegregation on the nation’s political agenda,\(^{300}\) but suggests that multibranch involvement is necessary for concrete change to occur. If real societal change requires not only judicial action but also the legislature's support, then the force of the challenge above—the possibility that Congress could have legislatively reversed the Shelley decision—is largely dissipated, for there is not much of a difference between (1) a Court opinion disallowing enforcement of restrictive covenants in the face of Congress’s unwillingness to support the Court’s declaration and (2) Congress’s embrace of restrictive covenants and the absence of judicial power to reverse the legislature’s decision. To the extent this is true, there is not much if any advantage that a Fourteenth


\(^{299}\) Klarman, supra note 117; Rosenberg, supra note 298; Ogletree, supra note 298; Sunstein, supra note 298; Finkelman, supra note 298.

\(^{300}\) It is not self-evident that this assisted the desegregation effort. Michael Klarman argues that the Brown opinion may have helped consolidate the antidesegregation movement, and in other respects may have slowed the development of a societal consensus against segregation. See Klarman, supra note 298, at 385.
Amendment approach to Shelley has in the third step in our comparative institutional analysis.

Third, a congressional statute that sought to authorize restrictive covenants after Shelley's ruling may have been amendable to being declared unconstitutional by the Supreme Court after all. If such a statute reflected invidious discrimination, for example, it would have violated the Equal Protection Clause.

Taking account of all three steps of our comparative institutional analysis, I conclude that institutional considerations favor relocating Shelley from the Fourteenth Amendment to the Thirteenth Amendment. The first two steps in the analysis clearly favor a constitutional doctrine that allocates primary decision-making authority to Congress and the President, and this conclusion is not undermined by the third step, though I acknowledge that the issue is a close one.

In the end, assessing the persuasiveness of this Article's proposal of course requires consideration of all the other benefits of reconceptualizing Shelley as a Thirteenth-Amendment based case that have been identified in this Part IV as well as consideration of the many drawbacks of treating the case as a Fourteenth Amendment decision that were shown in Parts I and II. Finally, it bears noting that one who is uncomfortable with Congress having final authority under its Thirteenth Amendment section two powers but otherwise is persuaded by this Article's suggestion that Shelley be reconceived as a Thirteenth Amendment-based decision might consider revisiting the Civil Rights Cases's holding with regard to the scope of section one of the Thirteenth Amendment. After all, if section one were deemed to ban not only slavery but its badges and incidents as well, then the Supreme Court would have a clear basis to overturn congressional legislation that sought to permit racially restrictive covenants.

CONCLUSION

Nearly sixty years of post-Shelley case law 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 stems from its efforts to ground the case in the Fourteenth Amendment. This Article instead has argued that Shelley is best understood as growing out of the Thirteenth Amendment. The Court could

301. 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 the homeowners' association and property rights.

302. See Bolling v. Sharpe, 347 U.S. 497 (1954) (reverse incorporating equal protection against the federal government). Though Bolling was decided six years after Shelley, the Court presumably could have fashioned the doctrine a few years earlier if circumstances had given rise to the need.

303. See supra note 182 for further discussion of this, including an explanation as to why I reject this approach.
have found restrictive covenants illegal based on two federal statutes enacted in the late nineteenth century, pursuant to Congress’s power under the Thirteenth Amendment. Even if Congress had not enacted those statutes, 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 and the public/private distinction. Relatedly, removing the Shelley case from the state action context may permit the creation of a more principled state action doctrine, as that body of law will no longer 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 slavery. The Article’s identification of the highly subjective and character-defining decision making that is involved in such determinations establishes that it is desirable for the more political branches to participate 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. 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 out of the Thirteenth rather than the Fourteenth Amendment. For these reasons, even if Shelley's Fourteenth Amendment approach was wise at the time, a complex historical and normative question that this Article does not pursue, there are good reasons to reconceptualize Shelley now.