How the Court chose equality

Liberty or Equality?

PHYLLIS TATE HOLZER
AND
HENRY MARK HOLZER

ON MAY 20, 1963, the United States Supreme Court decided a group of civil rights cases, causing some newspapers to headline that "sit-ins" had been legalized. This was merely a euphemistic way of expressing a widely-held view: equality under the law now meant that Negroes could plant themselves on someone's private property, and that neither the owner nor the police could remove them. The idea came as a shock to those who were naive enough to believe that Americans still retained the right to discriminate where it concerned their own property. There should have been no surprise over the sit-in decisions. They added nothing new. The right of private discrimination was destroyed over sixteen years ago.

The principle of "equality under the law" is expressed in the Fourteenth Amendment to the Constitution: "No State shall . . . deny to any person . . . the equal protection of the laws." The equal protection clause was basically designed to prevent the enactment of legislation that discriminated between persons in like circumstances, or the discriminatory application thereof. In other words, each person was to be equal before the law—both as written, and as applied. Held unconstitutional, as violations of the equal protection clause, have been the denial of equal access to the courts, inequality of treatment in the courts, systematic exclusion of Negroes from jury lists, suppression of a prisoner's appeal papers, a law requiring sterilization of persons convicted of larceny but not those convicted of embezzlement, and a law withholding permission from two hundred Chinese to operate laundries while granting it to eighty non-Chinese. The most publicized equal protection decision came in 1954—"separate but equal" public school segregation was held unconstitutional.

Most people would agree that these decisions were constitutionally correct; that the State has no right to discriminate between its citizens. Yet the attention paid to the equal protection clause by the United States Supreme Court, in its blind devotion to the principle of equality, is not without a tragic paradox. Urged on by militant egalitarians, who seldom seem to be bothered by the prospect of advancing one man's "rights" by trampling on those of another, the Court used the equal protection clause in 1947 to destroy one of the most fundamental rights of man in a free society: the right of private discrimination.

Simply stated, this basic right stems

from, and is nothing more nor less than, the right to own and use one's property without outside restraint or interference. This presupposes a corresponding duty to respect this same right in other property owners. Thus, privately owned clubs or businesses may rightfully restrict membership or patronage by virtue of the fact that the premises belong to a private person or group of persons. The use of one's private property also encompasses the owner's right to enter into contracts with others respecting that property—such as who can enter or use it, how it can be disposed of, and at what price. But to limit the use to which a man can put his property (except where the use would injure the person or property of another), to deprive him of the ability to make it available to some and not to others, is to make ownership a privilege, not a right—contrary to natural law and without legal or constitutional justification.

There is more than one way to accomplish this untoward result: either the State, through legislative action with judicial sanction, can directly prohibit the manner in which a man can use his property (in which case the infringement of the right becomes so obvious as to invite public censure), or, through the courts, it can completely undermine private property rights by refusing to enforce them. By clothing its decision in amorphous language, and supporting it with impressive-sounding legal mumbo-jumbo and a string of cases ostensibly serving as legal precedent, a court is quite capable of lulling even the more astute members of the public and the Bar into believing that the decision rests firmly on constitutional grounds. It is this latter approach which was seized upon by the Supreme Court in the 1947 case of *Shelly* v. *Kraemer* to decimate the property right of private discrimination. The vehicle by which the Court achieved its objective was the racially restrictive covenant.

A covenant is a binding and solemn agreement between two or more individuals to do or not to do a given thing. Racially restrictive covenants generally take the form of a clause in a property deed prohibiting all subsequent owners from selling to specified classes of persons, or a contract wherein adjoining property owners agree not to sell to members of an excluded class. The prohibition generally extends to Negroes, Chinese, Indians, Mexicans or Jews. The purpose of the covenant is obvious—to regulate the racial or religious composition of neighborhoods by excluding those the covenantors regard as undesirable. That they choose to take this action is morally reprehensible, because whenever men deal with one another they should be guided by reason and individual merit, not genetic lineage. But that they have the *right* to express their prejudices in a contractual, and therefore legally binding, form requires some amplification. These covenants are made by and between free, albeit biased, men for valuable consideration, concerning what they voluntarily choose to do with their own property. Their right to discriminate is traceable to a source common to all owners of property.

