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Making Sense of State Action

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ABSTRACT

Perhaps no question of constitutional law is more fundamental than whether the Constitution applies. The Bill of Rights, Fourteenth Amendment, and Fifteenth Amendment protect individuals’ rights from invasion by the state, but they do not protect against private action. Separating “state action” from “private action” thus poses a critical constitutional question, and it is one with which the U.S. Supreme Court has grappled more than seventy times since 1883.

Unfortunately, the Court’s state-action rulings provide something less than a model of clarity. Many rulings seem inconsistent, and issues of first impression frequently have created new lines of precedent that speak little to prior state-action rulings. The Court never has developed an overarching conceptual structure within which to tie together its many state-action rulings. Such a framework also has eluded scholars: though more than two hundred articles examine “state action,” none meaningfully distinguishes between it and "private action." In the words of one scholar, the distinction has become “at least a piece of the Holy Grail that has eluded state action theorists for decades.”

Nevertheless, distinguishing meaningfully between state action and private action is possible. In this Article, the authors advocate that the Court adopt a conceptual framework for determining, in any circumstance in which the state-action inquiry might arise, whether the Constitution applies. The authors review the law and scholarship of state action and—building on decades of analytical progress—propose a conceptual structure, consistent with case law and applicable to any set of circumstances, for meaningfully distinguishing between "state action" and "private action." The authors conclude by defending and illustrating this proposal.

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INTRODUCTION

The Supreme Court has held since 1883 that the Fourteenth Amendment affords no protection against private behavior.\(^1\) The Equal Protection Clause does not prohibit a private social club from refusing patrons on the basis of race.\(^2\) The Due Process Clause does not guarantee notice or a hearing before a private utility company shuts off the electricity to a person’s home.\(^3\) In fact, with the exception of the Thirteenth Amendment’s prohibition of

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\(^1\) See, e.g., The Civil Rights Cases, 109 U.S. 3, 11 (1883) (“It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment.”).

\(^2\) Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 177–79 (1972) (“[T]he operation of the regulatory scheme enforced by the Pennsylvania Liquor Control Board does not sufficiently implicate the State in the discriminatory guest policies of Moose Lodge to make the latter ‘state action’ within the ambit of the Equal Protection Clause of the Fourteenth Amendment.”).

\(^3\) Jackson v. Metro. Edison Co., 419 U.S. 345, 358–59 (1974) (“[T]he State of Pennsylvania is not sufficiently connected with respondent's action in terminating petitioner's service so as to make respondent’s conduct in so doing attributable to the State for purposes of the Fourteenth Amendment.”)
slavery, nothing in the Constitution limits private behavior; our founding document, for the most part, constrains state action only.\(^4\) Distinguishing between “state action” and “private action” thus carries enormous import.\(^5\) This fundamental question defines the Constitution’s reach.

Unfortunately, finding a meaningful distinction between “state action” and “private action” has proven difficult.\(^6\) The Court has considered the problem more than seventy times. It has defined the Constitution’s reach case by case, mostly through the traditional common-law method of analogical device, tracing a crooked and often blurry line between action that is “fairly attributable to the state” and action for which a private person is responsible.\(^7\) Through this method, the Court has established many lines of state-action cases over the years: cases involving a government official acting within, beyond, or contrary to the official’s authority; cases involving a nongovernmental entity taking on a function traditionally, exclusively reserved to the government; cases in which the state and a nongovernmental entity share a symbiotic relationship; and so on.\(^8\) With each new case, reconciling the outcome with prior precedent has become increasingly difficult. The Court first must choose—and choose consistently—which of its prior decisions most resembles the case under review, then resolve that case in harmony with the selected line of precedent. After years of this method, state-action jurisprudence has become jumbled; legal commentators regularly describe it as nothing less than a precedential zoo.\(^9\)

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\(^4\)See, e.g., Rendell-Baker v. Kohn, 457 U.S. 830, 837, 843 (1982) (holding that the First Amendment does not prevent a private school, though publicly funded, from firing a teacher for espousing a view with which the school’s director disagrees).

