Duke Law Journal

VOLUME 1965 SPRING NUMBER 2

MR. JUSTICE BLACK, CONSTITUTIONAL REVIEW, AND THE TALISMAN OF STATE ACTION

WILLIAM W. VAN ALSTYNE*

They also serve who only stand and wait.†

I

IN RECENT YEARS the Supreme Court has been greatly agitated over the significance of a single word. That word is state. It appears just once in those compact clauses which provide:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[1]

In those cases which ordinarily occasion an examination of the word, it may initially be supposed that a person may have been deprived of due process or denied equal protection. Before embarking upon the usual sorting, weighing and balancing of interests under the appropriate rubric of due process or equal protection, however, the Court has frequently found it necessary first to determine whether there is any occasion for such an elaborate and arduous undertaking. If it is clear that the alleged deprivation of due process or the claimed denial of equal protection cannot fairly be imputed to a state, for instance, there would seem to be no point whatever in pursuing the matter any further. After all, even the least sophisticated student appreciates the fact that the fourteenth amendment does not grant or establish anything as a legal right; it merely provides a limited immunity against *state* divestiture of certain pre-

* A.B. 1955, University of Southern California; LL.B. 1958, Stanford University. Professor of Law, Duke University. Senior Fellow, Yale Law School, 1964-65.

† Milton, *Sonnet on His Blindness.*

[1] U.S. CONST. amend. XIV, § 1.

rogatives which all persons may claim as human beings.[2] Private interferences with those prerogatives, like acts of God, presumably raise no problems under the fourteenth amendment. If a man is on his way to address a meeting in a public park, for instance, the fourteenth amendment apparently is no more involved when he is stopped by a private citizen who keeps him from the meeting than it would have been had he been detained by a sudden rainstorm. Since it would be futile for the Court to weigh the social value of rainstorms against the value of a person's freedom of speech in order to determine whether there has been an abstract unconstitutional abridgment, it has ordinarily seemed equally foolish to undertake a weighing of interests in cases where private action alone has intervened to frustrate a person's protected prerogatives. Thus, the initial issue in cases arising under the fourteenth amendment traditionally has been whether there was some reviewable state involvement in the acts of those who allegedly abridged the constitutionally protected interest in question.

A classical treatment of this traditional approach is *Black v. Cutter Labs.*[3] In that case, a private employee was discharged by a private employer because of her membership in the Communist Party. The discharge was pursuant to a private collective bargaining contract which provided that such membership would constitute "just cause" for discharge. The discharge was upheld by the California Supreme Court. The employee's petition for certiorari was dismissed by a majority of the Supreme Court on the ground that "the decision involves only California's construction of a local contract under local law and *therefore* no substantial federal question is presented."[4] The Court did not decide on the

[2] See, *e.g.*, Bell v. Maryland, 378 U.S. 226, 326 (1964) (dissenting opinion); Bouie v. City of Columbia, 378 U.S. 347, 365 (1964) (dissenting opinion); Griffin v. Maryland, 378 U.S. 130, 138 (1964) (dissenting opinion); Barr v. City of Columbia, 378 U.S. 146, 151-52 (1964) (dissenting opinion); Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961) (dictum); Collins v. Hardyman, 341 U.S. 651, 658 (1951) (dictum); Shelley v. Kraemer, 334 U.S. 1, 13 (1948) (dictum); Corrigan v. Buckley, 271 U.S. 323, 330 (1926); United States v. Wheeler, 254 U.S. 281, 298 (1920) (dictum); Hodges v. United States, 203 U.S. 1, 14 (1906) (dictum); Civil Rights Cases, 109 U.S. 3, 11 (1883) (dictum); United States v. Harris, 106 U.S. 629, 638-40 (1882); Virginia v. Rives, 100 U.S. 313, 318 (1879) (dictum); United States v. Cruikshank, 92 U.S. 542, 554-55 (1875) (dictum).

[3] 351 U.S. 292 (1956).

[4] *Id.* at 299. (Emphasis added.)

merits that the particular employer's business interests as weighed against the employee's circumstances and interests made the employer's decision constitutional because it was reasonable. So far as the majority was concerned, the reasonableness of the employer's decision was not reviewable because of the fact that no state involvement beyond orderly protection of that decision was present; absent some other state action, there was nothing to review. The employer, not the State of California, had fired the employee, and if due process had been denied, it had been denied by the employer and not by California.

A recent and exceptionally vigorous restatement of this common sense approach is provided by Mr. Justice Black's dissenting opinion in *Bell v. Maryland.*[5] There, twelve Negro students had been convicted of trespass after refusing to leave a restaurant when requested to do so by the manager, who was acting on orders given by one Hooper, the president of the corporation which owned the restaurant. Whether Hooper's decision to refuse service and exclude the Negroes was reasonable under all the circumstances, *i.e.*, whether the corporation's interest in freedom of action, its business risks, its employees' associational preferences, etc., were of sufficient importance to rationalize whatever injury was done to the interests of the Negroes by their being denied service, was never discussed by Mr. Justice Black. It would supposedly have been a waste of time for him to make such an inquiry if the exclusionary decision could not have been reasonably imputed to the state. Absent some significant involvement of the state, this "private" denial of equal protection would no more have raised a constitutional issue under the fourteenth amendment than had lightning arbitrarily struck the Negroes just before they entered the restaurant.

Accordingly, in keeping with sensible orthodoxy and the logical order for reviewing the issues, Mr. Justice Black began his opinion by noting that the equal protection clause could be brought into play only after a determination that the state, in this case Maryland, had made the decision to exclude the Negroes:

[5] 378 U.S. 226, 318 (1964). For the fate of the majority's treatment of the case, see Bell v. State, 204 A.2d 54 (Md. 1964). The Court will not be confronted with the case again, however, because of its decision in Hamm v. City of Rock Hill, 379 U.S. 306 (1964).

> This section of the Amendment, unlike other sections,[6] is a prohibition against certain conduct only when done by a State—'state action' as it has come to be known—and 'erects no shield against merely private conduct, however discriminatory or wrongful.'[7]

He then pointed out that the facts clearly established that Maryland did not attempt to influence the owner's decision to refuse service to Negroes:

> There is no Maryland law, no municipal ordinance, and no official proclamation or action of any kind that shows the slightest state coercion of, or encouragement to, Hooper to bar Negroes from his restaurant.[8]

Mr. Justice Black might also have added that there was no governmental subsidy, leasehold connection or delegation of governmental functions which could identify Maryland as the necessary "real"

---

[6] At this point, Mr. Justice Black inserted the following footnote: "*E.g.*, § 5 [of the fourteenth amendment]: 'The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.'" *Id.* at 326. In several other places in his opinion, Mr. Justice Black further adverted to the power of Congress to extend the coverage of equal protection to private acts of discrimination. See, *e.g.*, *id.* at 329, 335, 339, 343. Is Mr. Justice Black prepared to uphold federal legislation bottomed on § 5 of the fourteenth amendment and directed against discrimination in *all* places of public accommodation, not merely against those affecting interstate commerce or involving orthodox state action? While he has expressly declined to commit himself, *id.* at 343, I believe that he is.

Support for such an exercise of congressional authority can be found in FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT 1862-1890 190-93 (1939); HARRIS, THE QUEST FOR EQUALITY (1960); MAGRATH, MORRISON R. WAITE: THE TRIUMPH OF CHARACTER 116-34 (1963); Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131 (1950); Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353 (1964); Hale, *Rights Under the Fourteenth and Fifteenth Amendments Against Injuries Inflicted by Private Individuals*, 6 LAW. GUILD REV. 627 (1946); Peters, *Civil Rights and State Non-Action*, 34 NOTRE DAME LAW. 303 (1959); Roche, *Civil Liberty in the Age of Enterprise*, 31 U. CHI. L. REV. 103, 107-12 (1963). Significant case law on point includes Lynch v. United States, 189 F.2d 476 (5th Cir. 1951); Picking v. Pennsylvania R.R., 151 F.2d 240 (3d Cir. 1945), *cert. denied*, 332 U.S. 776 (1947); *Ex parte* Riggins, 134 Fed. 404, 409 (N.D. Ala. 1904); United States v. Given, 25 Fed. Cas. 1324 (No. 15210) (C.C.D. Del. 1873); United States v. Hall, 26 Fed. Cas. 79, 81-82 (No. 15282) (C.C.S.D. Ala. 1871).