Since every man is endowed by nature with the unalienable right to pursue happiness by holding fast to his own life, liberty and whatever property he manages to acquire, to the extent that he exercises this right and respects it in others, no other man or group of men may limit his activities. To do otherwise would be to convert that right to mere permissive action, and permission can always be revoked. The task of protecting a right, any right, has been delegated to

the State so that, through use of the police, the military and the courts, it can administer protection on a mass scale. Since this is the proper function of government, the State has a delegated duty to enforce even those property rights which may be exercised in a morally offensive manner. At first, the courts appeared to recognize this obligation.

It was not long after the adoption of the Fourteenth Amendment in 1868 that the question was raised for the first time: Did racially restrictive covenants violate the equal protection clause? A plain reading of the clause, with its emphasis on *State* denial of equality, made such an interpretation patently ludicrous. Furthermore, the *Civil Rights Cases* in 1884 had judicially determined that the Fourteenth Amendment in its entirety (which included the "equal protection" clause) proscribed "State action" only; it had no application to the conduct of private citizens.

The first reported legal test which pertained specifically to restrictive covenants came before a lower federal court in 1892. The holding was essentially that judicial *enforcement* of a racially restrictive covenant would constitute denial by the State of equal protection of the laws. However, this decision was neither sanctioned by the Supreme Court (the losing party never appealed), nor followed by any other courts. It was totally ignored as precedent because it was inconsistent with established interpretations by the state courts of the equal protection clause. Moreover, the decision stood for the untenable proposition that the courts must abdicate their duty to enforce valid contracts pertaining to private property.

Therefore, the constitutional validity of enforcing restrictive covenants was unanimously upheld by every court which considered them in the fifty-five years before *Shelly* v. *Kraemer*. The courts chose to concentrate on the proper application of the equal protection clause, confining it to instances where the State, acting through a legislative, executive or judicial agent, officially performed a discriminatory act against a private person. An example was the 1917 case of *Buchanan* v. *Warley*. The Supreme Court struck down a city ordinance that determined the character of neighborhoods on the basis of race. This was an entirely consistent application of the equal protection clause, since the "State action" resulting in racial discrimination emanated from the city council in the exercise of its legislative function.

To venture from the simple clarity of this analysis to the tortured and confused thinking that accompanied the Supreme Court's decision in *Shelly*, one must make a considerable adjustment and take a giant step backward. The precedent of half a century can disappear depending merely upon the make-up of the Bench. And so it did!

In 1947, the Supreme Court of the United States agreed to examine the constitutionality of judicial *enforcement* of racially restrictive covenants. The Court chose to hear two cases on the subject simultaneously, one from Missouri and one from Michigan. They were joined together, for the purpose of the appeal, under the name of the Missouri case, *Shelly* v. *Kraemer*. The facts in the two cases were substantially the same. Property owners had executed a contract to the effect that land would not be sold to non-Caucasians. Negroes took a deed to some of the property. The owners of the remainder of the property covered by the covenant sued to prevent them from taking possession and to divest them of title. The supreme courts of both states en-

forced the contracts by granting this relief. Neither court found any violation of equal protection because the discrimination had been by private individuals. Shelly and McGhee, the petitioners in the Missouri and Michigan cases respectively, took the position that judicial enforcement of the covenants was unconstitutional.

At the outset, it is of more than passing interest to observe who lined up where for the ensuing battle. Thurgood Marshall of the N.A.A.C.P. appeared for petitioner McGhee. By special leave of the Court, the Solicitor General and the Attorney General of the United States appeared as "Friends of the Court" and filed a joint brief in support of petitioners. "Friend of the Court" briefs were also filed in support of petitioners by the following organizations: Grand Lodge of Elks; Protestant Council of New York City; Non-Sectarian Anti-Nazi League to Champion Human Rights, Inc.; General Council of Congregational Christian Churches; National Lawyers Guild; A.F.L.; C.I.O.; American Veterans Committee; American Jewish Congress; American Jewish Committee; American Indians Citizens League of California, Inc.; American Civil Liberties Union; National Bar Association; American Unitarian Association; American Association for the United Nations.