\(^5\)As Professor Charles Black comments, “It is not too much to have said that the state action problem is the most important problem in American law. We cannot think about it too much; we ought to talk about it until we settle on a view both conceptually and functionally right.” Charles L. Black, Jr., Foreword: State Action, Equal Protection, and California’s Proposition 14, 81 HARV. L. REV. 69, 70 (1967).


\(^8\)See, e.g., id.

\(^9\)See, e.g., Ronald J. Krotoszynski, Jr., Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations, 94 MICH. L. REV. 302, 304 (indicating that the Court’s precedent has proven “difficult to apply in practice” and has “done little to improve either the quality or consistency of state action determinations”); Thomas P.
circumstances are dire; commentators even as far back as 1967 have recognized that “[o]n the cases and on the opinions, ‘state action’ is a doctrine in trouble.”\(^\text{10}\) Distinguishing state action from private action through analogical device is failing.

Much of the problem is attributable to the fact that the Court has never explained how its many distinct lines of state action precedent relate to each other or articulated which lines of cases govern in what circumstances.\(^\text{11}\) There also is considerable confusion within each line of precedent.\(^\text{12}\) To bring order to state action jurisprudence, the Court should adopt a conceptual structure within which to tie together its many state action rulings.

This Article proposes an overarching conceptual structure for distinguishing between state action and private action in any circumstance in which the inquiry arises. Under the proposed structure, a court would conduct three steps of analysis. First, it would identify what conduct and whose conduct is challenged in the complaint.\(^\text{13}\) Recognizing that the state is never

Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083, 1085 (1960) (“It is apparent that the Court will be called upon with increasing urgency to give shape to this ‘protean concept’ and attempts to establish the boundaries of state action, based on analyses of these [the Court’s] cases, will continue.”).

\(^\text{10}\) Black, *supra* note 5, at 91. As Professor Black more optimistically continues, “It is just possible . . . that rescue might be found in the scholarly commentary.” *Id.*

\(^\text{11}\) See, e.g., Joan Kane, Note, *The Constitutionality of Redlining: The Potential for Holding Banks Liable as State Actors*, 2 WM. & MARY BILL RTS. J. 527, 558 (1993) (“It is impossible to predict which standard will be used by a court examining the state actor doctrine.”). The Court has made inroads. See Lugar v. Edmondson Oil Co., 457 U.S. 922, 936–37 (1982) (“First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible …. Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.”).

\(^\text{12}\) Several commentators have tackled apparent inconsistencies among the Court’s rulings within single lines of precedent. See, e.g., Glenn Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 CORNELL L.Q. 375, 378–418 (1958) (explaining the Court’s rulings in state-action cases involving off-duty police officers, leases to private individuals, private entities performing a “public function,” state judicial intervention to aid private discrimination, and state inaction in preventing private discrimination); James D. Barnett, *What is “State” Action Under the Fourteenth, Fifteenth, and Nineteenth Amendments of the Constitution?*, 24 OR. L. REV. 227, nn. 47–79 and accompanying text (1945) (exploring the development of state-action doctrine involving government officials who act outside the scope of their authority or contrary to law); Louis Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 1–34 (1959) (responding to Herbert Wechsler’s charge that many of the state-action cases during the 1950s were unprincipled by stepping through several cases and reconciling each with its relevant line of precedent).

\(^\text{13}\) See *infra* Part II.A.
wholly removed from any private action, the court would also identify how the state interacted with the challenged conduct both before and after the fact. Second, the court would determine whether the party whose conduct is challenged is “public” in nature or “private.” If the party is public, its conduct constitutes state action; and the inquiry ends. If the party is private, the court would proceed to a third step of analysis. At this step, the court would analyze how the state interacted with the challenged conduct both before and after the fact. If, before the fact, the state encouraged or mandated the specific conduct at issue, or if, after the fact, the state demonstrated a special relationship with the challenged conduct, state action exists; and the Constitution applies. If, however, the state merely permitted the challenged conduct under generally applicable law, state action does not exist, and the challenged conduct is not subject to constitutional scrutiny.

Analytically, it must be stressed, this entire inquiry occurs only at the threshold of constitutional analysis. If a court holds that state action exists, the court still must determine whether the conduct at issue violates the constitution.