The possible significance of § 5 of the fourteenth amendment should also be examined in view of Dean Griswold's analysis of § 2 of the fifteenth amendment. *Hearings on S. 480, S. 2750, and S. 2979 Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 87th Cong., 2d Sess. 138-53 (1962). Also of considerable relevance are GELLHORN, AMERICAN RIGHTS ch. 9 (1960); PEKELIS, *Private Governments and the Federal Constitution*, in LAW AND SOCIAL ACTION 91 (1950); Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 559 (1954).

[7] 378 U.S. at 326.

[8] *Id.* at 333.

author of the decision to exclude the Negroes.[9] In any case Mr. Justice Black was on solid footing when he held that the exclusionary decision could not be imputed to Maryland, and since Hooper, not Maryland, had refused service to the Negroes, there could be no basis for proceeding further into the case. Arbitrary or not, invidious or not, capricious and unassociated with any compelling proprietary interest or not, Hooper's action was simply unaffected by anything in the fourteenth amendment.

Finally, Mr. Justice Black directed his attention to the only visible connection between Maryland and Hooper, namely, the executive and judicial application of the state's nondiscriminatory trespass statute which safeguarded Hooper's decision. Mr. Justice Black quickly eliminated that connection as sufficient to impute the restaurateur's decision to Maryland:

> To avert personal feuds and violent brawls [our society] ... has led its people to believe and expect that wrongs against them will be vindicated in the courts. Instead of attempting to take the law into their own hands, people have been taught to call for police protection to protect their rights wherever possible .... None of our past cases justifies reading the Fourteenth Amendment in a way that might well penalize citizens who are law-abiding enough to call upon the law and its officers for protection instead of using their own physical strength or dangerous weapons to preserve their rights.[10]

The point seems eminently well taken. No reasonable person would contend that Maryland's even-handed willingness to apply its trespass statute to protect or vindicate Hooper made his decision to exclude Negroes the decision of Maryland. Maryland enforced the decision, but it clearly did not make the decision.

In view of all of this, it was forebearing of Mr. Justice Black to have refrained from ridiculing his three brothers who went on to balance the interests and scrutinize the fairness of Hooper's conduct

[9] Compare Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Terry v. Adams, 345 U.S. 461 (1953); Marsh v. Alabama, 326 U.S. 501 (1946); Smith v. Allwright, 321 U.S. 649 (1944); Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir.), *cert. denied*, 376 U.S. 938 (1964); Boman v. Birmingham Transit Co., 280 F.2d 531 (5th Cir. 1960). See also Griffin v. Maryland, 378 U.S. 130 (1964); Lombard v. Louisiana, 373 U.S. 267 (1963); Peterson v. City of Greenville, 373 U.S. 244 (1963); Garner v. Louisiana, 368 U.S. 157, 163 (1961); Monroe v. Pape, 365 U.S. 167 (1961); Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230 (1957); Screws v. United States, 325 U.S. 91 (1945); United States v. Classic, 313 U.S. 299 (1941).

[10] 378 U.S. at 327-28.

almost as though the fourteenth amendment applied to Hooper himself, and not merely to Maryland. Evidently these straying Justices bypassed the threshold prerequisite of "state action" which is necessary to legitimate that further inquiry. Evidently they ignored the language and limitations of the fourteenth amendment which the Court has often restated:

> The provisions of the 14th Amendment of the Constitution we have quoted all have reference to State action exclusively, and not to any action of private individuals.[11]
>
> Individual invasion of individual rights is not the subject-matter of the amendment.[12]
>
> [T]he action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.[13]
>
> [P]rivate conduct abridging individual rights does no violence to the Equal Protection Clause....[14]

II

It is true, of course, that three of these celebrated quotations are taken from cases in which they were dicta, cases where the Court in fact found reviewable state action, proceeded to the merits, and applied the fourteenth amendment in behalf of equal protection claims. It is likewise true that the fourth case, the *Civil Rights Cases*,[15] involved the constitutionality of a federal statute under section five of the fourteenth amendment. There the Court actually presumed that the states did not enforce or protect a conflicting proprietary claim.[16] No matter. The dicta are firmly based on the clear language of the fourteenth amendment. They were bound to be applied when put to a proper test as in *Bell* and *Cutter Labs*.

Nevertheless, while Mr. Justice Black's analysis in *Bell* is clearly

---

[11] Virginia v. Rives, 100 U.S. 313, 318 (1879).

[12] Civil Rights Cases, 109 U.S. 3, 11 (1883).

[13] Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

[14] Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961). See also other cases cited in note 2 *supra*.

[15] 109 U.S. 3 (1883).

[16] "[H]is rights ..may presumably be vindicated by resort to the laws of the State for redress. An individual... may, by force or fraud, interfere with the enjoyment of the right in a particular case [but]... he will only render himself amenable to satisfaction or punishment; and amenable therefore to the laws of the State where the wrongful acts are committed." *Id.* at 17.

the same type of analysis as that implicit in the brief majority treatment of *Cutter Labs.*, Mr. Justice Black actually joined in a dissenting opinion in the latter case. Even more strange is the fact that that dissent turned on a weighing and balancing of the rival interests of the *private* litigants. The dissenters did not draw up short of a treatment of the merits, even though they knew perfectly well that it had been the owners of Cutter Laboratories rather than the State of California who had fired the petitioner. To the contrary, they briefly reviewed the petitioner's interest in freedom of political association, they noted the absence of evidence suggesting that Cutter Laboratories had some legitimate reason for dispensing with her services, and they would have applied the due process clause to bar the employer's discharge decision from taking effect. Moreover, in refusing to boggle over the state action prerequisite, the dissent in *Cutter Labs.* expressly relied on *Shelley v. Kraemer*[17] as precedent.[18] Since Mr. Justice Black had voted with a unanimous Court in *Shelley*, it is not surprising that he would approve of its citation in the *Cutter Labs.* dissent. The surprise is, rather, that *Shelley* itself held a state responsible for denying equal protection in the mere application of a common law rule which safeguarded a *private* covenantee's own current easement in real property. *Shelley* held that certain privately acquired, bargained-for property rights of private citizens could not be enforced by any state, when such enforcement would frustrate a purchaser's interest in acquiring and holding the affected property without disqualification because of race or color.[19] The Court in *Shelley* did not, as it assuredly could not, impute to the state the particular willinguess of Kraemer to bargain away an incident of ownership in return for an identical easement against co-covenantors. As in *Bell*, "no [state] . . . law, no municipal ordinance, and no official proclamation or action of any kind [showed] . . . the slightest state coercion of, or encouragement to,"[20] the private decision-makers in *Shelley*. Rather, it was merely "in granting judicial enforcement"[21] to a wholly private decision to

[17] 334 U.S. 1 (1948).

[18] 351 U.S. at 302-03.

[19] *Compare* Bell v. Maryland, 378 U.S. 226, 328-31 (1964) (Mr. Justice Black's discussion of *Shelley*) *with* Brief for Petitioners, pp. 51-57, Hamm v. City of Rock Hill, 379 U.S. 306 (1964).

[20] 378 U.S. at 333.

[21] 334 U.S. at 20.

withhold private property from prospective Negro purchasers that the state became involved. It was never in doubt that the racial animus and the decision to discriminate were supplied solely by private parties who were neither coerced nor encouraged by the state.

So private citizen Kraemer, not Missouri, decided that faithless covenantor Ferguson should be bound by his agreement and that Shelley should be kept from home ownership because of his race. Private corporation Cutter Laboratories, not California, decided that its employee should be fired because of her political affiliation. What else, if anything, tends to detract from the crystalline correctness of Mr. Justice Black's analysis in *Bell*?