Against this array of organizational and legal talent, respondents' case was buttressed by only three "Friend of the Court" briefs, representing the National Association of Real Estate Boards, the Arlington Heights Property Owners Association, and the Mount Royal Protective Association, Inc.

Why did all the self-appointed guardians of civil liberties line up behind the men who sought to effectuate their desire for equality on a private level, at the expense of someone else's unalienable right to judicial protection of his contracts and his property? Why did none of them realize that pitted against each other was a right and a desire—the latter deserving of sympathy and respect, but something to be achieved by education or economic boycott rather than erosion of the clear meaning of the Fourteenth Amendment? One explanation for the fact that no one paid any attention to the civil liberties of the respondents might be rooted in the principle of underdogism: the idea that the enforcement power of the State be used in support of the weaker party. Thus, it was no coincidence that the briefs and oral argument laid great stress on such things as "destruction of human and economic values" and the housing plight of Negroes in large cities.

Only six Justices (Vinson, Frankfurter, Murphy, Burton, Black and Douglas) participated in the decision. Chief Justice Vinson delivered the unanimous opinion of the Court. First, he clearly framed the issue. The Supreme Court had never before decided if the equal protection clause of the Fourteenth Amendment prohibited judicial enforcement of restrictive covenants based on race or color.

Next, he laid the groundwork for the first part of the Court's holding. He admitted that although the State had no right, under the Fourteenth Amendment, to discriminate against one who sought to acquire, enjoy or dispose of property, in *Shelly* the discriminatory restrictions stemmed "in the first instance" from contracts between private persons. The Court therefore concluded that the restrictive covenants standing alone were not violative of any rights guaranteed to petitioners by the Fourteenth Amendment.

> So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would ap-

> pear clear that there has been no action by the State and the provisions of the Amendment have not been violated.

The Court had thus ruled that private racially restrictive covenants were valid *per se*.

Such being the case, there was only one course open if the right of private discrimination was to be rendered a nullity. Without the ability to *enforce* a restrictive covenant, it would be as ineffectual as if it had never existed. Moving in this direction, Vinson sought to show that as soon as a court gave life to a restrictive covenant by enforcing it, this constituted "State action" as prohibited by the equal protection clause. In support of this thesis, he set forth what was to be the underlying premise upon which the entire decision in *Shelly* rested:

> 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, is a proposition which has long been established by decisions of this Court.

To sustain his premise, Vinson engaged in lengthy citation of precedent. While the precedent supported the premise that judges were indeed agents of the State, it failed to support the conclusion that Vinson sought to reach: that whenever a judge determined and enforced the rights and liabilities of litigants in a courtroom, he was engaging in the kind of "State action" proscribed by the equal protection clause. What Vinson neglected to point out was the distinction between a judge who personally performed, sanctioned or "legislated" a discriminatory act, and a judge who merely enforced a contract where the discrimination originated with private parties.

Additionally, the Court equivocated, misled and distorted by resorting to what every law school freshman is taught to avoid as being dishonest. Knowing that only what a court *holds*—what it *decides* based on the facts before it—has legal significance and constitutes "precedent," the Supreme Court relied on language which was nothing more than gratuitous "dicta," completely unnecessary and irrelevant to the holding.[1] With the aid of such equivocating terminology as "the principle was given *expression*," and "further examples of such *declarations*" (emphasis supplied), Vinson quoted favorable language from courts that had "observed," "stated" or "pointed out" that action of courts or judges could be State action. Observe that no case was cited as having actually *upheld* this proposition as a principle of law.

Besides relying on dicta, Vinson cited at least four cases which were not even remotely applicable to the question. Further liberties were taken by using as "precedent" cases where the State itself, as an instrumentality, had taken affirmative action alleged to be discriminatory; the actors being a city council, a State Board of Equalization, a State legislature, and a State Board in charge of condemnation proceedings.

The remaining cases upon which the Supreme Court based its decision in *Shelly* pertained directly or indirectly to State action on the part of the courts. They may be grouped into three categories, the first of which deals with judges who, from the bench, personally performed a discriminatory act (i.e., they systematically excluded Negroes from juries and thus denied them equal protection of the laws).

The second category involved, not equal protection, but judicial proceed-

ings which were in some manner procedurally unfair. Here, the lower courts had sanctioned such violations of *due process* as inadequate notice and no opportunity to be heard, use by the State prosecutor of coerced confessions and testimony known to be perjured, the absence of effective counsel, and allowing trials to be held in a mob-dominated atmosphere.

