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Property and equality: Public accommodations and the constitution in South Africa and the United States*

Joseph William Singer**

In order to avoid a fatal schism between justice and liberty a theory of property must justify the existence of private property without denying the promotion of equality.

*Prof André J van der Walt*¹

The propertyless are not only themselves deprived of property. Their inability to recognize freely the property rights of others undermines the rights of those who have property.

*Prof Johan WG van der Walt*²

1 Introduction

The signing of the new Constitution of the Republic of South Africa on 10 December 1996 by President Nelson Mandela provides a propitious moment to examine the relation between property and equality. This is not a question of merely theoretical import. A proper understanding of the relationship between property and equality is essential to develop the common law and statutory law of the new South Africa in a manner that 'promote[s] the spirit, purport, and objects of the Bill of Rights' as section 39 of the Constitution, 1996 requires. Promoting the 'spirit' of the bill of rights, in turn, requires judges to 'promote the values that underlie an open and democratic society based on human dignity,

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¹'Property rights, land rights and environmental rights' in Dawid van Wyk *et al* (eds) *Rights and constitutionalism: the new South African legal order* (1994) 455.

²*The twilight of legal subjectivity: towards a deconstructive republican theory of law* LLD thesis, Rand Afrikaans University (1995) 166, 167.

equality, and freedom'.³ In other words, the future law of South Africa depends on a sensitive and responsible judicial openness to reconsider traditional concepts and principles in light of the new reality and in accord with the court's new constitutional responsibilities.

One might suppose that abolition of the old apartheid laws restores a common law base that is racially-neutral and that application of pre-existing and subsisting common law and civil law principles will promote equal treatment and human dignity. With due respect to the South African legal tradition, nothing could be further from the truth. This is not because the common law is intentionally pernicious or flawed. It is because it is a conceptual and logical error to assume that abolition of apartheid, by itself, moves South Africa from a situation of injustice, racial domination, and inequality to one of justice, liberty, equality and democracy.

The past cannot be escaped so easily. As Professor Johan van der Walt explains, '[t]he major threat to the equal dignity of all South African citizens will come from the continued exercise of liberties gained as a result of rights sanctioned by the unjust laws of the past'.⁴ The promotion of democratic values requires not just that the old laws be abolished but that the fundamental concepts of the common law including the concept of property be reconceptualized in order to promote the democratic and egalitarian values underlying the new constitution.⁵ Unless this reconceptualization occurs, seemingly neutral concepts, such as traditional understandings of property, can become vehicles for oppression. In Professor van der Walt's words: 'The most innocent looking legal concept can become an instrument for surreptitious ideological interests'.⁶ The new Constitution is based

³Section 39(1)(a).

⁴'Justice Kriegler's disconcerting judgment in *Du Plessis v De Klerk*: much ado about direct horizontal application (read nothing)' 1996 *TSAR* 732 at 736.

⁵See also AJ van der Walt 'Tradition on trial: a critical analysis of the civil-law tradition in South African property law' 1995 *SAJHR* 169 at 170 (discussing the views of Albie Sachs *Protecting human rights in a new South Africa* (1990)) and at 203 (suggesting that the traditional civil-law conception of property may need to be modified 'if the law of property is to take party in and promote the transformation of society' envisioned by the new constitution). See also AJ van der Walt 'Towards a theory of rights in property: exploratory observations on the paradigm of post-apartheid property law' 1995 *SAPRPL* 298 (arguing that the common-law concept of property should be 'unbundled' or fragmented to ensure that property law develops in accordance with the new constitutional values).

⁶'Concerning freedom and remembrance: the past is no longer what it used to be, but fortunately, neither is the present' 1992 *Fundamina: A Journal of Legal History* 59 at 74. This could be intentional or unintentional. One could use a neutral concept to mask a political bias or an invalid class interest. However, it is much more likely to be the case that neutral concepts are not intentionally used so as to promote injustice; rather, the very neutrality of the concept may hide from view its unequal operation in practice.

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on the twin goals of promoting democracy and of protecting fundamental rights to both liberty and equality. Section 9 clearly prohibits discrimination by both government officials and private actors. At the same time, the Constitution offers protection for preexisting property rights – rights acquired during apartheid. How is it possible to promote equality while protecting property rights? Aren't these goals in conflict – or at least in significant tension? If they are, how do we conceive of their relationship? I have argued and will argue below that property rights must be reconceptualized to adhere to the new norm of racial equality underlying the Constitution. But if this is so, how can this be done when that very same constitution protects property rights? How is it possible to move, constitutionally, from an unjust situation to a condition of justice without violating constitutionally protected property rights?

If property rights must be reconceptualized to live more in harmony with new antidiscrimination norms, doesn't this give judges the license to ignore property rights entirely in the interest of promoting equality? In fact, it does not. Judges are constitutionally committed to developing a defensible conception of property that will allow it to co-exist with equality. Doing this, however, is extremely difficult. What role must judges play in this process of reinterpretation? How can judges responsibly address this complicated question?

The legal relation between property and equality can be best analyzed by confronting a concrete example. A useful context for examining this issue is what we in the United States call 'public accommodations'. Public accommodations are privately-owned facilities that offer goods or services to the public. These facilities are regulated by both common law and statute and, in certain respects, constitutional norms. Public accommodations laws require businesses that serve the public to grant their services without unjust discrimination on the grounds of race or other illegitimate categories such as sex or disability. By regulating the use of property to promote equal access, public accommodations laws therefore raise fundamental questions about the meaning of property and the relation between the norms underlying private property and the norms underlying other constitutionally-protected interests in equality, freedom of association, privacy, and free speech. These issues are especially important in South Africa in its transition from apartheid to a constitutional democracy.

Let me start with an example. A clothing store owned by a white person installs a lock on the door with a buzzer. Prospective customers can press the buzzer to request admittance and the clerk inside the store chooses whether or not to let the customer enter. The store uses this method to exclude all black customers while admitting almost all prospective white customers. A black customer kept out of the store challenges this practice in court, arguing that the store owner's conduct is discriminatory and therefore unlawful. The customer claims a right of access

to stores which are generally open to the public. The store owner claims a right to exclude nonowners from his property. Related examples include facilities organized as 'private clubs' with the purpose of excluding people of a particular race. Such facilities may be recreational in nature (as in swim clubs or gyms or tennis clubs) or they may be residential, such as attempts to organize a neighbourhood as a restricted private community, with private roads and a gate limiting access to residents and their guests. The store owner who seeks to exclude black customers makes the following argument in court:

I own the store and I have the right as a property owner to exclude nonowners from my land. If I choose not to open my property to the general public, I have the right to choose who will enter my private space. Section 25 of the new South African Constitution protects me from having my property 'expropriated' without compensation. As the United States Supreme Court held in 1979, in the case of *Kaiser Aetna v United States*, the right to exclude is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property'.⁷ If I cannot exclude others from my property, I cannot control it. If ownership means anything, it means the security of knowing I can prevent others from physically intruding on my land. A forced physical invasion by a stranger constitutes an expropriation of a core property right. It takes my right to determine when to let others into my property and transfers that right to the state. In fact, in the *Loretto* decision in 1980, the United States Supreme Court held that a forced permanent physical occupation of property by a stranger constitutes a per se unconstitutional taking of property even if that occupation comprises 1 square foot of space for a cable television box and some cables connecting that box to utility poles.⁸ And in the *Nollan*⁹ case of 1987 and the *Dolan*¹⁰ case of 1994, the United States Supreme Court held that a forced grant of an easement of passage to the general public over one's land constitutes a taking of property which can be accomplished only with compensation.

Even if a law limiting my right to exclude were merely a 'deprivation' of property, rather than an 'expropriation' of property, within the meaning of section 25, my exclusion of black customers is not an instance of 'unfair discrimination' prohibited by section 9(4). On the contrary, it is a protected exercise of property rights. Suppose I hosted a dinner party at my home. I have the right to choose my guests without having the state telling me whom I must invite to dinner. The constitution protects my rights to privacy, section 14, and my right to freedom of association, section 18. My right to exclude is fundamental to both of these rights. My property rights serve my privacy interests by giving me the power to keep others out of my home and to determine the conditions under which I will let others into my private domain. My property

⁷444 US 164 at 176 (1979).

⁸458 US 419 (1982).

⁹483 US 825 (1987).

¹⁰114 SCt 2309 (1994).

rights are also fundamental to my right of freedom of association. I cannot choose my associates if others have a right to tell me with whom I must spend my time. Again, the United States Supreme Court has stated that citizens have no constitutionally-guaranteed free speech rights to enter shopping centers to distribute leaflets because, in the words of the court, 'private property does not lose its private character because the owner has allowed others to enter his property'.¹¹

Nor does exclusion violate equality norms. Black owners, as well as white owners, have the right to control their property, preserve their privacy and control their associations. All property owners have the same rights; all nonowners have the same vulnerabilities. Of course, the apartheid laws are gone, and the state cannot force me to exclude customers on the ground of race. But neither can the state force me to include customers on the ground of race. When I exclude others on the ground of race, no unfair discrimination occurs; I am simply exercising my constitutionally protected property rights. My choices about whom to admit to my property represent exercises of my constitutionally protected rights to control my property, preserve my privacy and choose my associates without the state telling with whom I may and may not associate.