In Illinois at one time, private employers were free to forbid organizational picketing of their shops when there was no existing dispute between the employer and his own employees. No employer was required to forbid such picketing, however, and Illinois did not coerce or encourage any employer's decision in any way. If a given employer wished to permit such picketing, he was at liberty to do so (just as he was free to hire Communists or serve Negroes). On the other hand, if he decided not to allow picketing, he could secure an injunction in order to protect his decision. The situation in Illinois regarding picketing was therefore analogous to the trespass situation in Maryland in the very same respect that Mr. Justice Black found to be of critical importance in *Bell*: any given shop owner's decision to impair an interest allegedly protected by the fourteenth amendment would have been solely the decision of a private party. Since the decision of such an employer could not honorably have been imputed to Illinois, which had neither encouraged nor coerced his decision, the fourteenth amendment evidently could not have been involved in a case arising from the state's protection of that decision. Accordingly, the Supreme Court should have dismissed any appeal taken by pickets who had been enjoined from refusing to honor an employer's decision to bar them from picketing in front of his private shop. Certainly there would seem to have been no occasion to waste time by considering the pickets' due process claim on the merits; no matter how unreasonable the employer's decision might have been or how substantial the interests of the pickets, the case would seem to have been no more reviewable than had a cruel and arbitrary plague, rather than the employer, intervened to halt the picketing. Private

decisions and plagues, as we have noted, evidently raise no fourteenth amendment issues.

Curiously, however, seven members of the Supreme Court did not reach this result in *AFL v. Swing*,[22] decided in 1941. Instead, they briefly assessed the competing interests of the employers and union organizers, concluded that the union's interest in peaceful and non-defamatory picketing outweighed the needs of the employers to be free of such harassment, applied the due process clause, and reversed the judgment below. Mr. Justice Black concurred. The case was cited and relied upon with Mr. Justice Black's approval in *Shelley*[23] in 1948, and, as previously noted, *Shelley* in turn was relied upon by the dissent in *Cutter Labs.*[24] in 1956, again with Mr. Justice Black's approval.

Perhaps, however, the surface inconsistency of these cases does not detract from the soundness of Mr. Justice Black's 1964 opinion in *Bell* where he dealt so differently with the prerequisite of state action. Or perhaps he has simply altered his position for the better, with the correct approach being that taken by him in *Bell.* In each case, to be sure, something desired by some persons was denied or taken away at the instance of other private persons who lacked any collateral tie with the state and whose decisions were neither encouraged nor coerced by the state. Perhaps Mr. Justice Black would now feel that such actions as those of Kraemer, Swing, and Cutter Laboratories would fail to raise a substantial federal question.[25]

There is still another, more recent case, however, which is also difficult to square with the relentless logic of prerequisite state action developed by Mr. Justice Black in *Bell.* That case is *New York Times Co. v. Sullivan.*[26]

In Alabama, as in most states, private citizens enjoy a certain

---

[22] 312 U.S. 321 (1941).

[23] 334 U.S. at 17.

[24] See note 18 *supra.*

[25] Of course the *Swing* case permits an easy orthodox distinction because the picketing occurred on a public sidewalk rather than inside Swing's shop. See, *e.g.*, Kunz v. New York, 340 U.S. 290 (1951); Cantwell v. Connecticut, 310 U.S. 296 (1940); Hague v. CIO, 307 U.S. 496 (1939). *But see* International Bhd. of Teamsters v. Vogt, Inc., 354 U.S. 284 (1957); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949).

Nevertheless, note where the protected speech occurred in Garner v. Louisiana, 368 U.S. 157, 185, 196-204 (1961) (concurring opinion); Marsh v. Alabama, 326 U.S. 501 (1946); Thornhill v. Alabama, 310 U.S. 88 (1940). Compare Commonwealth v. Davis, 162 Mass. 570, 39 N.E. 113 (1895).

[26] 376 U.S. 254 (1964).

right to be free from defamatory utterances which they find offensive. These citizens are neither encouraged nor coerced by the state to refuse to consent to such treatment, however, or to invoke the state's libel laws upon being defamed without advance consent. As a matter of fact, a resident of Alabama is every bit as free to permit other persons to impugn his reputation as a storekeeper in Maryland is to permit Negroes to remain in his restaurant. Alabama does nothing more to encourage its residents to do anything about libellants, than Maryland does to encourage its restaurateurs to exclude Negroes. In this respect, Alabama also takes the same disinterested position with respect to libel as Missouri did in *Shelley* regarding Negroes; Missouri covenantees were free to allow Negroes to live next door, just as Alabama libellees are free to allow other persons to defame them. In each case, the individual alone decides whether adequate protection of his own best interests requires that some law, such as the common law of libel, property, or trespass, be applied in a manner which necessarily subordinates the conflicting interests of others.

When the *New York Times* defamed Mr. Sullivan in Alabama, and Mr. Sullivan—like Mr. Kraemer of Missouri and Mr. Swing of Illinois in their cases—decided freely to discipline the *Times* through "a civil lawsuit between private parties,"[27] it should have surprised no one that the Alabama Supreme Court declined to consider any argument of the defendant based upon the fourteenth amendment.[28] The decision to punish the *Times* and to discourage its editors from future assaults on his reputation obviously was made solely by Sullivan, not by Alabama. Had the Alabama Supreme Court been able to anticipate Mr. Justice Black's dissent in *Bell,* it might usefully have adopted part of his opinion in this sort of paraphrase:

> There is no Alabama law, no municipal ordinance, and no official proclamation or action of any kind that shows the slightest state coercion of, or encouragement to, Sullivan to discipline the *New York Times* for reflecting adversely upon his reputation.[29]

Then, directing its attention to the only visible connection between Alabama and Sullivan, *viz.,* the judicial application of the state's common law rule against libel, the Alabama court might quickly

[27] *Id.* at 265.

[28] New York Times Co. v. Sullivan, 273 Ala. 656, 676, 144 So. 2d 25, 40 (1962), *rev'd,* 376 U.S. 254 (1964).

[29] See text accompanying note 8 *supra.*

have eliminated *that* connection as sufficient to impute Sullivan's decision to Alabama by paraphrasing another passage of Mr. Justice Black's opinion in *Bell*:

> To avert personal feuds and violent brawls our society has led its people to believe and expect that wrongs against them will be vindicated in the courts. Instead of attempting to take the law into their own hands, people have been taught to seek the protection of the courts wherever possible. None of our past cases justifies reading the fourteenth amendment in a way that might well penalize citizens who are law-abiding enough to call upon the law instead of using their own physical strength or dangerous weapons to preserve their rights.[30]

That approach certainly would have been just as applicable in the *New York Times* case as it was in *Bell*. The fourteenth amendment should not have been interpreted in a manner which would have encouraged Sullivan to seek private vengeance against those who libelled him rather than turn to the courts for vindication of his reputational rights in an orderly fashion.

Although the Alabama Supreme Court did not have the benefit of this wisdom, it nevertheless made the proper finding according to the orthodoxy of Mr. Justice Black's dissent in *Bell*. It noted that "the Fourteenth Amendment is directed against State action and not private action."[31] And the facts clearly established that Sullivan's decision not to consent to the *Times*' libel and to invoke the protection of the state courts could not be imputed to Alabama. Accordingly, it affirmed the judgment in favor of Sullivan without embarking upon a lengthy balancing of Sullivan's interests in reputational integrity against the *Times*' interests in publication. Such a balancing operation seemingly would have served no useful purpose. In withholding consent from the *Times* and suing for damages under Alabama law, Sullivan may have deprived the *Times* of freedom of speech, but Sullivan, of course, is not subject to the fourteenth amendment!