Part I presents the traditional objections to creating one overarching theory of state action and discusses the few attempts to create such a theory. Part II presents the proposed conceptual structure and shows how it is consistent with Supreme Court precedent. Part III defends the structure, testing it against the scholarly arguments against developing a comprehensive state action theory.

I. PROBLEMS WITH CONCEPTUALIZING THE STATE ACTION DOCTRINE

Despite near universal acknowledgement that the state action doctrine is a mess, a number of commentators continue to argue that the Court should not or cannot develop a comprehensive approach to state action questions that is consistent with precedent. Some such commentators object that the concept of state action is inherently self-defeating; because the state is involved in all private action, there is no way to separate state from private behavior. Others argue that developing a comprehensive state action approach is impossible because the state action inquiry can arise in limitless factual situations and therefore defies definition. Still others argue that even if crafting a conceptual theory of state action were possible, doing so is

14 See, e.g., Louis Henkin, Shelley v. Kraemer: Notes for a Revised Opinion, 110 U. Pa. L. Rev. 473, 478 (1962) (“[W]hether the judgment of a court enforces a voluntary discrimination or compels a no-longer-voluntary discrimination, the discrimination is private in origin; in both cases it requires a court judgment to make the discrimination effective.”); Cass R. Sunstein, Lochner’s Legacy, 87 Colum. L. Rev. 873, 886 (1987) (“[H]ow does one decide whether government is ‘acting’? The legal test could in theory depend on whether government agents are involved in the process. But . . . such a test would be inadequate. State officials are involved in the enforcement of private contract, tort, and property law every day, and their involvement does not subject all private arrangements to constitutional constraints.”).

15 See infra Part II.B.

16 See infra Part II.C.
inadvisable because such a theory would instruct wrongdoers how to evade constitutional scrutiny and underprotect civil rights and liberties. This Part presents these objections. It also outlines the few ways in which scholars have attempted to conceptualize state action, and it considers the extent to which those attempts confront the objections discussed.

A. Traditional Objections to Conceptualizing the State Action Doctrine

The primary objection to conceptualizing state action is that the state is so tied up in all action that it is impossible to separate out private behavior. Searching for state action is therefore meaningless, as are attempts to develop a conceptual structure for the inquiry. This argument stresses that, for any legal private behavior, the state compels, encourages, or at the very least permits the behavior before it occurs. Conversely, the state ratifies legal private behavior after the fact by upholding it under the law. This, of course, has to be the case: public enforcement of private rights is essential to possessing private rights meaningfully. Because of the public permission and enforcement, however, under this objection, all private action becomes attributable to the State.

Assume, for example, that A, a private citizen, excludes B, another private citizen, from a dinner party in A’s home on account of B’s ethnicity. Although A’s action is private, it is supported by the state’s common law property rights allowing the exclusion. Furthermore, if B sued A in a court of law, the court would uphold A’s action after the fact. The state is therefore

17 As Professor Jerre Williams explains,

[A]s a means of determining whether individual constitutional liberties have been violated, the concept of state action has substantially lost its utility. A court decision resolving a private legal dispute is state action. Police action in the enforcement of a private interest is state action. State action is broadly found in many businesses or organizations which are substantially private in nature but have some public concern connected with them. Indeed, all rights of private property and of contract are based upon state law. So the enforcement of these laws is state action.

The result is that it is difficult to conceive of situations where state action is not present. One private citizen steals money from another. It would be state action to refuse to enforce the law concerning theft. A private citizen bars someone from his home on a racial basis. This is the extreme situation which always is posed. He is entitled to claim it as his home only because of state common law or statutory enactment, which is state action. If he calls upon the police to evict the undesired person from his property, this is state action. While in the past it has been possible to use the finding of state action as the determining factor in deciding whether constitutional rights have been violated, we are now substantially at the end of this road.


18 See id.
wound up with A’s discrimination, and the privately asserted right constitutes state action. The same would be the case for almost any legal private deprivation.\textsuperscript{19}

The objection gains force because, under some interpretations, the Supreme Court has suggested that all state enforcement of private rights constitutes state action.\textsuperscript{20} In the seminal case of \textit{Shelley v. Kraemer},\textsuperscript{21} the Court held that judicial enforcement of a private racially-based restrictive covenant constituted state action. Despite the fact that the covenant was a private agreement, the Court struck it down under the Equal Protection Clause because it had been judicially enforced.