Finally, even if my exclusionary practice is discriminatory, and presumptively violates equality norms, my property rights prevail over any claimed right of access unless a statute expressly limits my right to exclude. Although section 9 of the Constitution provides, at section 9(4), that '[n]o person may unfairly discriminate directly or indirectly against anyone [on the ground of] race', it also provides that '[n]ational legislation must be enacted to prevent or prohibit unfair discrimination'.¹² This requirement of 'national legislation' is missing in section 9(3), the section prohibiting the state from engaging in unfair discrimination. This suggests that section 9(3) is self-executing while section 9(4) requires legislation before it can become legally effective to alter the preexisting common law rule that property owners have the right to exclude nonowners from their property.¹³

How should a court respond to these arguments? I will proceed in the following way. In part 2, I will explain the history and current status of public accommodations law in the United States, addressing both common law and federal and state statutes. Then in part 3, I will address several possible challenges to the constitutionality of public accommodations laws, focusing on the claim that such

¹¹*Lloyd Corp Ltd v Tanner* 407 US 551 (1972).

¹²*Ibid.*

¹³In addition, the owner might note that the interim Constitution of 1993 but not the final Constitution of 1996 provided that '[e]very person shall have the right to acquire and hold rights in property' in s 28. This right might have supported a right of access to stores to buy property, but the omission of this right in s 25 of the final Constitution suggests that the right to exclude has been privileged over the right of access.

laws represent a taking of property without just compensation, as well as the claims that such statutes invade rights of privacy, free association, and free speech. I will explain why public accommodations laws have been upheld as constitutional and therefore not prohibited. Finally, in part 4, I will address the new South African Constitution and explain why public accommodations laws are not only permitted but, in my view, are mandated by the South African Constitution. In other words, while the United States Supreme Court has held that legislatures in the United States may choose to pass public accommodations laws (they are not prohibited by any constitutional right), it has also assumed that the failure to pass a public accommodations law violates no constitutionally-protected rights of equality; the legislatures are free to pass or not to pass such laws.¹⁴ In contrast, I will argue that the South African Constitution cannot sustain such a reading.¹⁵

2 Public accommodations law in the United States

If you ask a lawyer in the United States for the common law rule regarding public access to private property, you will hear that property owners have the right to exclude non-owners from their property unless a civil rights statute limits that right or they fit into the limited class of businesses that historically had duties to serve the public. The businesses which traditionally have had a duty to serve the public include innkeepers, common carriers, and public utilities. Courts have traditionally held that other businesses have no common law duty to serve the public. If this common law rule were the final word in the United States, most businesses, including retail stores and educational facilities, would have the right to discriminate on the basis of race. Why is this so? This is so because the traditional rule states that no one – black or white – has a right of access to most

¹⁴My own view is that 'equal protection of the laws' properly understood is inherently violated by a regime of property law that delegates to private property owners the power to institute a privatized form of apartheid. This view is supported by an expansive reading of *Shelley v Kraemer* 334 US 1 (1948), as well as current interpretations of the 'right to contract' and the 'right to purchase ... property' protected by the Civil Rights Act of 1866. See 42 USC §§1981 & 1982; *Jones v Alfred Mayer Co* 392 US 409 (1968) (holding that having the 'same right' to purchase property 'as is enjoyed by white persons' prohibits racially-motivated refusals to sell or lease property); *Patterson v McLean Credit Union* 491 US 164 (1989) and *Runyon v McCrary* 427 US 160 (1976) (both holding that the 'right to contract' on the same terms as 'white citizens' imposes a duty on white persons who advertise their services to the public to contract with black customers ready, willing, and able to purchase those services on the terms offered).

¹⁵I should clarify that I do not accept the US Supreme Court's understanding of the equal protection clause as a defensible accommodation between property and equality norms. The absence of a public accommodations law of some type delegates to private property owners the power to institute a private form of apartheid; in my view, this should be unacceptable under the equal protection clause. It is only tolerable, under US jurisprudence, because of the state action doctrine, a doctrine rightly rejected by the South African Constitution.

businesses. Rather, the owner has the power, as owner, to determine whom to admit to his property. At the same time, it is important to note that some businesses – innkeepers and common carriers – have always had a common law duty to serve the public¹⁶ in the United States. This means that the common law in most states in the United States has often differentiated between those businesses that had a right to exclude for any reason, including an arbitrary or discriminatory reason, and those that had a duty to serve customers unless they had a legitimate business-related reason for not providing service.

This common law rule has often been modified by statute. At one time, much of the United States, like South Africa, had state laws that mandated racial segregation in businesses and other private facilities. The Jim Crow laws in the United States and the apartheid laws in South Africa are no more. However, abolishing these laws does not create a nonracial society if property owners have the freedom to recreate segregation voluntarily, rather than being forced to do so by government fiat. For this reason, both the states and federal government have passed a complicated variety of public accommodations statutes that require service without regard to race. Federal statutes prohibit discrimination on the basis of race, religion or national origin in restaurants, inns, gas stations, common carriers involved in interstate commerce, and places of entertainment.¹⁷ I should also note that comprehensive federal legislation has prohibited discrimination in housing¹⁸ and employment.¹⁹ A recent federal statute prohibits discrimination on the basis of disability in a much wider range of facilities, including educational institutions, hospitals, lawyers' offices, beauty parlours and barber shops, and retail stores.²⁰

The fact that the 1964 federal public accommodations law applies only to innkeepers, restaurants, gas stations, and places of entertainment means that federal protection against discrimination on the basis of race may not exist in the case, for example, of retail stores. The only federal statute that might apply to prevent discrimination in retail stores is the Civil Rights Act of 1866, passed just after the Civil War and the passage of the Thirteenth Amendment freeing the slaves and the Fourteenth Amendment guaranteeing equal protection of the laws. This statute provides that every person has the same right to contract and to

¹⁶This duty to serve was, of course, abolished in the South, when the racial segregation laws were passed between 1880 and the 1930s and until the federal public accommodations law of 1964 invalidated those statutes.

¹⁷42 USC §2000a (title II of the Civil Rights Act of 1964) (innkeepers, restaurants, gas stations, places of entertainment); 49 USC §10741(b) (Interstate Commerce Commission Act) (common carriers).

¹⁸42 USC §3601-3619, §3631 (Fair Housing Act of 1968).

¹⁹42 USC §2000e (title VII of the Civil Rights Act of 1964).

²⁰42 USC §12101-12213 (Americans with Disabilities Act).

purchase real and personal property as is enjoyed by white citizens.²¹ It is possible, but not certain, that this statute requires the owners of retail stores to serve customers without regard to race. In addition, statutes in most states require retail stores to serve customers without regard to race; however, seven states in the deep south where slavery prevailed have no such laws.²²

We are left with a muddled legal situation. The definition of what constitutes a public accommodation varies from state to state, with some regulating retail stores and others regulating only innkeepers and common carriers. Federal law clearly prohibits racial discrimination in carriers, inns, restaurants and places of entertainment but is ambiguous with respect to other facilities, including retail stores. Because courts have held that the common law imposed no duty on retail stores to serve the public, and because federal law is ambiguous about its application to such establishments, and because some states fail to regulate racial discrimination in retail stores, it is not possible to say cleanly and definitively that US law unambiguously prohibits store owners across the nation from excluding customers on the ground of race.

On the other hand, if we move from the formal law to knowledge of the behaviour of judges, I can state unequivocally that no judge in the United States would rule today that a retail store open to the public has the power to exclude customers on the ground of race. This includes judges in states that have no state public accommodation laws and which traditionally held that the duty to serve the public is limited to innkeepers and common carriers. In these states, the courts would either change the common law or they would reinterpret the Civil Rights Act of 1866 as a general public accommodations law. This point bears emphasis. Despite the lack of any state statute, and despite the common law rule that most business have no common law duty to serve the public, and despite the fact that the only extant federal public accommodations law is limited to inns, carriers, and places of entertainment, it is virtually inconceivable that a judge in a state without a state public accommodations statute would allow a store to exclude black customers on the ground of race.

There are two ways a court would find a legal duty on retail stores to serve black customers. First, such a court might change the common law rule. The courts have said that the duty to serve the public has been limited to inns, carriers, and public utilities because they were likely to be monopolies or to operate in situations of limited competition and because they were traditionally thought to be engaged in quasi-public functions. However, this rationale makes little sense today as applied

²¹42 USC §§1981 & 1982.

²²JW Singer 'No right to exclude: public accommodations and private property' (1996) 90 *Nw ULR* 1283 at 1290.

to inns and common carriers. Competition exists in both these settings; moreover, small towns may see a lack of competition in other businesses, such as grocery stores. The presence or absence of competition is a weak policy reason for treating carriers and innkeepers differently from retail stores and other businesses. In addition, both inns and carriers are today run and owned by private businesses and not by government; we cannot sustain the distinction between businesses with and without a duty to serve on the basis of their serving quasi-governmental functions. Nor can we rely on the justification that inns and carriers provide a necessary service for people far from home who face significant physical risk if left out in the cold. Grocery stores sell food – clearly a necessity – but do not have a duty to serve under the traditional rule.