The Supreme Court of the United States viewed the case somewhat differently. In a single terse paragraph, which, incidentally, cited the *Swing* case, the Court declared that Alabama rather than Sullivan had acted in a manner allegedly depriving the *Times* of

[30] See text accompanying note 10 *supra*.
[31] 273 Ala. at 676, 144 So. 2d at 40.

freedom of speech.[32] It then proceeded to weigh the competing interests of the parties at considerable length, and concluded that consistent with substantive due process, the *New York Times* could not be barred from publishing the type of statement which Sullivan found objectionable. Consequently, it reversed the judgment in favor of Sullivan on constitutional grounds. Mr. Justice Black not only concurred in the decision, but wanted to provide even more fourteenth amendment protection than that provided by the majority.[33] The *New York Times* decision came down just three months before Mr. Justice Black dissented in *Bell* for want of sufficient state action to reach the merits.

III

No doubt certain distinctions lend themselves to a rationalization of the cases discussed above. Many such distinctions have been suggested in the vast periodical literature which has been fascinated

[32] "The first [ground asserted to insulate the judgment of the Alabama courts from constitutional scrutiny] is the proposition relied on by the State Supreme Court—that 'The Fourteenth Amendment is directed against State action and not private action.' That proposition has no application to this case. Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute.... The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised." 376 U.S. at 265.

Note that it was enough that a common law rule was applied to mediate conflicting claims of right "between private parties." The Court did *not* find reviewable state action by relying upon the fact that the plaintiff was a state official (a police commissioner), or that the state could be described as seeking to suppress criticism of itself to the extent that it granted damages for libel directed to the official conduct of one of its own functionaries. It is significant that the Court did not take this easy means of isolating the reviewable element of state action. Had it done so, the Court would have left itself open to difficulty in extending the holding of the case to protect non-malicious libel directed against *candidates for office,* who are not state officials and whose criticized conduct could not possibly be attributed to the state. The case is almost certain to afford such protection, since the rationale was stated in terms of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," and the need for "breathing space" and protest regarding "major public issues," even when such debate and protest contains carelessly made false statements injurious to others. 376 U.S. at 270-83. See also Kalven, *The New York Times Case: "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191; Pedrick, *Freedom of the Press and The Law of Libel: The Modern Revised Translation,* 49 CORNELL L.Q. 581 (1964). A rule insisting that negligent defamation of an incumbent directed to his official conduct is constitutionally protected. but that negligent defamation of his opponent regarding his qualifications for office is not equally protected, would be an unthinkable warping of fair political comment. See Garrison v. Louisiana, 379 U.S. 64, 77 (1964).

[33] 376 U.S. at 293.

with the state action conundrum.[34] None of these distinctions, however, ultimately serves to excuse Mr. Justice Black's unique failure to examine the fundamental fairness of the Maryland trespass law as applied in *Bell*. For there was in that case, as there is in every case where conflicting claims of right are mediated by state law, sufficient state involvement to bring the case within the threshold of constitutional review. And if the trespass convictions in *Bell* were

[34] In addition to the materials cited in note 6 *supra*, see Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 CORNELL L.Q. 375 (1958); Alfange, *"Under Color of Law": Classic and Screws Revisited*, 47 CORNELL L.Q. 395 (1962); Barnett, *What is "State" Action Under the Fourteenth, Fifteenth, and Nineteenth Amendments of the Constitution?* 24 ORE. L. REV. 227 (1945); Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PA. L. REV. 933 (1952); Carl, *Reflections on the "Sit-Ins,"* 46 CORNELL L.Q. 444 (1961); Gilbert, *Theories of State Action as Applied to the "Sit-In" Cases*, 17 ARK. L. REV. 147 (1963); Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149 (1935); Hecht, *From Seisin to Sit-In: Evolving Property Concepts*, 44 B.U.L. REV. 435 (1964); Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); Henkin, *Some Reflections on Current Constitutional Controversy*, 109 U. PA. L. REV. 637 (1961); Horowitz, *Fourteenth Amendment Aspects of Racial Discrimination in "Private" Housing*, 52 CALIF. L. REV. 1 (1964); Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 SO. CAL. L. REV. 208 (1957); Hyman, *Segregation and the Fourteenth Amendment*, 4 VAND. L. REV. 555 (1951); Karst & Van Alstyne, *Comment: Sit-Ins and State Action—Mr. Justice Douglas, Concurring*, 14 STAN. L. REV. 762 (1962); Lewis, *The Role of Law in Regulating Discrimination in Places of Public Accommodation*, 13 BUFFALO L. REV. 402 (1964); Lewis, *The Sit-In Cases: Great Expectations*, 1963 SUP. CT. REV. 101; Lewis, *Burton v. Wilmington Parking Authority—A Case Without Precedent*, 61 COLUM. L. REV. 1458 (1961); Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960); Manning, *Corporate Power and Individual Freedom: Some General Analysis and Particular Reservations*, 55 NW. U.L. REV. 38 (1960); Ming, *Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases*, 16 U. CHI. L. REV. 203 (1949); Paulsen, *The Sit-In Cases of 1964: "But Answer Came There None,"* 1964 SUP. CT. REV. 137; Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959); Pollitt, *Dime Store Demonstrations: Events and Legal Problems of First Sixty Days*, 1960 DUKE L.J. 315; Rice, *Sit-Ins: Proceed with Caution*, 29 MO. L. REV. 39 (1964); St. Antoine, *Color Blindness But Not Myopia: A New Look at State Action, Equal Protection, and "Private" Racial Discrimination*, 59 MICH L. REV. 993 (1961); Schwelb, *The Sit-In Demonstration: Criminal Trespass or Constitutional Right?*, 36 N.Y.U.L. REV. 779 (1961); Traynor, *Law and Social Change in a Democratic Society*, 1956 U. ILL. L.F. 230; Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); Wellington, *The Constitution, the Labor Union, and "Governmental Action,"* 70 YALE L.J. 345 (1961); Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347 (1963); Comment, *A Statement Against State Action*, 37 SO. CAL L. REV. 463 (1964); Comment, *The Impact of Shelley v. Kraemer on the State Action Concept*, 44 CALIF. L. REV. 718 (1956); Comment, *Lunch Counter Demonstrations: State Action and the Fourteenth Amendment*, 47 VA. L. REV. 105 (1961); Comment, *Constitutional Law—Equal Protection—Racial Discrimination and the Role of the State*, 59 MICH. L. REV. 1054 (1961); Note, *State Action*, 1 RACE REL. L. REP. 613 (1956); Note, *Applicability of the Fourteenth Amendment to Private Organizations*, 61 HARV. L. REV. 344 (1948).

reconcilable with the equal protection clause of the fourteenth amendment, it could only have been because the state's mediation of the conflicting claims of right was sufficiently reasonable under the circumstances. It could not have been because the reasonableness of the scheme was not reviewable by the Court for lack of requisite state action, as Mr. Justice Black thought.

The action to be reviewed in a fourteenth amendment case does not, of course, inhere in the decision of a private citizen to deny something to others when that decision meets with the acquiescence of those whom it adversely affects. If the matter is carried no further than that, there is—by definition—no clash of interests which the state is called upon to mediate and no case or controversy to be carried to the Supreme Court for review. Such would have been the case in *Bell* had Hooper's decision not to serve Negroes been unopposed by the contention of the Negroes involved that they were entitled to service. Reviewable state action does inhere, however, in the manifestly public act explicit in every state decision to deny something which persons claim as a matter of right, as when Negroes maintain that they are entitled to enter into certain commercial transactions as a matter of right, regardless of race and regardless of a seller's feeling about race. And whether the state's decision to deny the claimed right is based upon some state policy which seeks to protect interests of the state, or upon some state policy which seeks to protect purely private interests opposed to the asserted claim of right, *it equally involves a policy of the state.* In every case, the state policy is permissible under the fourteenth amendment only if it is consistent with standards of due process and equal protection. Accordingly, the Court cannot avoid an inquiry into the reasonableness of the manner in which the state has classified competing private interests, some of which it has preferred and established as "rights," and others of which it has subordinated.