Up to now, Vinson was not happy with his "precedent," and his final comments on these spurious examples of obviously inapplicable State action implicitly revealed his dissatisfaction. He had not yet bridged the gap between the judge who discriminates (either affirmatively or by sanction) as a matter of State policy, and one who makes private discrimination possible by upholding valid contracts. In the third and last group of cases, Vinson made a final attempt to justify the Court's ultimate position that unconstitutional "State action" encompassed both types of activity. And on the surface it looked good.

In an effort to show that "State action" existed even in the absence of a legislative enactment or an obvious deprivation of due process or equal protection from the bench itself, Vinson brandished seven cases where the Supreme Court had found "State action" violative of freedom of speech, press or religion. Yet, in these cases, the Court did not have before it either a statute or a procedurally defective judicial proceeding. The lower courts had simply interpreted the non-statutory common law and then, as interpreted, enforced it by issuing injunctions or contempt citations. Vinson therefore reasoned that the "State action" consisted of a judge merely making a decision—any decision—and enforcing it; nothing more was required. Naturally, this would enable him to argue that a judge enforcing a private right—such as the right to discriminate through a restrictive covenant—constituted "State action." If true, the *State*, not the individual, was effectuating the discrimination in violation of the equal protection clause.

But Vinson's conclusion was based on a false premise. In all seven cases, the courts were not engaged simply in making a decision and enforcing a valid right, but in *interpreting* the old common law. Their interpretations amounted to nothing less than the *creation* of non-statutory law, which is one of their proper functions. In a word, they were "legislating"—but in such a way as to violate First Amendment freedoms. Vinson unwittingly admitted this crucial fact when he introduced the seven cases. He said: "It has been recognized that the action of state courts in enforcing a . . . common law Rule *formulated by those courts*, may result in the denial of rights . . . ." (emphasis supplied). What evolved from these judicial interpretations was as much a part of our law as a statute passed by a legislature. Both can be struck down for violating the Constitution. Neither amount to mere enforcement of one's rights. It was the particular interpretation of the common law that was objectionable, not the mechanical granting of an injunction or a contempt citation. The only valid conclusion to be drawn is that the "State action" in all seven cases was derived from the *formulation* of law which the courts had engaged in, exactly as legislatures do.

Notwithstanding the fact that all of Vinson's arguments were so easily discredited, the holding in *Shelly* v. *Kraemer* was as follows: court enforcement of racially restrictive covenants was deemed an act of the State, which denied the Negro petitioners equal protection of the laws.

Left up in the air was an unanswered question: of what use is an unenforceable contract?

Ignored was the fact that in every prior case of legitimate precedential value, what the legislative, executive or judicial body did, or failed to do, as a matter of State policy, was the *essence* of the offending conduct. State action is a combination of a deed and a conscious purpose, and if the purpose is only to enforce a private right, that purpose does not intrude into the area of State policy.

Forgotten was the logic of following the discrimination back to its source, a series of private acts whose scope and direction had been determined long ago by the contracting parties, with court enforcement merely putting the lid on the transaction.

Now that *Shelly* was the law of the land, what exactly did the decision of the six Justices mean? It meant that certain contract rights were henceforth to be bottomed on the rather unsubstantial hope of voluntary adherence. It meant that the courts were closed to anyone who sought to use his property with anything less than the same scrupulous regard for fairness and equality which the Fourteenth Amendment demands of the State.[2] It meant that every man has legal rights which can become unconstitutional merely through judicial enforcement. It meant that whenever a court does enforce a contract or property right, the State affirmatively sanctions the particular outcome. It meant that if a private citizen discriminates against Jews, the court that tries to enforce his right to do so is likewise prejudiced against Jews. It meant that if a property owner's right to sell to a Negro is restricted by a covenant, the Negro nevertheless has a "right" to purchase the property, thus giving the latter more of a right in the land than the previous owner had himself. It meant that the State had officially reneged on its duty to protect contract and property rights, and had thus converted these rights into meaningless privileges.