We are left with the conclusion that the distinction between businesses with a duty to serve and those without a duty makes little sense today. But which way does this cut? Should we abolish the duty to serve the public or extend it to all businesses? Current settled social values support the general view that businesses that serve the public should have a good reason for excluding a particular customer. The recent Americans with Disabilities Act of 1990 has a long list of establishments that must provide access to people in wheelchairs and with other disabilities reflecting this new social consensus.

This conclusion is supported by history. The common law rule limiting the duty to serve to inns and carriers did not crystallize in the United States until the middle of the nineteenth century at the moment when black citizens began to demand the same rights as white persons in access to public accommodations.²³ Before 1850, the cases uniformly held that inns and carriers had a duty to serve the public because they held themselves out as ready to serve the public, the public relied on access to them, and they therefore had a moral and a legally-enforceable obligation to do what they held themselves out as ready to do. When black persons began demanding rights of access, the courts began cutting back on those obligations. For example, in the Commonwealth of Massachusetts, the Supreme Judicial Court decided in 1858 that places of entertainment, including lecture halls, had no duty to serve the public.²⁴ This result was thought to be nondiscriminatory because neither white nor black persons had a right to enter a theater without the owner's consent. Of course, giving the owner discretion to determine whom to admit allowed the owner to maintain a segregated theater by calling on the state to enforce the trespass laws.

Thus, the current rule limiting the duty to serve to inns and carriers was born at the very moment when the United States was facing the question of whether the

²³*Ibid.*

²⁴*Ibid* 1339. *McCrea v Marsh* 78 Mass (12 Gray) 211 (1858).

world of the market place would become racially-integrated. By holding that most property owners have a right to exclude customers at will, the courts were able to support substantial racial segregation without having it mandated by state statutory law. Only later did the states in the south pass the Jim Crow laws that mandated segregation in more and more places.

This history demonstrates that the common law rule giving most businesses the right to choose their customers at will crystallized at a moment in US history when black persons were demanding access to places of public accommodation. It is not an accident that the first case to hold that a business that held itself out as open to the public had no duty to serve the public involved a black plaintiff seeking admission to a lecture hall. Limiting the right of access to inns and carriers while exempting other businesses from the rule had the effect of allowing businesses to exclude customers on the ground of race while appearing to be a neutral protection for the rights of owners to exclude nonowners from their property. Although the change from a right of access to places that held themselves out as open to the public to a right to exclude at will in most businesses appeared neutral (because it denied to both black and white persons a right to demand service in retail stores and places of entertainment), the effect of this change in the common law rule was to authorize segregation imposed, not by legal mandate, but by enforcement of the trespass laws at the instance of private owners who chose to engage in racial discrimination.

Given this history, a state court in the South might well conclude that the current common law rule granting most businesses the right to serve whomever they wish is not a neutral rule of property law but a vehicle for promoting privatized-apartheid. The original basis for the duty to serve was the fact that businesses held themselves out as open to the public, the public relied on both their services and their act of holding themselves out as ready to serve, and that they had a moral duty to do what they held themselves out as ready to do. The long list of establishments in the 1990 Americans with Disabilities Act details the current settled social and political consensus that all businesses open to the public have a duty to provide their services without unjust discrimination. Both current social norms and legislative policy mandate modernization of the common law rule by adopting the pre-Civil War standard that requires all businesses open to the public to serve the public without unjust discrimination. One state supreme court has clearly stated this as the law.²⁵

Another way a court could find a duty on a retail store to serve the public would be to interpret the Civil Rights Act of 1866 as imposing such a duty. Two lower

²⁵*Uston v Resorts International* 445 A 2d 370 (NJ 1982).

federal courts in the US have recently adopted this strategy.²⁶ That statute provides that every person has the same right to contract and to purchase property as is enjoyed by white citizens. Since 1968, the Supreme Court has interpreted this to mean that, in most situations, individuals cannot refuse to enter into a contract with another person because of that person's race.

Where does this leave us? There is an odd disjunction between the formal law in the United States and the law in practice. The formal law appears sometimes to protect the right of property owners (especially retail stores) to refuse to serve customers for invidious reasons. The common law seems to privilege the interests of property owners in excluding nonowners over the interests of the public in obtaining access to businesses open to the public. Taken to the extreme, this principle would allow owners to exclude customers on the basis of race. If this had been allowed in the South in the United States in the 1960s, the repeal of the segregation laws would have had little effect since white business owners could have voluntarily maintained segregation. Attempts by black persons to enter stores against the owner's wishes would have been rebuffed by police officers enforcing the trespass laws. In a society filled with prejudice by white persons against black persons, those trespass laws could have as effectively maintained segregation as the segregation statutes did. At the same time, the current universal view is that retail stores, as well as other businesses, cannot exclude customers or segregate on the basis of race. The idea that the law may be unclear on this subject is astounding to everyone without whom I have conversed about my findings. And in fact, if one were giving advice to a client, there is no question that one would state, unequivocally, that property owners who open their property to the public and hold themselves out as open to the public for certain purposes must serve the public without discrimination on invidious grounds established by statute.²⁷

The disjunction between the law on the books and the law in action is striking. Formally, the law states that public accommodations law are permissible rather than mandatory. The common law rule is that property owners may exclude at will unless they fit in a small class of businesses with a duty to serve the public or a civil rights statute limits their right to exclude. However, it is inconceivable that a judge in the US would allow a retail store to exclude a customer on the basis of race. In states without public accommodations laws, the courts would either change the common law rule to provide a duty to serve without regard to race or

²⁶*Perry v Command Performance* 913 F 2d 99 (3d Cir 1990); *Watson v Fraternal Order of Eagles* 915 F 2d 235 (6th Cir 1990).

²⁷One must note, however, that a person excluded on a nonlisted ground, such as a homeless person, may indeed have no right of access to public accommodations in the vast majority of states that impose a common law duty to serve only on inns and carriers.

the court would interpret an ambiguous 1866 civil rights statute to require stores to serve without regard to race.

3 Are public accommodations laws permitted or prohibited by the United States Constitution?

3.1 *Issues: prohibited, permitted, or mandated?*

Given the ubiquity of public accommodations laws in the United States, the question arises whether they can be challenged on constitutional grounds. Three practical possibilities emerge: public accommodations laws are either prohibited, permissible, or mandatory. The first possibility is that such laws are prohibited because they interfere with constitutionally-protected property or liberty interests. One could argue that public accommodations laws unconstitutionally 'take' or 'expropriate' property rights. Under this view, the right to exclude is seen as a fundamental aspect of property and a law that takes away the owner's discretion to control access to his property takes one of the core rights associated with private property. The taking of this core right also interferes with the owner's constitutionally-protected liberty interests by restricting his freedom to determine with whom he will associate himself – in other words, the freedom not to be forced to associate with someone against one's will.

The second possibility is that public accommodations laws are permissible but are not constitutionally required. One could argue that public accommodations laws constitute legitimate limits on property rights because they promote the competing and overriding goal of equality. Or one could argue that these laws constitute an accommodation between competing property rights: the right to exclude and the right of access to property. Either way, public accommodations laws are constitutionally permitted but are not required.

This view suggests that public accommodations law constitutes a mere regulation of property, rather than a 'taking' or 'expropriation'. In the language of the South African Constitution, one might say that regulation of public accommodations constitutes a 'deprivation' of a property right, rather than an 'expropriation'.²⁸ Under this interpretation, public accommodations laws are clearly constitutional since they do not expropriate property and constitute laws of 'general application'.²⁹ Thus, no constitutional questions remain; the only issue is whether such a law is wise. Should property rights be limited to promote equality either through a public accommodations statute or a change in the common law rules governing property?

²⁸Section 25(1).

²⁹*Ibid.*

A third view would constitutionally mandate the existence of a public accommodations law either by statute or by interpretation or revision of common law. In this reading, public accommodations laws are not merely permitted but are constitutionally required either because of the equality interest in abolishing apartheid or because they constitute an interpretation of property rights that is truer to the norms underlying the institution of private property.

The first view (that public accommodations laws unconstitutionally take protected-property rights) has been summarily and clearly rejected in the United States³⁰ and will, without any doubt, be rejected in South Africa. A limit on the right to exclude to promote access to public accommodations is not likely to be interpreted as an 'expropriation' of property for which compensation must be paid under section 25(2) of the South African Constitution and even if it constitutes a 'deprivation' within the meaning of section 25(1), it is not arbitrary and reflects a 'law of general application' rather than an imposition on an individual not imposed on other similarly-situated persons.

At the same time, I want to argue that it is harder than it appears to explain why public accommodations laws do not constitute illegitimate deprivations of constitutionally-protected property rights. After all, it is correct to argue that the right to exclude is one of the most fundamental sticks in the bundle of rights that comprise property. Defining the contours of the right to exclude and its relation to the right of access raises difficult questions about the meaning of property, as well as the relation between property norms and other constitutional norms such as equality and freedom of association.