So the decision to be reviewed for constitutional reasonableness in fourteenth amendment cases is solely the decision of the state, manifest in the law which is employed by the state to mediate the conflicting claims (or decisions, if you like) of private parties. The decision to be reviewed in such cases is the decision-in-law of the state to establish one freedom and disestablish another, and the issue is whether that decision-in-law is fundamentally reasonable, *i.e.*, whether it classifies and treats the interests with which it is con-

cerned, preferring some and subordinating others, in a fashion consistent with due process and equal protection.

The issue in *Bell* was not whether Hooper acted in an arbitrary fashion from a point of view which takes into consideration only his interests, but whether Maryland was arbitrary in its classification of the "rights" of property owners and the "duties" of customers under the circumstances, *i.e.,* whether the state was arbitrary in its dispositive point of view with respect to the interests of *all* the parties. The issue in *Swing* was not whether Swing's wish to be free of pickets was unreasonable from his point of view, but whether Illinois was unreasonable in defining the "rights" of shopkeepers and the "duties" of union organizers in a manner which made Swing's point of view count for everything and the union interests count for nothing. The issue in *Cutter Labs.* was not whether Cutter acted unreasonably when it decided to fire one of its employees because of her political affiliation, but whether California had a sufficient reason under the circumstances for *its* decision to prefer the business interests of employers over the conflicting interests of employees in the manner provided for in its law of contracts. The issue in *Shelley* was not whether the Kraemers' antagonism regarding Negro neighbors was unreasonable from their point of view, but whether Missouri's law respecting enforceable covenants was reasonable under the circumstances, taking into consideration the points of view of the prospective Negro purchaser and the willing seller.[35] And finally, of course, the issue in the *New York Times* case was not whether Sullivan should have "permitted" the *Times* to impugn his official conduct, but whether Alabama's law of libel unreasonably protected reputational interests at the expense of free speech. *The issue in such cases as these, in short, is the constitutionality of operative governmental policies, manifest in laws which mediate conflicting personal claims of right.*

Before a case involving conflicting claims of right reaches the Supreme Court under the fourteenth amendment, it will have been tentatively resolved according to some state law. That law will have been utilized to determine "whose conduct is entitled to the 'law's protection' "[36] as between two or more human beings whose conflicting interests and proposed decisions and conduct are mutually

[35] See Van Alstyne & Karst, *supra* note 34 at 44-49.

[36] 378 U.S. at 312. See also Paulsen, *supra* note 34 at 164.

exclusive under the circumstances. Whatever answer that law has propounded, it will be final only if the value preferences implicit in the answer are within the range of choices open to the state under the fourteenth amendment, *i.e.*, only if the state's operative policy is consistent with due process and equal protection. In order to pass upon that consistency, the Court must necessarily review the reasonableness of the state's policy as applied through the law which was used to decide whose conduct is entitled to protection. This, of course, is precisely the approach in which Mr. Justice Black has repeatedly concurred in such cases as *Swing, Shelley, Cutter Labs.*, and *New York Times.*

A further review of the *Swing* case may make the matter clearer. The State of Illinois has classified people in a tremendous variety of ways, according to many different tests and for many different purposes. It not only has established broad legal categories or classifications, *e.g.*, "buyers" and "sellers," it also has established operative classifications further refining these categories, *e.g.*, "sellers of securities" and "buyers of stolen goods." Whether each such classification and the concomitant recognition of rights, privileges, duties, powers and immunities which attach to membership in it are constitutional, depends in each case upon the fundamental reasonableness of the classification. Whether each given classification is fundamentally reasonable depends, in turn, on a variety of considerations which the Supreme Court usually regards as relevant. The relevance of these considerations, moreover, does not depend upon any connection which the state may have with either party other than through the law which fixes their operative rights and duties. In the *Swing* case, for instance, the Court might have assessed the state's apportionment of "rights" and "duties" between shopkeepers and union organizers in terms of these typical questions:

(1) What policies within the legitimate concern of the state are served in its current treatment of conflicting employer and union interests?
(2) How is the particular grouping of legal interests explicit in Illinois' allocation of rights and duties respecting picketing related to those policies?
(3) What is the character and extent of adversity endured by those subject to the particular duty imposed by this law?
(4) What alternative means, if any, are available to the state adequately to protect certain employer interests which it should be free to protect

without, however, hampering union interests to the extent inherent in the present scheme?

(5) To what extent do considerations of federalism, the special character of the problem, or other matters oblige the Court to refrain from substituting its judgment for that of the state legislature, or from reaching the merits?

Once these and perhaps other considerations were taken into consideration in reviewing the reasonableness of the Illinois law, the Court was in a position to arrive at its decision. Conversely, had these considerations not been raised and resolved, no reasonable decision would have been possible.

The breadth of the decision in a given case may vary, of course, again depending on a number of considerations which are always a part of the judicial process. For instance, the decision may be a narrow one if the Court perceives distinctions in the case which would not have equal significance if certain facts were altered. It may also be narrow if the case being reviewed is relatively novel and the Court is reluctant to foreclose consideration of related cases which it cannot clearly anticipate. On the other hand, the decision may be broad to the extent that the Court is concerned with its workload and reluctant to entertain a series of line-drawing sequels to the case at hand, or to the extent that a broader rule would better serve the educative function of the Court or better advise legislators who cannot be expected to master the minutiae of finely drawn distinctions. Technically, the decision may be, as it was in *Swing*, merely to reverse the state supreme court's affirmance of an injunction. In so doing, however, the Court in *Swing* held the Illinois law which authorized that injunction unconstitutional as applied. Thus, as a matter of stare decisis, the case stands for the proposition that no state may impose a duty upon persons to refrain from peaceful and nondefamatory organizational picketing at the request of an employer, even in the absence of a controversy between that employer and his own employees. What was it that was reviewed and found wanting under the fourteenth amendment in the *Swing* case? It was a law and a policy of Illinois, nothing more and nothing less.

But what of the reason advanced by Mr. Justice Black in *Bell* for not wanting to review the law of Maryland in the same fashion? Shouldn't the Court have upheld the Illinois law in *Swing* in order

to refrain from penalizing "citizens who are law-abiding enough to call upon the law and its officers for protection instead of using their own physical strength or dangerous weapons to preserve their rights"?[37] Wasn't it likely that Swing would attempt to disperse the pickets himself, after learning that the state could not protect his "rights"? Perhaps it was, but it would have begged the whole question for the Court to rely upon the apprehension of such conduct as a reason to uphold the law. It would also have assumed that the Court must condone unconstitutional injustice in one case for want of authority to prevent violence in some other case, even though it has not been shown that: (a) such violence is likely to occur; (b) the Court would lack means of correcting the violence if it did occur; or (c) the threat of violence in some other case is a sufficient reason to deny a constitutional right in the case at hand.

The first of these propositions could not safely be assumed in either *Swing* or *Bell.* The third proposition has been flatly contradicted by the Court's unanimous position in the violent aftermath of *Brown v. Board of Education.*[38] The second proposition indulges a presumption which is probably false; any subsequent outbreak of violence is very likely to result in another case which will once again permit the Court to review the manner in which the state has mediated conflicting personal claims of right.

Assume, for instance, that after the *Swing* case, Illinois had revamped its law so as no longer to authorize injunctions on behalf of employers who have requested union organizers to refrain from picketing their shops. Instead, suppose it had enacted a new statute merely recognizing an employer's "privilege" to use any force necessary in order to remove pickets from in front of his business establishment and denying the "right" to recover damages to any picket injured under such circumstances. Assume further that a case subsequently had arisen in which an employer had inflicted personal injuries upon a picket in order to discourage him from picketing,

[37] 378 U.S. at 328.

[38] 349 U.S. 294 (1955).

"[C]onstitutional rights... are not to be sacrificed or yielded to. violence and disorder " Cooper v. Aaron, 358 U.S. 1, 16 (1958).

"[I]mportant as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." Buchanan v. Warley, 245 U.S. 60, 81 (1917).