In an oft-quoted passage, Professor Wechsler conjectures that, under \textit{Shelley}, all state enforcement of private rights could be categorized as “state action.”

\begin{quote}
[T]he state may properly be charged with discrimination when it does no more than give effect to an agreement that the individual involved is, by hypothesis, entirely free to make. Again, one is obliged to ask: What is the principle involved? Is the state forbidden to effectuate a will that draws a racial line, a will that can accomplish any disposition only through the aid of law, or is it a sufficient answer there that the discrimination was the testator’s and not the state’s? May not the state employ its law to vindicate the privacy of property against a trespasser, regardless of the grounds of his exclusion, or does it embrace the owner’s reasons for excluding if it buttresses his power by the law? Would a declaratory judgment that a fee is determinable if a racially restrictive limitation should be violated represent discrimination by the state upon the racial ground? Would a judgment of ejectment?\textsuperscript{22}
\end{quote}

Since \textit{Shelley}, the Court has handed down a number of seemingly inconsistent decisions finding no state action despite judicial enforcement after the fact. The Court has never overruled \textit{Shelley}, however; and the logical force of the objection therefore persists. As one commentator noted,

\begin{quote}
[\ldots] logically extended, the Shelley-Barrows rule simply will not go down. \ldots \textsuperscript{22} If the courts in adjudicating rights and relationships between private persons must hold every private person to the identical constitutional standards binding on a state, then effectively over eighty-five years of unbroken constitutional rulings go
\end{quote}


\textsuperscript{20} Shelley v. Kraemer, 334 U.S. 1 (1948).

\textsuperscript{21} Id.

\textsuperscript{22} Herbert Wechsler, \textit{supra} note 19, at 29–30 (1959).
by the board, and individual action for all practical purposes becomes subject to
the fourteenth amendment. 23

The argument that, under Shelley, private action cannot be separated from state action is
probably the most common, and the most persuasive, argument against conceptualizing state
action; it is studied by countless students in their first-year course on Constitutional law. 24 It is
not, however, the only such objection.

Several commentators have posited that developing a comprehensive conceptual structure
to the state-action inquiry is impossible because the state action inquiry can arise in limitless
factual scenarios. It can arise when any state official—judicial, legislative, or executive—or any
individual acting jointly with a state official, or any individual assuming the functions of a state
official, deprives someone of any civil right or liberty protected by the Constitution. 25 The sheer
variety of circumstances, commentators argue, defies reduction to a single conceptual structure. 26

However, many doctrines of law exist in workable fashion even though they could apply
to limitless factual scenarios. Consider, for example, the law of negligence. There is no end to
the ways in which an individual might breach the duty to act as an ordinarily, reasonably prudent
person. This variety of factual scenarios merely required the Court to frame the law of
negligence in a sufficiently flexible manner. One could argue, in fact, that where legal structures
apply to a wide variety of factual circumstances, it becomes even more important to develop a
workable conceptual structure because, in these circumstances, it is all the more difficult to
decide cases by analogizing to precedent.

A final objection to developing a comprehensive structure to state action is that such an
approach would guide individuals on how to evade constitutional scrutiny when engaging in
unconsciousable behavior. As Professor Charles Black explains,

The commitment of the Court to a single and exclusive theory of state action, or
to just five such theories, with nicely marked limits for each, would be altogether
unprincipled, in terms of the most vital principle of all—the reality principle. It

23 St. Antoine, supra note 19, at 1008.

24 See, e.g., ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES § 6.4

25 Topol, supra note 6, at 1146.

26 See Reitman v. Mulkey, 387 U.S. 369, 378 (1967) (“This court has never attempted the
‘impossible task’ of formulating an infallible test for determining whether the State ‘in any of its
manifestations’ has become significantly involved in private discriminations.”); Thomas P.
Lewis, The Sit-In Cases: Great Expectations, 1963 SUP. CT. REV. 101, 120 (“[T]he Court will
take a particularistic approach to the state action problem, an approach difficult if not impossible
to capture in a meaningful rule or principle. Most commentators urge such an approach because
of the sheer volume and variety of no-so-hypothetical situations that invite judicial solution.”).
would fail to correspond to the endless variations not only of reality as presently
given, but of reality as it may be manipulated and formed in the hands of people
ruled by what seems to be one of the most tenacious motives in American life.
Such an arbitrary commitment would serve only to instruct racism in the
essentials of evasory tactics; it would make the law, classically, “[t]heir perch and
not their terror.”