The second view (that public accommodations laws are permissible but not mandatory) is problematic in similar ways. It suggests that the decision whether to promulgate a public accommodations law is within the discretion of the lawmaker and either result will comport with the principles underlying a democratic constitution. Although this is the approach taken in the United States, this proposition is as hard to explain and justify as the proposition that public accommodation laws do not take property rights. What conception of property and what conception of equality would make it equally permissible to allow owners to discriminate on the basis of race or require them to serve customers without regard to race and are these conceptions defensible?

The third view (that public accommodations law are mandatory) is perhaps the most controversial. No court in the United States, for example, has ever held that the federal or a state constitution requires a public right of access to private

³⁰*Heart of Atlanta Motel Inc v United States* 379 US 241 (1964).

property.³¹ This is because the state action doctrine limits the application of constitutional rights to vertical application and public accommodations claims appear to operate horizontally.³² Moreover, if such a right is required, what are its contours and limits? Surely it cannot mean that people are required to choose their intimate friends and associates without regard to race. Such a rule would impermissibly interfere with freedom of association and privacy.

Although the third view is controversial and unexpected, it is, in my opinion, the only defensible understanding of the relation between property and equality in a democratic constitution. Although the right of access has limits (it cannot apply to decisions about whom to invite to dinner at one's home), and those limits are hard to define, the failure to prohibit discrimination in access to property open to the public cannot be defended under either property norms or state action grounds. The seeming horizontal application in this instance is illusory; to exercise the right to exclude, the owner must call on the aid of the state to enforce the trespass laws. It is a mystification to consider the state as not acting in this situation. Privatized-apartheid is apartheid nonetheless, maintained by state power through trespass law. A constitution dedicated to equality cannot tolerate such a situation.

3.2 *Do public accommodations laws take property without compensation in violation of the fifth or fourteenth amendments?*

When the Civil Rights Act of 1964 abolished segregation in inns, restaurants, gas stations, and places of entertainment, it was challenged in court as an unconstitutional taking of property without just compensation. In the case of *Heart of Atlanta Motel, Inc v United States*,³³ decided the year the Civil Rights Act was passed in 1964, the Supreme Court brushed aside the argument that the statute deprived a motel owner of constitutionally-protected property rights by stating simply that a motel 'has no "right" to select its guests as it sees fit, free from governmental regulation'.³⁴ This argument assumes that public accommodations laws constitute 'regulations' of property use rather than 'takings' of core property rights and that businesses that serve guests never had absolute property rights under either the constitution or the common law to choose their customers with impunity. No mention was made of the fact that the public accommodations law

³¹The exception is the several states that have held that their state constitutional free speech clauses apply to private action and therefore impose duties on shopping center owners to allow leafletting on their premises.

³²I say 'appear' because the operation of trespass laws, both civil and criminal, necessarily involve state action.

³³(Note 30).

³⁴*Ibid* 259.

limited the owner's right to exclude nonowners from the property or that mandated access constituted a forced physical invasion of property by strangers.

Sixteen years later, in the 1980 case of *PruneYard Shopping Center v Robins*,³⁵ the state of California interpreted its constitutional free speech guarantee as including the right of citizens to distribute leaflets in a privately-owned shopping center. The Supreme Court held that the state law forcing the owner of the shopping center to allow his property to be used to distribute political literature did not violate his property rights because (1) the invasion was temporary; and (2) it did not interfere with his primary expectations regarding the property³⁶ such that '[t]here is nothing to suggest that preventing appellants from prohibiting this sort of activity will unreasonably impair the value or use of their property as a shopping center'.³⁷ The Court specifically denied that a taking could be involved merely because the leafletters had physically invaded the property. 'Appellees were orderly, and they limited their activity to the common areas of the shopping center. In these circumstances, the fact that they may have "physically invaded" appellants' property cannot be viewed as determinative'.³⁸

While there is no doubt that public accommodations laws are constitutional and do not constitute deprivations of constitutionally-protected property rights, it is not clear analytically why they do not. In a number of other recent cases, the Supreme Court has held that state-mandated physical intrusions on property constitute takings of property which violate constitutional norms.

In the most far-reaching opinion, *Loretto v Teleprompter Manhattan CATV Corp*,³⁹ the Court held that a law requiring landlords to allow a cable television company to install a cable box and cables on their buildings constituted a per se taking of property rights, even though the cable box increased the market value of the land and even though it would have been constitutional to order the landlord to buy and install the cable box himself as a condition of doing business as a landlord. In justifying this result, the Court explained that,

we have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause [and that] when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred.⁴⁰

³⁵447 US 74 (1980).

³⁶Nor did it interfere with his free speech rights or his right to freedom of association. *Roberts v US Jaycees, New York Club* 468 US 609 (1984).

³⁷*PruneYard Shopping Center v Robins* (n 35) 83.

³⁸*Ibid* 83-84.

³⁹458 US 419 (1982).

⁴⁰*Ibid* 426-427.

The *Loretto* Court tried to distinguish *PruneYard* in two ways. First, the Court stated that the invasion in *PruneYard* was 'temporary and limited in nature'.⁴¹ Second, the Court noted that 'since the owner had not exhibited an interest in excluding all persons from his property, "the fact that [the solicitors] may have 'physically invaded' [the owners'] property cannot be viewed as determinative"'.⁴²

Do the distinctions hold up? Let's start by asking whether public accommodations laws are justified under US constitutional law because the forced physical invasion by strangers can be characterized as merely 'temporary'. The answer is no. The Supreme Court has been remarkably inconsistent in its views about the constitutionality of takings of property when laws involve 'temporary' physical invasions. *PruneYard* suggests that temporary and limited physical invasions are not takings of property. But in *Nollan* (1987) and *Dolan* (1994), the Court held that the states could not force property owners to grant public easements in return for a development permit. *Nollan* involved an easement to walk along the beach near a private beach house. *Dolan* involved a bicycle path near a store. In both cases, the physical invasions were as 'temporary' as in *PruneYard*. Yet the Court held that the forced granting of an easement to the public constituted a taking of property in both *Dolan* and *Nollan*.

Rather than characterizing the movement of people across land as a 'temporary' invasion, the Court in both *Dolan* and *Nollan* characterized it as the 'permanent' granting of a property right to the public – 'public easement of access'. Although no case has characterized the public right of access to public accommodations as an 'easement', there is no conceptual or factual or legal distinction between the easements involved in *Nollan* and *Dolan* and the right of access involved in *PruneYard* and *Heart of Atlanta Hotel*. If *Nollan* and *Dolan* are good law, and if forced physical invasions by strangers are per se takings of property without regard to the public interests at stake, then the holdings of *PruneYard* and *Heart of Atlanta Hotel* are in jeopardy.

Consider also *Kaiser Aetna v United States*.⁴³ There the United States Supreme Court held that a law requiring free public access to the ocean near a private marina violated the marina's property rights. In that case, an owner of a private pond dredged a sandbar between the pond and the ocean, making the pond navigable. Federal law provides that all navigable waters in the United States must be open to the public for purposes of navigation. When the federal government attempted to enforce this policy, the Supreme Court held that it

⁴¹*Ibid* 434.

⁴²*Ibid*.

⁴³(Note 7) 179-180.

constituted a taking of property without just compensation since the pond had become navigable only because of the private owner's investment. The Court emphasized that the navigational servitude (the right of access for boaters) took away the landowner's right to exclude; that right, said the Court is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property'.⁴⁴ The Court explained:

This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioner's private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina. ... And even if the Government physically invades only an easement in property, it must nonetheless pay compensation.⁴⁵

The infringement on property rights appears to be based on the fact of physical intrusion, as in *Nollan* and *Dolan*. *PruneYard* tried to distinguish *Kaiser Aetna* this way:

This case is quite different from *Kaiser Aetna v. United States* ... *Kaiser Aetna* was a case in which the owners of a private pond had invested substantial amounts of money in dredging the pond, developing it into an exclusive marina, and building a surrounding marina community. The marina was open only to fee-paying members, and the fees were paid in part to 'maintain the privacy and security of the pond.' ... The Federal Government sought to compel free public use of the private marina on the ground that the marina became subject to the federal navigational servitude because the owners had dredged a channel connecting it to 'navigable water.'

The Government's attempt to create a public right of access to the improved pond interfered with *Kaiser Aetna*'s 'reasonable investment backed expectations.' We held that it went 'so far beyond ordinary regulation or improvement for navigation as to amount to a taking ...'.⁴⁶

I submit that the owner's investment-backed expectations are an insufficient explanation of the difference between *Kaiser Aetna* and *PruneYard*. The Court suggests that the owner invested in creating the marina and that it would make more money if it could exclude the public from the waters near the marina. But the same could be said about *PruneYard*: some people might not shop if they know they will be accosted by people handing out political pamphlets. Moreover, some shopping centers will be more used for leafletting than others; thus the

⁴⁴*Ibid* 176.

⁴⁵*Ibid* 180.

⁴⁶(Note 35) 84.

burdens and benefits of this law will not necessarily be evenly distributed among all shopping centers, perhaps creating a competitive disadvantage at those centers most used for political speech.