See also Kunz v. New York, 340 U.S. 290 (1951); Feiner v. New York, 340 U.S. 315, 327 n.9 (1951) (dissenting opinion); Hague v. CIO, 307 U.S. 496 (1939).

the picket had sued for damages in a state court, the court had dismissed the action in accordance with the revised Illinois law, and the state supreme court had affirmed per curiam. The plaintiff would have applied for certiorari to the United States Supreme Court, alleging that the Illinois "employer-privilege" statute had deprived him of substantive due process and denied him the equal protection of the laws. What would have been the result? Would the state statute in question have been less arbitrary than the one which preceded it? Clearly it would have been more arbitrary, for the state could no longer have urged that its law was based in part on a policy of avoiding violence in labor disputes—a policy which arguably tended to make its original law somewhat more reasonable. If anything, this case would have been easier than the *Swing* case; the statute would have been doomed. But that is not really the point. The point is, rather, that when the Court applied the fourteenth amendment in the *Swing* case to invalidate the state's common law rule providing for injunctive protection of employers, it did not in the least imply that a different scheme, even more invitive of violence, would pass constitutional muster.

Precisely the same observations can be made with respect to *Bell*. In striking down the Maryland trespass statute as applied in that case, the Court most certainly would not have authorized the state to apply some other law, even more arbitrary in its classification of "ownership rights" and "customer duties," to protect Hooper.

Mr. Justice Black's principal analytical shortcoming in *Bell* was his unexamined assumption that the trespass statute in question was bottomed on a reasonable classification of rival proprietary and customer interests. He *assumed* that it was reasonable for the state to protect the discriminatory prerogatives of corporate restaurateurs and to subordinate the prerogatives of those who seek commercial services. Given that assumption, of course, it followed that the trespass convictions should be affirmed. At no point, however, did Mr. Justice Black address himself to the question which his assumption bypassed: was the state's classification of those claimed prerogatives reasonable under the circumstances?[39]

[39] The nearest that Mr. Justice Black comes to addressing himself to this question is his statement that "the Amendment does not forbid a State to prosecute for crimes committed against a person or his property, however prejudiced or narrow the victim's views may be." 378 U.S. at 327. However, this response is itself grounded on challengeable assumptions. The initial assumption is either (a) that the property

Had the Court held the Maryland trespass statute unconstitutional as applied, it necessarily would have done so because the state's classification of "incidents of ownership" and "customer duties," manifest in its trespass law, was arbitrary under the circumstances. In making such a determination, the Court would have addressed itself to a series of questions similar to those which were advanced earlier as possibly present in the Court's analysis of the *Swing* case. Thus, the issues which Mr. Justice Black should have discussed in *Bell* are these:

(1) What policies within the legitimate concern of the state are manifest in the state's trespass law which mediates conflicting proprietary and customer interests?
(2) How is the trespass law's allocation of rights and duties respecting service in places of public accommodation related to those policies?
(3) What is the character and degree of hardship which must be endured by those persons who are subject to the duties imposed by the law?
(4) What alternative means, if any, are available to the state adequately to protect legitimate proprietary interests without, however, subordinating legitimate customer interests to the extent inherent in the present scheme?
(5) To what extent do considerations of federalism, the special character of the problem, practical limitations on the Court's power, or other matters, oblige the Court to refrain from subordinating state policies to those of the fourteenth amendment on this occasion?

Mr. Justice Goldberg's opinion recognized the duty of the Court to confront these questions, and it resolved them against Maryland.[40]

"belongs" to the owner in accordance with principles found elsewhere than in the law of the state, and hence not within the purview of the fourteenth amendment, or (b) that the state is adhering to due process and equal protection when it grants an absolutely enforceable, exclusionary privilege to absentee corporate "owners," and treats conflicting interests which are asserted as "criminal." With respect to (a), see BENTHAM, THE THEORY OF LEGISLATION 111-13 (Ogden ed. 1931); Hecht, *supra* note 34. With respect to (b), see Garner v. Louisiana, 368 U.S. 157, 196-204 (1961) (concurring opinion); Marsh v. Alabama, 326 U.S. 501 (1946); Thornhill v. Alabama, 310 U.S. 88 (1940); Berle, *supra* note 34; Manning, *supra* note 34.

Moreover, the latter part of Mr. Justice Black's statement appears to imply that the owner in such a case is merely being protected by the state in order to safeguard his right to hold a personal prejudice rather than to protect some impersonal business calculation, and that the state is merely protecting the owner's right to hold such a "view" rather than his attempt to assert that view through discriminatory action. As to the nature of the belief allegedly protected by the state, see 378 U.S. at 245-46, 271-78 (opinion of Mr. Justice Douglas). With regard to whether the state in such cases is protecting a prejudiced belief or discriminatory action, *compare Bell with* Davis v. Beason, 133 U.S. 333 (1890) *and* Reynolds v. United States, 98 U.S. 145 (1879).

[40] 378 U.S. at 311-12. Mr. Justice Goldberg's opinion is outlined here in order to demonstrate how he resolved the questions appropriately raised by the equal protection claim, and not to suggest that a different resolution would have been unreasonable.

According to Mr. Justice Goldberg, the limitations imposed on state power by the equal protection clause dictate that no state may subordinate customer interests in commercial service to proprietary interests in refusing to deal when

(a) the establishment where such service is sought is generally open to the public at large;
(b) the service is of an impersonal, casual, and occasional nature;
(c) the owners or managers who seek to refuse service are not personally involved in rendering that service;
(d) the service sought would contribute to the material comfort and well-being of those interested in it;
(e) those seeking service are wholly unobjectionable other than because of their race or color; and
(f) the proprietary interests involved are unlikely to suffer from competition by similar establishments, in which customer interests in service must be equally respected.[41]

In passing upon the constitutional acceptability of the Maryland trespass statute, Mr. Justice Goldberg was necessarily concerned with the claimed prerogatives of private proprietors and those of private customers. He would have been derelict not to be so concerned, for the fairness of the manner in which those competing personal claims of right were tentatively mediated by the State of Maryland, through its trespass statute, could not possibly have been determined absent an assessment of the claims of right themselves. Whether the trespass statute constituted an unreasonable limitation of customer prerogatives manifestly could not have been determined without evaluating the respective interests of the parties, meaning the parties whose conduct was affected by the trespass statute.[42] In precisely the

His historical arguments, for instance, are far from conclusive. 378 U.S. at 288-311. Compare Mr. Justice Black's opinion in this regard. *Id.* at 335-41. See also Paulsen, *supra* note 34, at 151-58.

[41] 378 U.S. at 312-15.

[42] See Traynor, *supra* note 34, at 238. See also Peterson v. City of Greenville, 373 U.S. 244, 248 (1963) (Harlan, J., concurring):

> Judicial enforcement is of course state action, but this is not the end of the inquiry. The ultimate substantive question is whether there has been 'State action of a particular character'...—whether the character of the State's involvment in an arbitrary discrimination is such that it should be held *responsible* for the discrimination.
>
> This limitation on the scope of the prohibitions of the Fourteenth Amendment serves several vital functions in our system. Underlying the cases involving an alleged denial of equal protection by ostensibly private action is a clash of competing constitutional claims of a high order: liberty and equality. Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even

same fashion in the *New York Times* case, competing personal reputational and free speech claims were subjected to judicial evaluation with reference to the Alabama libel rule.

In the very same sense, every fourteenth amendment decision—no matter how orthodox—considers and affects private interests, private conduct, and prerogatives of making efficacious private de-

---

unjust in his personal relations are things all *entitled to a large measure of protection from governmental interference.* This liberty would be overridden, in the name of equality, if the strictures of the Amendment were applied to governmental and private action without distinction. *Id.* at 249-50. (Emphasis added in part.)

As a general proposition, Mr. Justice Harlan's eloquent statement presents a highly relevant and valuable consideration in the proper analysis of fourteenth amendment cases. Along with Professor Karst, I have attempted to respect it. See Van Alstyne & Karst, *supra* note 34, at 8, 14-22, 34-36, 41-44, 46-47. The portion of the opinion italicized above, however, is somewhat misleading.