If no public outcry was raised over these logical extensions of *Shelly*, it was only because attention was focused on the more obvious (and less onerous) aspects of the decision. Too many people, by sympathizing with the aspirations of the underdog, failed to notice the subtle encroachments on their liberty. Few took the trouble to dwell on several compelling questions that remained in the wake of *Shelly* v. *Kraemer*. To what extent would the courts venture into the once-sacred preserve of contract and property rights in order to eradicate private discrimination?

In the area of contracts, the answer was not long in coming. Five years later, the Supreme Court held that one who was a party to a restrictive covenant could breach it with impunity, by selling to a Negro, without being liable for damages. He could ignore the covenant even though there was a deliberate breach of a valid contract, voluntarily entered into. The paradox was that Justice Vinson strenuously dissented. He pointed out that since no Negro was being injured by the assessment of damages against the seller, the Court had gone too far and was seeing judicial "State action" where there was none. Vinson's elaborate creation had become a Frankenstein.

The situation with respect to private property, however, is not so clearly defined. If a Jew sues to gain admittance to a private club which restricts membership to Christians, would mere refusal by the court to grant relief amount to judicial enforcement of the discrimination? If a Mexican seeks an injunction

to force someone to sell him land subject to a restrictive covenant, is the court duty-bound to order the sale because to do otherwise would be to sanction the restrictive covenant? If, because he is denied access to property which Caucasians are free to enter, a Negro trespasses on that property, can the owner compel the police to remove him from the premises? The Supreme Court provides some of the answers in the recent sit-in decisions.

Of the six racial discrimination cases before the Court, only two are significant. The first grew out of a Greenville, South Carolina ordinance requiring segregation in restaurants, and the conduct of a local businessman who, refusing to desegregate his lunch counter, regarded the Negro "sitters" as trespassers. Convicted as such, the Negroes appealed.

With the emphasis on State "involvement" in private discriminatory conduct (a meaningful and attenuated departure from State "action"), Chief Justice Warren found that the mere existence of the ordinance absolved the Court of its responsibility to determine whether the businessman had actually wanted to discriminate, or had been intimidated by the city.[3] Disregarding the fact that the Negroes had trespassed on private property, the Court charged, without substantiation, that the trespass law was being used to enforce the ordinance. In short, once the city had asserted the power to require segregation, it automatically became "involved" with the discrimination practiced in every private eating place. Whether or not the owners had even heard of the ordinance was irrelevant, since the Court would not deign to "separate the mental urges of the discriminators." The convictions were thus set aside as violative of equal protection. Only Justice Harlan objected to this novel judicial approach. He realized that henceforth, in any state with a segregation law on the books, private restaurateurs would be forced to resort to self-help—unaided by law enforcement—to rid themselves of trespassers.

The second case, citing the first one as precedent, arrived at the same result on essentially the same facts, with one significant exception: neither the city of New Orleans nor the state of Louisiana had a restaurant segregation law. This time, the alleged State action was disguised in the public announcements of a mayor and a police superintendent. Basically, they had urged a halt to the sit-in demonstrations before they deteriorated into a disruption of peace and order in the community. To equate announcements with a segregation statute was an obvious judicial contrivance. Yet the Court did just that:

> As we interpret the New Orleans city officials' statements, they here determined that the city would not permit Negroes to seek desegregated service in restaurants. Consequently, the city must be treated exactly as if it had an ordinance prohibiting such conduct.

This was gross distortion, for nothing could even be implied from what was said to bar Negroes from seeking desegregation in a peaceable manner, and without trespassing on the property of unwilling restaurateurs.

Unlike *Shelly* v. *Kraemer*, there was no pretense about these two decisions being rooted in a consistent application of constitutional principles, traceable through the years by means of legal precedent. While Vinson made an attempt, however misleading, to justify his conclusions by inundating them with case authority,

Warren found it necessary to cite only three cases (two dealing with city-owned or leased premises and the third with a judge who excluded Negroes from a jury). That August Body, that Super Legislature, apparently had no need for precedent. Its members had no compunction about rendering a decision based on whatever version of the facts and application of the law would conveniently fit the desired result.