Further, the 'reasonable investment-backed expectations' argument is essentially circular. Why was it reasonable to expect that once the owner connected its property to navigable waters that it would retain its right to exclude when the law provided that navigable waters are open to the public? Just as the Supreme Court recognized in *PruneYard* that a motel owner never historically had a right 'to select its guests as it sees fit, free from governmental regulation',⁴⁷ so too navigable waters had always been open to the public for navigation purposes and could not be reduced to private ownership.

Neither the temporariness of the invasion nor the owner's investment-backed expectations can explain the difference between *PruneYard* and *Kaiser Aetna*. What is really at stake in *Kaiser Aetna* is the Court's mention of the exclusiveness of the marina and its attempt to charge fees to enter its waters. In the Court's view, the shopping center in *PruneYard* had already been opened to the public while the marina in *Kaiser Aetna*, the business in *Dolan*, and the beach front home in *Nollan* had not been opened to the general public for the purposes sought by the plaintiffs. The law in *Kaiser Aetna* would have changed a restricted club into an area open to the public (although the club still could have charged for and limited access to its docks and its landed facilities.) The business in *Dolan* invited the public to shop, not to bicycle along its rear border. The homeowners in *Nollan* sought to exclude the public altogether from walking along the beach in front of their home. By contrast, the Court in *Loretto* noted that the owner 'had not exhibited an interest in excluding all persons from his property'.⁴⁸ But this last argument cannot mean what it says: a homeowner does not have to decide to have no guests at all in order to retain privacy rights in controlling whom he invites onto his property. One cannot be required literally to exclude all persons from one's land to retain a right to exclude.

Perhaps the way to understand these cases is that an owner can be forced to grant a public easement if the owner opens one's property to the general public for certain purposes, such as shopping or eating. In that case, what the Court has been trying to say is that an owner can attempt to limit access to his property. If the owner is very selective, the right to exclude will prevail. But once the owner invites the public at large to enter the property, state or federal statutes can force the owner to act in a nondiscriminatory manner. Of course, this involves the state

⁴⁷(Note 33) 259.

⁴⁸(Note 39) 434.

in forcing the owner to allow access to people the owner wants to exclude. Neither the temporariness of this invasion nor the presumption that the owner invested in reliance on his ability to control access to his land is allowed to justify the owner's attempt to exclude people unreasonably. Property open to the public loses its private character and the state can force the owner to admit members of the public generally.

But is this proposition defensible? The Court in *PruneYard* thought so. The shopping center owner had 'already invited the general public'⁴⁹ and a requirement of access did not 'unreasonably impair the value or use of [the] property as a shopping center'.⁵⁰ On the other hand, remember *Dolan*: a hardware store was held to have a right not to have a public bikepath along its back border, even though the bike path would not have interfered with the business in any way and despite the argument in *PruneYard* that no taking had occurred because the entrance by leafletters did not 'unreasonably impair the value or use' of the owner's property. And recall the 1972 case of *Lloyd Corp v Tanner*,⁵¹ in which the Supreme Court held that the federal constitution's free speech guarantees did not give citizens a right to distribute leaflets in a privately-owned shopping center. The ruling was based on the fact that the center was privately owned, and even though it was the equivalent of a 'business district' in a downtown area – traditionally open to leafletters on public streets and sidewalks – the court concluded that 'private property [does not] lose its private character merely because the public is generally invited to use it for designated purposes'.⁵² I submit that this observation directly contradicts the theory underlying *Heart of Atlanta Motel* and *PruneYard*. Rather, in order to sustain the public accommodations law in the face of the claim that they constitute forced expropriations of a public easement, it is logically necessary to conclude that the reasoning of *Lloyd Corp* is incorrect and that, indeed, private property does lose at least some aspect of its 'private character' when 'public is generally invited to use it for designated purposes'.

3.3 *Do public accommodations laws violate rights of free association, privacy, or free speech?*

If public accommodations laws do not violate the takings clause – at least as applied to property that is held open to the public at large – can it be challenged on other grounds, for example, as an infringement of rights of privacy, free association, or free speech? The answer is yes and in some cases, those challenges have succeeded in the US. At the same time, in the case of property that is really

⁴⁹*Ibid.*

⁵⁰*Ibid.*

⁵¹(Note 11).

⁵²*Ibid* 569.

open to the general public, it has been held that interests in promoting equality, racial integration and combating racial discrimination outweigh the property owner's interests in privacy or free association.

For example, in *Roberts v United States Jaycees*,⁵³ and *New York State Club Ass'n v City of New York*,⁵⁴ 'private clubs' required by state or local public accommodations laws to admit members without regard to sex challenged those statutes as infringements on constitutionally-protected free association and privacy rights. In both cases, the Supreme Court held that the state had a compelling state interest in combating sex discrimination and that this interest justified limiting the club's free association rights when the clubs were large and relatively unselective in their membership (except on the basis of sex). Nor did the public accommodations laws violate free speech rights even though the Jaycees club in *Roberts* had taken positions on public issues and lobbied legislators for passage of laws and some of the eating clubs in *New York State Club Association* may have had some general expressive purposes. The Court noted in *Roberts* that the 'right to associate for expressive purposes is not ... absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms'.⁵⁵ Similarly, the Court in *PruneYard* held that requiring a shopping center owner to allow members of the public to distribute leaflets did not violate the owner's own first amendment free speech rights.⁵⁶ Rather, the Court concluded in *Roberts* and *New York Club Association* that the compelling state interest in eradicating sex discrimination justified the incidental effect on free speech rights when the public accommodations laws were designed to combat exclusion on account of sex and were unrelated to the suppression of speech, at least where the private club was large and relatively unselective in its membership.

In both *Roberts* and *New York State Club Association*, as well as *PruneYard*, the Court had to balance the equality interests in access to places open to large segments of the public against the free association, privacy, and free speech interests of the owner. In all these cases, the court found no constitutional reason for striking down laws intended to promote equal access to property that was open to the general public or to large, unselective segments of the public. On the other hand, in *Hurley v Irish-American Gay, Lesbian, and Bisexual Group of*

⁵³(Note 36).

⁵⁴487 US 1 (1988).

⁵⁵(Note 53) 623.

⁵⁶(Note 35) 85-88.

Boston,⁵⁷ the Supreme Court overturned a ruling of the Massachusetts Supreme Judicial Court that applied the state public accommodations law to the organizers of a parade on city streets. The parade celebrated St. Patrick's Day and had been run by the same private group for many years along the same route and on the same day each year. It involved thousands of participants in the parade and thousands of spectators. The organizers were unselective in admitting groups to march but had excluded members of the Ku Klux Klan, a racist organization devoted to white supremacy which had historically been associated with lynching of black men in the South. It also excluded a group of gay, lesbian and bisexual activists who wanted to march with a banner identifying themselves. The organizers stated they would allow the group to march if they did so without a banner.

The Massachusetts Supreme Judicial Court held that the parade was a public accommodation and not a political march. Because it was akin to a moving amusement park, it had an obligation to comply with the public accommodations law's nondiscrimination provisions, which specifically prohibited discrimination on the basis of sexual orientation. The Supreme Court of the United States reversed, holding that parades are inherently expressive and that the free amendment rights to speak overrode the state's interest in combating discrimination.

In my view, both courts addressed the question inadequately. The state court failed adequately to consider the free speech and free association interests implicated in the case; the Supreme Court failed adequately to consider the state's compelling interest in eradicating invidious discrimination in facilities open to the general public. The Supreme Court in *Hurley* seemed to assume that, once free speech interests were implicated, it was per se impermissible to apply a public accommodations law. But surely this is incorrect. After all, *Roberts*, *New York Club Association* and *PruneYard* all rejected precisely this proposition. Free speech interests cannot trump access norms per se. Suppose the case involved an amusement park rather than a parade. It would clearly be constitutional to forbid the amusement park from excluding any patrons who wear NAACP (National Association for the Advancement of Colored People) or ANC (African National Congress) T-shirts. Consider further the restaurant that calls itself the 'White Supremacy Restaurant'. Federal law requires such a restaurant to provide 'full and equal enjoyment' to black customers. The restaurant could not exclude people wearing ANC T-shirts; nor could it insult black customers while providing service. It may even be illegal for it to use the moniker 'White Supremacy Restaurant' since it may be interpreted as providing less than 'full and equal enjoyment' without regard to race.

⁵⁷115 S Ct 2338 (1995).

The upshot is that free speech rights may be curtailed to promote interests in eradicating discrimination. On the other hand, when a private club is truly selective, small in size, and devoted to either religious or expressive or political purposes, and not engaged in public commerce (the provision of goods and services to the public), then it is constitutionally protected in its desire to choose its members and to engage in what would otherwise constitute invidious discrimination.

3.4 *Property rights shaping the contours of social relationships*

What is at stake in these cases is precisely the character of the property – the ‘publicness’ of the use of the property. The public/private distinction does not only describe the relation between the state and society. The example of the public accommodation shows that much private property is considered in law and social practice to be part of the ‘public world’ as opposed to the private world of the home and family. In the public world of the state we expect equal access without regard to wealth – one person, one vote. In the public world of the market, money counts, so we no longer have one person, one vote but one dollar, one vote, as we say in the US. At the same time, the assumption is a right of access to get in the door to be able to use the money one has by entering a store to purchase property. The same applies for housing; one has the right to enter the housing market to rent an apartment, to buy a home, and not be excluded because of one’s race.