As a purely practical matter, whether anyone has a meaningful "right" to act capriciously in the context of a conflict, *i.e.*, when the necessary effect of that act is to displace conflicting acts proposed by others, may not depend entirely upon his freedom *from* governmental interference. Rather, it may depend wholly upon the willingness of local government *to interfere to protect that act.*

> [F]or legal purposes a right is only the hypostasis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it—just as we talk of the force of gravitation accounting for the conduct of bodies in space. One phrase adds no more than the other to what we know without it. HOLMES, COLLECTED LEGAL PAPERS 313 (1920).
>
> [O]nly those economic advantages are 'rights' which have the law back of them.... United States v. Willow River Power Co., 324 U.S. 499, 502 (1945) (Mr. Justice Jackson).

See also Bingham, *The Nature of Legal Rights and Duties,* 12 MICH. L. REV. 1, 7, 15 (1913); Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning,* 23 YALE L.J. 16 (1913).

Barring a condition of social anarchy in which "rights" are effectively determined by the comparative brute strength of antagonistic parties, the establishment or disestablishment of a private claim of right is therefore a function of government "interference." Necessarily, a state "should be held *responsible*" (in the words of Mr. Justice Harlan) whether it employs its power to interfere against the claim of right to equality by defending the claim to liberty, or whether it employs its power to interfere against the claim of right to liberty by defending the claim to equality.

The question remains which, if either, "interference" deprives persons of liberty without due process or denies persons the equal protection of the laws? Whose conduct, if that of either party, is entitled to protection under the fourteenth amendment? Mr. Justice Harlan's opinion may imply that it is the liberty of the property owner which is constitutionally entitled to protection. Mr. Justice Goldberg's opinion in *Bell,* on the other hand, holds that it is the competing claim of equality which is constitutionally entitled to protection.

It is entirely possible, however, that in many contexts where liberty and equality clash, neither claim is automatically established by the fourteenth amendment, because (again, in Mr. Justice Harlan's words) not all claims of liberty or equality are "constitutional claims of a high order," or in fact constitutional claims at all. Precisely these conflicts may be reserved for state resolution alone. See Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion,* 110 U. PA. L. REV. 473 (1962).

cisions. For instance, if the Court invalidates a state rate regulation which pegs railway tariffs at a level lower than that which the Court determines to be consistent with substantive due process, the effect is necessarily one of vindicating certain economic interests of railways at the expense of the economic interests of shippers and others who have benefited from the restriction on the carriers' prerogative to bargain for higher rates. Although it is the state's law which is invalidated, the Court's decision necessarily constitutes a Supreme Court evaluation and rearrangement of competing private interests and conduct and the permissible latitude of private decisions which were formerly dependent on that law for their status as "rights" or "privileges." The essential point remains: those interests—those claimed prerogatives—have no constitutional claim to status as operative rights or privileges if they were established by the state in accordance with a policy which is fundamentally unfair or arbitrary.[43] The same reasoning applies in *Bell*. If we object to the power of the Supreme Court to make these determinations, then our objection is really directed toward *Cohens v. Virginia*[44] and every other case which has reaffirmed the authority of the Court to invalidate state laws which it finds incompatible with its notions of constitutional standards. It cannot be contended, however, that no reviewable state action was involved with respect to the law which was invalidated.

IV

This article is in part a restatement and elaboration of a highly original article written by Professor Harold Horowitz in 1957.[45] In that article, Professor Horowitz effectively discarded the disingenuous dicta in *Shelley* and drew recognition from the case that the fourteenth amendment is involved not only when an individual asserts a claim of right against a state, but also when he asserts a claim of right against the claims of right of other persons and the state resolves the conflict according to its policy of what is reasonable

[43] The Court's evaluation of the state policy in question necessarily involves a weighing and balancing of competing interests, not altogether different from the task originally performed by the legislature which formulated and implemented the policy. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 112-14 (1921); BICKEL, THE LEAST DANGEROUS BRANCH 34-72 (1962); Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75.

[44] 19 U.S. (6 Wheat.) 264 (1821).

[45] Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 SO. CAL. L. REV. 208 (1957).

under the circumstances, *i.e.*, according to its law. The legitimacy of the state's policy, and the legitimacy of applying that policy in the manner provided for to the dispute at hand, are, as Professor Horowitz said then, fully reviewable to determine whether they square with standards of due process and equal protection. The issue of "state action" for purposes of reviewability having been thus established, it is the duty of the Court to devote its attention to the sole remaining issue, *viz.*, "whether the particular state action in the particular circumstances, determining legal relations between private persons, is constitutional when tested against the various federal constitutional restrictions on state action."[46]

This approach seems to be an entirely sensible formulation, and happily a number of commentators have attempted to review the acceptability of particular state action under particular circumstances accordingly.[47] Occasionally, however, the approach has been partly obscured by characterizations which may be misleading. Thus, the critical question to be considered by the Supreme Court under this approach has been formulated in these terms:

> In the given situation, is this the kind of state action that violates the amendment?[48]
>
> [T]he inquiry is not whether state action is present but whether the state action denies equal protection.[49]

In fact, however, the question intended to be raised under the due process and equal protection clauses is not whether this "is the *kind* of state action that violates the amendment,"[50] for that unduly emphasizes the mechanics of manifested state power. It is, rather, whether the state's value judgments which are represented by and put into effect through its operative laws are permissible judgments within the limitations of due process and equal protection. For example, was it permissible in the *Swing* case for Illinois to prefer certain employer prerogatives to be free of picketing over union prerogatives to picket? Was it permissible in *Shelley* for Missouri to prefer the interests of adjoining white home owners over the interests

[46] *Id.* at 209.

[47] See, *e.g.*, Henkin, *supra* note 42; Horowitz, *Fourteenth Amendment Aspects of Racial Discrimination in "Private" Housing*, 52 CALIF. L. REV. 1 (1964); Williams, *supra* note 34.

[48] Allen, *Critique of "Racial Discrimination in 'Private' Housing,"* 52 CALIF L. REV. 46, 47 (1964).

[49] LOCKHART, KAMISAR & CHOPER, CONSTITUTIONAL LAW 1314 (1964).

[50] Allen, *supra* note 48.

of prospective Negro purchasers? Was it permissible in *Cutter Labs.* for California to prefer the employer's "right" to fire over the employee's "right" to work? In each case it was the policy preference of the state, made operative by its laws, which was under consideration. It was, of course, the operation of those laws which created the occasion for Supreme Court review of the state policies, but that did not necessitate focusing on the *kind* of state action, or on *the* state action involved in each case, to the neglect of evaluating the competing claims of right which reflected upon the constitutional rationality of the state law in question.

A further distinction should also be observed. State action manifest in the ordinary application of a state law, which makes every dispute resolved by state law *reviewable* according to due process and equal protection standards, is not to be confused with collateral ties which a state may have with one of the parties—ties which may have their own distinct bearing on the *rationality* of the law as applied in the case. Such collateral ties, *e.g.,* subsidies, leases and delegations of governmental functions, may alter the outcome of a given case on the merits, since their presence may serve to indicate clearly the arbitrariness of a state's policy which prefers some claims of right at the expense of others. The absence of any such collateral connections, however, does not automatically insulate the state's policy from constitutional review, *nor does it necessarily establish that the state's policy is sufficiently fair to survive the demands of due process and equal protection.*[51] Thus, a state's policy made operative through its law may still lack constitutional support even though the state has no collateral tie with either private party, as was the case in *Swing, Shelley, Cutter Labs.,* and *Bell.*

In *Shelley,* for example, the Supreme Court held that Missouri's policy, operating through its law of enforceable covenants, rested on

[51] As was true in *Swing, Shelley* and *Bell.* See also Terry v. Adams, 345 U.S. 461 (1953); Marsh v. Alabama, 326 U.S. 501 (1946); Smith v. Allwright, 321 U.S. 649 (1944).

"[T]here are *some* modern fourteenth amendment decisions that can be explained honestly only by reference to the premise that situations exist in which the states are under constitutional compulsion to prevent discrimination by private persons or groups." Allen, *supra* note 48.