One result may be to hasten the demise of segregation laws. But once the ordinances have been repealed and the local executives gagged, once State policy—official and unofficial—has been submerged, what then? A property owner, at least in Southern states, will undoubtedly find that police protection from Negro trespassers is still unavailable to him. It is now too easy to attribute the discrimination to local custom, and from there to a veiled threat of some public official. Nor is the private club owner, or anyone else, likely to fare any better in the courts should he attempt to enforce his right to discriminate. By merely shifting from a passive to an active role in litigation, by initiating suit on some pretext such as "discrimination is against public policy" or "the club is across the street from city hall," the party being subjected to the discrimination might obtain a hearing. Once in court, a consistent application of *Shelly* requires the conclusion that any enforcement or implementation of private discrimination—no matter how indirect—is "State action."

The members of the Supreme Court who participated in the sit-in decisions might never have taken the liberties that they did without the comforting knowledge that theirs was only a repeat performance of an old play. Nor does the Court need an ordinance or a "coercive" speech to justify its future attempts to weave the thread of egalitarianism into the fabric of American life. Once judicial enforcement of valid private rights is construed as unconstitutional, the groundwork has been laid for withholding recognition of every type of private discrimination that reaches the attention of the courts. Let there be no mistake about the price paid for this kind of "equality under the law"; property and contract rights have been dealt a crippling blow from which they may never recover. And it was *Shelly* v. *Kraemer* that wrote the script, set the stage, and cast "State action" in the leading role.

[1]The importance of distinguishing between precedent and dicta can not be overemphasized, since precedent means that a court's holding will serve as a rule for future guidance in identical or analogous cases. But if dicta were to be regarded as authoritative, then any personal opinions or beliefs a judge cared to insert in his decision, no matter how irrelevant, unwarranted or absurd, could become law.

[2]Whether or not private property owners discriminate on the basis of race or religion is a moral issue. Though such discrimination constitutes an unconscionable refusal to measure men by their own inherent worth, to be moral or immoral in this respect is and should remain a matter of individual choice. The State, on the other hand, has no such choice. As the Declaration of Independence points out, it was precisely to secure the unalienable rights of *all* men that government was created in the first place. In the face of this universal grant of power, it is incumbent upon the State, itself, to treat all of its citizens equally.

[3]The ordinance in and of itself, being an exercise of the city's legislative power, was repugnant to the Fourteenth Amendment.

The Planners and the Planned

ERNEST VAN DEN HAAG

I. *The Appeals of Planning*

WE ALL HAVE GOALS, more or less far-reaching, valued, compatible and explicit. If we behave rationally, i.e., economize, we try to attain our ends with the least expenditure of whatever else we value (means or alternative ends). To "plan" thus is to propose to behave rationally; in this sense, we all favor planning. However, to favor planning—to favor using appropriate means to achieve ends—is not to accept a particular plan, its ends, or it means. Above all, to favor planning our own lives is not to favor someone else, or the government, planning them for us.

The issue is not *whether* to plan, but *who* is to plan *what, for whom* and *with what powers.* Is the government a means to help individuals achieve their ends? Or must we ourselves be used as means to achieve the central planner's ends? If people were asked whether they prefer to be regarded as ends in themselves, or as means, few would favor central planning. But the issue is usually presented as though the central planners favored individual planning, and the individual planners favored chaos, inefficiency and anarchy.

Socialists often compare their blueprint—the plan—with capitalist reality. However, blueprints must be compared with blueprints and reality with reality. In such a comparison, capitalism does well.

Much of the appeal of planning rests on even simpler equivocations. Planning is often equated with "successful planning"—the planner's hopes are accepted as fulfillments. Now, the planned birds in the bush certainly sing more prettily than the birds caught in any real (capitalist) nets. But can they be caught? And will they sing as sweetly? Promises are easier to make than to keep—and plans are promises. In a democracy, unfounded claims can be checked on, and people may oust a government that promises without delivering. It is no accident that planning *seems* most successful in dictatorships. Full-scale central planning takes place nowhere else.

There are many additional grounds for the irrational appeal of planning. Man is not easily reconciled to the niggardliness of nature, which condemns him to work and to economize—to be rational; or to the conventions of his own society, which endow with prestige mainly those who rise above the average, and cause most people to feel deprived. This is bearable in an immobile society, but hard in a mobile society (such as ours) that asks everybody to rise above everybody else. Perhaps an age in which communication, and therewith competition