At the same time, the right of access is limited by competing rights, such as the right to privacy, freedom of association, and freedom of religion. A Jewish synagogue is not required to enroll Catholics as members. A family is not required to open its home to strangers at dinner time. The hard cases come in situations that fall in the middle: the social club that is relatively unselective and intends to maintain a restaurant for white persons only. How selective must the club be before we say that it is in the public world where equal access without regard to race is the norm? When can religious norms trump equality norms? Can a private school discriminate on the basis of race merely by asserting that its position on racial segregation is based on its interpretation of the Christian Bible? In order to determine what types of private property constitute public accommodations (where the norm of access prevails) and what types of private property constitute private clubs or homes (where the right of exclusion prevails) requires difficult judgments to be made about the contours of social relationships. It requires choices about the structure of the social world. It cannot be performed by deduction from an understanding of the meaning of property, or by adopting a single presumption, such as a presumption that property owners have the right to exclude nonowners from their property.

The desired structure of social relationships requires differentiation among types of property. Property that is devoted to purposes of family, religious practice, or

intimate association, as well as those devoted to public purposes of political organizing or lobbying for particular purposes, have strong interests in choosing when and under what circumstances to allow nonowners into the property or to become members of the group. However, property devoted to commercial purposes and/or open to the general public in an unselective manner has no right to exclude people in a discriminatory or arbitrary manner. The character of the property in question, including its social role and the social meaning attributed to it, is relevant in determining the appropriate balance between access norms and exclusion norms.

Moreover, what differs between a public accommodation and a private home is not a difference between property and equality. It is not correct, in my view, to state that property rights prevail in the home while equality rights overcome property rights in the context of the public accommodation. In both cases, a conflict is presented between two property rights: the right of access to property versus the right to exclude or the right to purchase property versus the right to refuse to sell. Property cannot exist as a social institution if there is no right to buy property or to otherwise acquire it. If one cannot obtain access to a store to purchase property, one cannot become an owner. Thus, the right of access to purchase property conflicts with the right to exclude. The balance or relation between these competing rights is different in the context of the store and the home. Equality norms, as well as privacy and associational norms all affect how the balance is drawn and which right takes precedence. But in the end, a conflict among strands within the property bundle is being defined.

4 Public accommodations and the South African Constitution

4.1 *Are public accommodations laws permissible?*

The question of whether a public accommodations law would violate constitutionally-protected property rights in South Africa appears to be an easy one, despite the note of caution on which I started. Such a law is unlikely to be understood as an 'expropriation' under section 9(4) and, as a deprivation of property under section 9(3), can be justified as a law of general application designed to achieve the constitution's goals of abolishing apartheid. It appears certain that public accommodations laws will be permitted and not prohibited by the South African Constitution.

Some hard questions remain however. One set of questions involves the contours of the right of access and its relation to competing constitutional norms, such as the right of freedom of association and the right of privacy. Regulation of access to a shopping center is a different matter than regulation of access to a private

home where privacy and associational interests are present. The hard questions involve the cases in the middle. Should the law limit the ability of a group to create a 'private club' that fulfills the functions of facilities that used to be open to all white persons, such as grocery stores or restaurants? Can a restaurant take the form of a club to keep out black customers? Can a group of homeowners transfer ownership to a single non-profit entity and then lease the property from it for the purpose of preserving the area for white persons?

These questions are complicated and require judgments based on social history, the goals of the new constitution and practical concerns of the possibility of violence. They require an understanding of property as socially situated, as simultaneously an individual right and a social institution. Property involves an accommodation between the right to exclude and the right of access, between the right to purchase property and the right to determine when to sell one's property. In defining the contours of these conflicting rights, the courts must take into account, not only its conception of individual rights, but the social consequences of adopting one accommodation rather than another.

4.2 *Are public accommodations laws mandatory?*

I want to conclude by arguing that a constitution premised on the notion of equal protection of the laws and the abolition of the apartheid system could not abide a situation in which public accommodations law of one kind or another did not exist. In other words, it is my view that public accommodations laws are not only permissible but that they are mandatory. The textual argument rests on the requirement in section 9(4), providing that 'no person may unfairly discriminate' on the ground of race. Section 9 also provides that 'national legislation must be enacted to prevent or prohibit unfair discrimination'. This latter sentence might be taken to mean that the courts should not act to impose on private owners duties to serve the public but should wait for the Parliament to pass legislation in this regard. However, section 8(2) provides that the bill of rights applies directly to 'natural and juristic persons', as well as to 'all organs of state', 'to the extent that it is applicable'. And section 39(2) requires the courts to 'develop ... the common law ... [to] promote the spirit, purport, and objects of the Bill of Rights'. Given the mandatory nature of the obligation in section 9(4), it is arguable that, whether applied directly through section 8 or indirectly through development of the common law (section 39), the Constitution of South Africa mandates a norm of equal access without regard to race in facilities that are held open to the general public. Although the Constitution protects rights of free association (section 18), privacy (section 14), and free expression, (section 16), as well as property (section 25), it seems clear that, in at least some cases, the equality rights guaranteed under section 9(4) will trump these other rights. Given the mandatory quality of section 9, there will be significant cases in which the constitution will

be interpreted to require owners of property to open that property without regard to race or other factors protected by section 9.

The policy argument is equally simple. If no public accommodation laws are passed, or if the common law is not interpreted to provide a right of access to property open to the public, the ordinary operation of trespass law may have the effect of maintaining substantial racial segregation in the country. This result would be contrary to the goals and ideals underlying the new Constitution. In the United States, we have relied on the Civil Rights Act of 1866 as well as a host of other statutes to force individuals and companies to contract with others without regard to race. This practice began in 1968 in *Jones v Alfred Mayer Co.*,⁵⁸ in which the court held that the right to purchase property under the 1866 Civil Rights Act was violated when a private owner refused to sell a home to a black family. It continued in 1968 in *Runyard v McCrary*,⁵⁹ where the court held that a private school that advertised for students could not refuse to admit a student because of that student's race. In *Jones*, the Court held that the right to purchase property ensured that 'a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man'.⁶⁰

In this regard, one should also pay close attention to *Shelley v Kraemer* (1948), holding that it is unconstitutional to enforce a racially-restrictive covenant.⁶¹ This case was criticized by several of the justices in *Du Plessis v De Klerk*,⁶² who noted that it had been subject to great criticism by both judges and law professors in the United States. I want to argue forcefully that this criticism is unwarranted and is premised on a misunderstanding both of what was at stake in *Shelley* and what the implications of the holding in *Shelley* were. In *Shelley v Kraemer*, the Supreme Court held that enforcement of a racially-restrictive covenant constituted state action and that enforcement of the contract to prevent an owner from selling property to a black family violated the equal protection clause. Consider first the state action holding. The court found that enforcement of a restrictive contract involved the state in imposing coercive control of conduct and thus constituted state action under the fourteenth amendment. At the same time, the Court held that, until a person seeks court enforcement, no state action is involved. Thus, the Court would have found no state action in the case of an individual owner voluntarily refusing to sell his property because of the prospective purchaser's race.⁶³

⁵⁸(Note 14).

⁵⁹427 US 160 (1976).

⁶⁰(Note 58) 443.

⁶¹(Note 14).

⁶²1996 3 SA 850 (CC).

⁶³In his concurrence in *Heart of Atlanta Motel*, Justice Douglas would have rested the opinion on the equal protection power and not just the commerce clause under the reasoning of *Shelley*. He noted that enforcement of trespass laws constitutes as much state action as does enforcement of a restrictive covenant.

Most of the criticism of *Shelley* has revolved around the idea that if state enforcement of a voluntary contract constitutes state action, it is hard to see why state action is not involved in implementation of any common law right. For example, the court's conclusion that no state action is involved when an owner refuses to sell on the ground of race is rendered suspect. Suppose the prospective purchaser forcibly entered the property and displaced the owner; the owner calls on the police to enforce the trespass laws and eject the trespasser. It is hard to see why, under the reasoning of *Shelley*, that state action is not implicated in enforcement of the trespass laws. This conclusion would, however, render all private action subject to constitutional norms. Taken to the extreme, it would require a private homeowner to admit persons to a private dinner party without regard to race.

This criticism is unfounded for several reasons. First, consider the state of the law if the Court had gone the other way. At the time of the Supreme Court's decision, the Shelley family (the black purchasers) had consummated the sale and moved into the house. If the Court had found no state action present in enforcing a private contract, the plaintiff neighbours could have obtained an injunction ordering the Shelleys to move out of the house. If they refused to do so, the plaintiffs could have them held in contempt of court and the court could and eventually would have ordered the police physically to remove them from the premises and throw them onto the street. All this would be done in the face of an opinion stating that no state action is involved in enforcing a private contract. The factual setting demonstrates the absurdity of that conclusion.