"Another conclusion which must be accepted from the lines of development... is that as a means of determining whether individual constitutional liberties have been violated, the concept of state action has substantially lost its utility." Williams, *supra* note 34, at 367.

"The real challenge then is to articulate the standards that must be met by state law authorizing private discriminatory action... " Traynor, *supra* note 34, at 238.

an arbitrary preference of covenantee interests over those of prospective Negro purchasers and faithless covenantors. This was so despite the fact that the covenantee in that case had received no special benefit from the state, other than through his membership in a class of covenant holders whose interests were preferred by the state law in question. Had the covenantee been the recipient of additional benefits, for instance, had he purchased his house from a government agency which bound itself to repurchase the house at any time for the original price, such benefits would have made it even clearer that the state's law rested on an arbitrary classification of interests under the circumstances. This would have been the case not because of any significant change in the covenantee's status as a private citizen, or because the Court would have fictitiously imputed *his* decision to bar Negro neighbors to the state, but solely because the policy of the state in preferring his claim of right over the claims of right of the faithless covenantor and the prospective Negro purchaser would have been even less reasonable than it was under circumstances where the covenantee was not protected against economic loss. In short, the fact that the covenantee would have been protected against economic loss would have made it even less defensible for the state to disable Negro purchasers through the application of its law of enforceable covenants.

Note, however, that the possibility of collateral ties between the covenantee and the state had no bearing upon whether the Missouri law of covenants was *reviewable* under the fourteenth amendment. That reviewability was established by the fact that a law of Missouri was employed by Missouri to reject a claim of right that a Negro is free to purchase a house from a willing seller, without regard to the racial bias of adjoining neighbors. The question then became whether Missouri's rejection of that claim was arbitrary. Collateral ties between the covenantees and the state would merely have helped to make it clearer that that rejection was arbitrary. The absence of such ties, however, did not make the case unreviewable and was not sufficient to alter the balance when the Supreme Court assessed the constitutional rationality of the Missouri law of enforceable covenants as applied. Thus, a collateral state connection with a private litigant has no magical quality, it serves no special constitutional function, and it raises no distinct problem. Such a connection merely presents one additional fact which contributes to an effective

weighing and balancing of interests within the permitted latitudes of due process and equal protection. Dicta to the contrary probably proceed from semantic confusion and vague yearnings to simplify matters of constitutional analysis, and those cases which purport to have been decided exclusively on the strength of such collateral factors have been justifiably criticized as cases which yield no neutral principles.[52]

V

"State action" traditionally has been assigned a quadripartite significance. It has, in practice, meant each of the following:

(a) Action which is reviewable under the fourteenth amendment and which, upon being reviewed, is found to reflect policies consonant with due process and equal protection as applied in a given case;
(b) Action which is reviewable under the fourteenth amendment and which, upon being reviewed, is found to reflect policies not consonant with due process or equal protection as applied in a given case;
(c) Action which is reviewable under the fourteenth amendment, but with respect to which consideration is deferred because of a self-imposed judicial policy applicable in certain kinds of cases;[53] and
(d) Action which is wholly unreviewable under the fourteenth amendment for purposes of determining whether it reflects policies consonant with due process and equal protection as applied in a given case.

The burden of this brief article has been to reiterate that this fourth categorization is inappropriate under the fourteenth amendment. Its adventitious development in constitutional theory is thoroughly regrettable, and its continued use as an analytic construct is subject to the following objections:

First, it is essentially a self-contradictory invention, the use of which is unredeemed by the myriad of *ad hoc* "state action" rulettes establishing reviewability on a crazy-quilt basis.

[52] See Wechsler, *supra* note 34, at 19, 26-35. For further illustrations of unwarranted emphasis by the Court on collateral factors, see Griffin v. Maryland, 378 U.S. 130 (1964); Lombard v. Louisiana, 373 U.S. 267 (1963); Peterson v. Greenville, 373 U.S. 244 (1963); *In re* Girard College Trusteeship, 391 Pa. 434, 138 A.2d 844, *cert. denied*, 357 U.S. 570 (1958).

[53] The Court has ample means of avoiding unwelcome cases without resort to the fiction of "no-reviewable state action," which operates to restrict its authority and not merely to attest to its discretion. See, *e.g.*, BICKEL, *op. cit. supra* note 43, at 111-98.

Second, it has prevented the Supreme Court from proceeding to examine due process and equal protection issues on the merits in cases where such an examination should have been made. In short, its use has sometimes resulted in a knowing or unknowing abdication of the Court's clear responsibility of constitutional review.

Third, it has prevented the Court from adequately distinguishing between categories (a) and (b), *i.e.*, it has corrupted analyses directed to the merits and demerits of due process and equal protection claims. For instance, it has led some justices virtually to assume that the collateral ties between a state and a private litigant which they feel must be relied upon merely to render a case *reviewable* automatically establish that a *violation* of due process or equal protection has occurred. Cases in which this occurs are thus fought out on the threshold of reviewability, frequently without a sufficient examination of the particular arrangement of the conflicting interests or of the manner in which those interests were mediated by the state in question. On the other hand, it has led other justices to disregard the merits in some cases on the presumption that the merits cannot be reached at all unless certain collateral ties exist between the state and one of the parties to the action. Neither view regarding collateral ties is proper, but perpetuation of the "no-reviewable state action" category has made each inevitable to a certain extent.

Abandonment of the mythological "no-reviewable state action" category will not, as some allege, necessarily increase the Court's eventual caseload or make the law of the fourteenth amendment hopelessly uncertain or unpredictable. The Court will certainly continue to reject appeals and to deny petitions for certiorari for want of a substantial federal question *whenever it is clear that the policy of the state, manifest in the law under consideration, does not offend due process or deny equal protection, as applied.* For example, had the Court considered *Cutter Labs.* on the merits, it might have concluded that the policy of the California law of contracts did reflect a constitutionally reasonable apportionment of rights and duties, and that the enforceable preference for an employer's freedom of action as originally accepted by the union was not an arbitrary state resolution of the conflicting employer-employee interests under the circumstances. Having so decided, the Court would have avoided consideration of "like" cases in the short run. Knowledgeable attorneys, correspondingly, would have refrained from pressing

"like" cases for review. Similarly, if the Court had found the California policy arbitrary as applied, that would have established a precedent of comparable utility. Whether subsequent cases are "like" cases, of course, depends upon the breadth of the holding and rationale in the case which operates in a stare decisis fashion.

The Court would also be justified in refusing to review such cases as those in which a state has upheld a home owner's interests in property, privacy, and freedom of association by sustaining the trespass conviction of an officious, uninvited guest, not because such a case would be unreviewable, but simply because any equal protection claim advanced by the trespasser would be so obviously insubstantial that review would be unwarranted.

The difference in approach, therefore, need not occasion any long run surfeit of cases,[54] and it most assuredly does not introduce any uncertainty into the law which is avoided by the traditional approach. Indeed, the *ad hoc* exceptions to the "no-reviewable state action" doctrine are themselves so numerous and unruly that no one can confidently predict what the Court may or may not do in a given case.

On the other hand, several distinct advantages are offered by the approach endorsed here, which begins by eliminating the category of "no-reviewable state action." First, it discards a cumbersome and misleading fiction and reiterates an obvious proposition, *viz.*, the fourteenth amendment by its very terms brings the fairness of every state policy, manifest in a state law resolving conflicting claims of right, within the Court's legitimate discretion to determine whether that policy, as applied in a given case, offends constitutional norms of due process or equal protection. Second, it avoids the false assumption that state action sufficient to bring a case within the range of constitutional review is also sufficient to establish a violation of constitutional norms of due process or equal protection. Third, it avoids the equally false assumption that extraordinary state action, *i.e.*, collateral connections, is a prerequisite of review under the fourteenth amendment, and it encourages the Court to consider collateral state action only as it affects the character of the interests actually involved in a given dispute.

[54] *Ibid.*