Second, the critics are correct to note that state action is involved in enforcing trespass laws. However, this is not a criticism of the result in *Shelley*, but a criticism of the assertion that no state action would be involved if an owner refused voluntarily to sell. The critics assume that if state action were involved, that it would have no limits; private dinner parties would be as fully regulated as public restaurants and private owners would have precisely the same obligations in their private lives as state officials have in exercising governmental power. This assumption, however, is completely unwarranted. Only a rigid, formalistic conception of rights would dictate such a result. The private homeowner giving a dinner party is differently situated than the property owner renting an apartment on the open market. As I argued earlier, the character and social meaning of the property is different and the demands of equality versus the rights of control are different in the two contexts. Moreover, countervailing rights of privacy and free association exist in one context and not the other.

Third, some critics suggest that no equality norms were violated in enforcing a restrictive covenant because black owners, like white owners could exclude or write racially-restrictive covenants. But such a conclusion does not mean that

enforcement of racially-restrictive covenants would be compatible with equal protection of the laws. The Supreme Court specifically rejected this view; it was interested in the result. Black and white people were not similarly situated; it was the black population that had been enslaved and faced systematic discrimination in the past; this history was relevant in measuring the demands of equality. Would black persons wind up having trouble finding a place to live or be excluded from 'white neighborhoods' if *Shelley* had gone the other way? You bet they would. This was the reason the court found that 'equal protection of the laws is not achieved through indiscriminate imposition of inequalities'.⁶⁴ This latter phrase assumes that equality is denied if anyone is denied the right to purchase property without regard to race.

The result is that property law must include some version of a right to purchase property and a right to contract in the marketplace without regard to race. Failure to include such a right means that state power can be exercised through enforcement of trespass laws to maintain a situation of racial segregation, exclusion, and unequal opportunity. We know that this form of state action violates equality norms because of looking at the consequences of protecting property rights to exclude nonowners from public accommodations or to enforce restrictive covenants. The *Shelley* Court was correct in determining that state action is present in enforcement of common law rights and that the failure to apply constitutional norms to private property owners might very well deprive citizens of equal protection of the laws when court enforcement of property rights had the effect of institutionalizing apartheid. The Court was wrong, in my view, to argue that no state action was involved when a private owner acted without benefit of court order. A private owner who refuses to sell a house to a black family does so pursuant to a property right defined, protected, and enforced by state law, backed up by the police. Property rights are meaningless without state enforcement; the right not to sell to someone is just as dependent on state authority and enforcement as the right to exclude a nonowner from one's property.

The new South African Constitution has cut through the conceptual paradoxes of the state action doctrine. Whether through legislation promulgated under section 9(4) or through interpretation of the common law in light of section 39(2), or through direct application of section 9(4) through section 8(2), the courts in South Africa must adopt some principle that makes private property open to the public available to everyone without regard to race. The contours of that right are complicated, including how to define private clubs that may be exempted from it and religious organizations that have religiously based reasons for exclusion. But the failure to have some such law would mean that those who are excluded would

⁶⁴*Shelley v Kraemer* (n 14) 21.

have their right to purchase property limited by the exclusionary desires of property owners, thereby perpetuating the effects of apartheid and violating the spirit of the Constitution.

The justices who interpreted the interim Constitution in *Du Plessis* as not including direct horizontal application of the bill of rights had some legitimate fears. First, they were afraid that application of the bill of rights to private actors would interfere with liberty by making all individuals subject to the rigorous requirements of nondiscrimination applicable to state actors.⁶⁵ But, as *Shelley* itself demonstrates, the refusal to apply constitutional norms against private actors in either a direct or an indirect manner allows the operation of the common law to recreate apartheid with the aid of state power. Consider a restaurant owner who refuses to serve black customers. A group of activists come into the restaurant and sit down, asking to be served. The owner asks them to leave; they refuse to go. The owner calls the police and asks them to eject the trespassers and charge them with criminal trespass. The state prosecutes. Can the prosecution proceed under the new Constitution? I submit that it cannot, and the fact situation demonstrates the inadequacy of a conception of constitutional rights that attempts to distinguish between state and private action. Although the owner is the one making the decision to exclude customers on the basis of race, it is the common law of property, and, in this instance, the criminal law, that delegates to the owner the power to call on the state to enforce the right to exclude. Is this a case of horizontal conflict or vertical conflict? One might argue that the criminal case involves vertical conflict since the prosecutor is the state, while a civil trial would involve horizontal conflict between the plaintiff is the owner, a private party. But the difference between criminal and civil actions cannot help us here. In either case, it is the courts and the police that enforce the owner's rights. Under section 9(4), the courts should hold that it is unconstitutional for the owner of property open to the public as a public accommodation to refuse to serve customers on the ground of race. This does not mean that a private owner must choose his friends and dinner guests at his home on a racially-neutral basis. Although a state actor must act in a nondiscriminatory manner in all its dealings, the private homeowner, unlike the state, has countervailing rights, including constitutional rights of privacy and free association. Section 8 states that the bill of rights shall apply horizontally 'to the extent that ... it is applicable'. Some judges and scholars are worried that the Constitution imposes maximal obligations while private law generally protects individual freedom; this formulation would mean that

⁶⁵For example, Ackermann J suggested that application of the bill of rights to private actors would prevent individuals from engaging in discrimination in private bequests, possibly interfering with private decisions that should be left unregulated by antidiscrimination law: *Du Plessis v De Klerk* (n 62) par 109. In a different vein, Kentridge J argued that horizontal application would create uncertainty in private legal relationships (par 33).

worried that the Constitution imposes maximal obligations while private law generally protects individual freedom; this formulation would mean that imposition of the bill of rights on private actors would infringe on liberty of individuals too much. But the Constitution provides that the bill of rights applies directly to private actors only to the extent the right 'is applicable'. This allows the obligations of state actors to be defined differently from the obligations of private actors. It allows the Constitutional Court to define the contours of the nondiscrimination provisions in section 9(3) (applicable to public actors) differently from the provisions of section 9(4) (applicable to private actors). Public and private actors may be distinguishable in important respects, especially because private actors may have countervailing rights, while this cannot be said about the state, which has only countervailing powers. However, the difference between public and private actors does not mean that private actors should have no obligations under the constitution. Just as judges distinguish cases in the common law system, finding that a rule applicable in a prior case may not apply in a subsequent case with important factual differences, they may define constitutional rights against state actors differently from those that apply in the context of horizontal relationships.

Second, some judges were worried about the division of powers between the Constitutional Court and the Supreme Court of Appeal,⁶⁶ as well as the division of powers between the Constitutional Court and parliament.⁶⁷ The Constitutional Court is limited to adjudicating constitutional questions while the Supreme Court of Appeal has jurisdiction over the common law. This worry is appropriate given the division of powers in the Constitution. At the same time, it is important to note that, while the Supreme Court of Appeal determines the common law, the Constitutional Court determines constitutional law. In my view, it would be an abdication of constitutional responsibility for the Constitutional Court to not make appropriate contributions to the development of the common law when the Constitution itself mandates that constitutional values should be used to change or interpret the common law.

The final Constitution appears to grant the Constitutional Court the power to either hear matters directly that involve constitutional law (section 167(6)(a)) or to hear appeals from the Supreme Court of Appeal on constitutional questions

⁶⁶See the opinion of Kentridge J arguing that only the Supreme Court has the power to formulate common law rules: *Du Plessis v De Klerk* (n 62) par 53-54. If the only thing the Constitutional Court can do is strike down a common law ruling, then a gap may be left in the law that is worse than the prior rule being struck down. *Ibid*.

⁶⁷See the opinion of Sachs J arguing that a 'major advantage' of using common law or legislation rather than direct constitutional horizontal rights is that 'Parliament could ... opt for amending or even abrogating Appellate Division decisions' while similar amendments would be severely limited in relation to determinations by [the Constitutional Court]: *Du Plessis v De Klerk* (n 62) par 179.

section 39. Sensitive opinion drafting can involve the Constitutional Court in the direct and indirect application of constitutional norms pursuant to sections 8 and 39. As I argued above, the fact that a constitutional right is involved does not mean that the right must operate in exactly the same manner against a private defendant and a government actor. It also does not mean that the Constitutional Court, by defining the role of constitutional norms in common law, would be displacing the Supreme Court of Appeal.

The Constitutional Court can engage in a dialogue with both the Supreme Court of Appeal and parliament in developing the common law. Consider the example given above of the restaurant owner who excludes customers on the basis of race who faces a group of protesters who sit in the restaurant demanding service. The owner refuses to serve them and gets the police to physically remove them. The protesters bring a lawsuit against the restaurant owner claiming that their exclusion violates both a common law right of access to places of public accommodation and a constitutional right to be free from unlawful discrimination under section 8(2). One could imagine the case being brought first in the common law courts. If the Supreme Court of Appeal rules that the plaintiffs have no remedy under either the common law or section 9, as applied through section 8(4), the plaintiffs could appeal to the Constitutional Court under rules promulgated by that court or legislation pursuant to section 167(6)(b). Alternatively, the plaintiffs could attempt to bring the case directly in the Constitutional Court, claiming that the Court should decide to hear the case in order to vindicate a fundamental constitutional right under section 9. The Constitutional Court could, pursuant to its rules, decide whether or not the case merits direct attention before being heard by the common law courts.

If the Constitutional Court decides to hear the case directly, this does not mean that the Supreme Court of Appeal would be taken out of the picture. The Constitutional Court could, for example, announce that it violates section 9 for a public accommodation to exclude a patron on the ground of race and that plaintiffs therefore are entitled to declaratory and/or injunctive relief against the defendant. Such a ruling might effectively change a pre-existing common law rule. Some judges worried that the Constitutional Court had only the power to strike down a law, including a common law rule, but had no power to make common law, and that the plaintiff would therefore be left with whatever common law background was left – a background that might be worse than the rule being challenged. This worry seems out of place to me, at least after passage of the final Constitution. The final Constitution allows – indeed requires – the Court to apply the bill of rights to horizontal relations in appropriate cases. Thus, the Constitution might apply directly to grant a right of access to places of public accommodation under section 8 and section 9. But even if the claim were that the pre-existing common law rule giving owners a right to exclude non-owners from

their property must be changed in light of constitutional values, it is not obvious to me that the Constitutional Court should not hear the case in the first instance. After all, if it is the case that exclusion from a public accommodation on the basis of race would violate section 9, then it is a matter of constitutional law that a common law rule which tolerates such exclusion must be changed pursuant to section 39. It is true that the Supreme Court of Appeal has the power to make the common law, but it is the Constitutional Court that has the power to declare that a constitutional norm requires a change in the common law.

An opinion by the Constitutional Court stating that public accommodations must serve the public without unjust discrimination under section 9 (as implemented through either section 8 or section 39) does not displace either the Supreme Court of Appeal or parliament. Constitutional rights constitute protection for fundamental interests that cannot be infringed by either common law or statutory law. However, once that minimum protection is met, the lawmakers (both common law courts and legislatures) are free to adjust and balance competing interests, as long as they do not infringe on the core constitutional rights. Thus, for example, the Supreme Court of Appeal could develop public accommodations law by ruling in future cases about the limits of the obligation (defining what constitutes a private club that can exclude and what clubs must be open because they are otherwise so unselective), as well as the facilities that are covered by the obligation. Similarly, parliament could pass a public accommodations statute that implements and defines the obligation in appropriate ways.

Such lawmaking by the Supreme Court of Appeal and parliament should be upheld by the Constitutional Court as long as they do not authorize infringements on core equality rights under the constitution. Further, the Constitutional Court may make its own determination of the correct balance between equality norms and free association norms while leaving parliament free to rewrite that relationship. Parliament may redraw the lines drawn by the Constitutional Court and defend them by explaining the legislative policies in the statute itself. The Constitutional Court is then free to say, 'Although this particular accommodation between equality norms and privacy or free association norms is different from the one we drew in our precedent, it is a plausible interpretation of the correct relation between them and thus withstands constitutional scrutiny'.

For example, the New Jersey Supreme Court announced that it violated the state constitution for towns to pass zoning laws that effectively excluded all multi-family housing (apartment buildings) from the municipality because this effectively segregated poor persons into a few urban communities in the state and thus violated the state's obligation to provide for the general welfare of all its

citizens, including poor people.⁶⁸ The New Jersey legislature was not happy with this decision and refused to implement it. The courts then implemented the new constitutional obligation by striking down zoning ordinances when challenged by builders and granting builders permits to build apartment complexes despite existing zoning laws.⁶⁹ The legislature finally passed a statute that created a state agency to determine each town's fair share of the regional housing need for low- and moderate-income families. While the legislative scheme was different from the accommodation reached by the New Jersey Supreme Court, the Court upheld the constitutionality of the legislative scheme as a viable means to achieve the constitutional right of poor people to have a chance of finding housing in almost any town in the state.⁷⁰

Sensitive opinion drafting by the Constitutional Court can invite lawmaking by both parliament and the Supreme Court of Appeal in areas where the Supreme Court of Appeal is defining constitutional rights. Some constitutional rights are fairly rigid after all and cannot be violated in any instances. Official torture, for example, is unlawful under all circumstances, even national emergencies (section 12(1)(d)).⁷¹ Other constitutional rights are not absolute; they can be limited or regulated by common law or statutory law in ways that do not violate the core of those rights and thus are compatible with constitutional norms. This is especially the case when two different constitutional rights clash, as is the case in public accommodations law, given the conflict between property, free association and privacy rights, on the one hand, and equality rights on the other. Thus, if it were correctly written, a constitutional ruling that places of public accommodation cannot discriminate on the basis of race would not completely displace either parliament or the Supreme Court of Appeal in developing the contours of that obligation – defining what is and what is not a public accommodation and when an action constitutes discriminatory treatment. In addition, legislation may protect classes of persons who are unprotected by constitutional rights. For example, a public accommodations law might provide that businesses cannot exclude anyone with a good reason, even though the Constitution only seems to protect against discrimination of particular kinds, such as race or sex discrimination.

5 Conclusion

The notion of responding to a responsibility confronts us with a paradox. It clearly involves an element of choice and a complete absence of choice.

⁶⁸*Southern Burlington County, NAACP v Township of Mount Laurel* 336 A 2d 713 (NJ 1975) (Mount Laurel I).

⁶⁹*Southern Burlington County NAACP v Township of Mount Laurel* 456 A 2d 390 (NJ 1983) (Mount Laurel II).

⁷⁰*Hills Development Co v Bernards Township* 510 A 2d 621 (NJ 1986).

⁷¹See table of non-derogable rights in s 35 on states of emergency.

Responding to a responsibility to which one is called upon to respond is not the act of a subject. But neither is it simply a matter of being 'subject to' a responsibility. To be responsible is a mode of existence that cannot be reduced to either the passive or the active voice.⁷²

Judges have a difficult job. They must do justice to both parties before them. When each side claims legitimate interests and plausible arguments for legal protection, judges face a painful and sometimes unbearable situation. The easy way to deal with dilemmas such as this is to convince oneself that some other lawmaking body should deal with the problem. But this conclusion is always a mistake. I do not mean that the court should always take the opportunity to change the law; I do mean that the court cannot refuse to become involved. When a patron is excluded from a restaurant on the ground of race, the precedents may either establish a right to exclude or a right of access, or they may be silent on the question. If they establish a right to exclude, the judge's refusal to change the law constitutes a ruling of law as much as a choice to change the rule. If the law is silent, the judge's refusal to create a right of access cannot be characterized as a refusal to make law; rather, the judge has ruled that property owners have the right to exclude on the basis of race in public accommodations, and has done so, moreover, in the face of a constitutional right to be free from discrimination by private persons. Either way the judge goes, she will be making law, determining the meaning of property in the new post-apartheid South Africa.

Property is not all the same. A private home is not the same as a retail store. Privacy interests exist in the context of the home that do not exist in the context of the store. Stores implicate interests in equal access to the public world of the market — a world that is public, not because it is publicly owned, but because it represents a sphere of life to which all have access without regard to race. It is because strict application of property law (the right to exclude) could have the effect of re-inscribing apartheid in a country that just got rid of it that requires a reconceptualization of the meaning of property. It is not possible to merely extend rights granted to white people to black and colored persons. The rights previously enjoyed by white owners must sometimes be changed to achieve equality. Thus, there may not have been a public accommodations notion in the apartheid era because white people were, in fact, admitted to public accommodations even if owners had a right to exclude them. If some prejudice remains, and a residual desire to keep certain groups out of certain neighborhoods, the right to exclude must be limited in the context of the type of property to which norms of access should prevail over norms of exclusiveness.

It is useful to distinguish among types of social settings and define property rights accordingly. As Professor André van der Walt notes,

⁷²Van der Walt (n 2) 431.

Property theories concerned with the diversification or fragmentation of property rights often stress the importance of specific property objects since these factors can and should determine the content and nature of specific property rights – the definition, content, and limits of the right to a pencil must obviously be different from the right to nuclear material.⁷³

In defining the contours of those rights, it is crucial to keep in mind the underlying values and social relationships that impinge on the choices open to the judges deciding the case. 'Property rights serve human values', wrote Joseph Weintraub, the great Chief Justice of the Supreme Court of New Jersey in 1971. 'They are recognized to that end, and limited by it'.⁷⁴ Defining these human values and applying them is an excruciatingly difficult task. The precondition for confronting these problems is a willingness to rethink and to reexamine cherished truths. 'Openness', writes Johan van der Walt, 'is the precondition of integrity'.⁷⁵

LLM course in Constitutional Interpretation

The Department of Constitutional and Public International Law of the University of South Africa offers an LLM (B curriculum) in Constitutional Interpretation (MSINLW-J).

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⁷³(Note 1) 459.

⁷⁴*State v Shack* 277 A 2d 369 at 372 (NJ 1971).

⁷⁵JWG van der Walt 'Squaring up to the difficulty of life: hermeneutic and deconstructive considerations concerning positivism and the rule of law in a future South Africa' 1992 *Stell LR* 231 at 238.