It is true that litigants could invoke a clear state action requirement as a shield behind
which to hide unconscionable behavior from the Constitution. This, however, is not necessarily
a bad thing; the very nature of the law is that it sets clear limits on acceptable behavior, both for
those who wish to comply with it and for those who seek to evade it. When the law is clear,
and wrongdoers still succeed in escaping its grasp, policy-makers can expand the law to ensure it
prevents wrongdoing—or, at least, their failure to do so will be blatant. Rather than striving to
make any law, including the state action doctrine, unclear, policy-makers should seek to limit
loopholes available to wrongdoers. If the state action doctrine is sufficiently comprehensive,
courts need not be concerned that by identifying constitutional behavior they invite violators to
conform their actions to the test while violating the principle.

Relatedly, commentators argue that developing bright-line rules for state action would
introduce too much inflexibility into courts’ analysis, causing courts to underprotect the civil
rights and liberties guaranteed by the Constitution. This objection, however, ultimately only

27 Black, supra note 5, at 90–91.

28 Analogously, American constitutional law places great value on informing citizens of what
punitive rules apply and when. See, e.g., U.S. CONST. art.I, § 8 (“No . . . ex post facto Law shall
be passed.”); BMW v. Gore, 517 U.S. 559, 574 (1996) (“Elementary notions of fairness
enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the
conduct that will subject him to punishment . . . .”).

29 See Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1,
31 (1959) (“I do not hesitate to say that I prefer to see the issues faced through legislation, where
there is room for drawing lines that courts are not equipped to draw.”).

30 See Lewis, The Sit-In Cases, supra note 26, at 119 (“A mechanical or conceptual structure to
state action touches either too much or too little.”); cf. St. Antoine, supra note 19, at 1010 (“The
development of constitutional theory must not be frozen in the established molds of property and
contract law. Concepts must not be exalted at the expense of hard facts.”).

of the right to equal protection of the laws could lie only in the breadth of its application, its
constitutional assurance was reserved in terms whose imprecision was necessary if the right were
to be enjoyed in the variety of individual-state relationships which the Amendment was designed
to embrace.”). Professor Ronald Krotoszynski tackles inflexibility within the state-action
inquiry, arguing that distinctions within the state action inquiry should not be applied rigidly. In
particular, he compares the current state action structure to “a fishing net with very wide holes.”
applies to an inflexible approach containing unregulated areas which allow actors to infringe civil rights and liberties. A comprehensive structure to state action should be mindful of the objection and provide explanatory room within which the doctrine can grow to solve such problems. Thus, a useful conceptual structure to state action could frame the analysis; and, rather than eliminating the flexibility to deal with the facts specific to each case, could serve as a method by which to choose the legal rules against which the facts are judged.

B. Comprehensive Structures for State Action Analysis

In light of these objections, and in light of the apparent contradictions in the state action case law, it is certainly true that “[m]aking sense of the state action doctrine is not an easy task.” It is not, however, a necessarily impossible or inadvisable one. A few commentators have attempted to develop a comprehensive conceptual structure to the state-action inquiry that incorporates the Court’s many lines of state-action precedent. Professors William Van Alstyne and Kenneth Karst suggest that the Court resolves every state-action case by weighing three competing values: the “personal interests of the parties affected by the incident which gave rise to the case,” the effect that a finding for or against state action would have on those interests, and the effect that a finding for or against state action would have on encouraging local governmental

See Krotoszynski, supra note 9, at 328. He presents meta-analysis as a way to fill these holes and inject flexibility into the inquiry; he would allow a court to find state action based on partial satisfaction of each of the tests even though none of the tests are fully satisfied. Id. at 337. This and other aspects of the theory, however, are susceptible to critique, and ultimately, the theory is unable to make sense of state action.

32 E.g., Topol, supra note 6, at 1142.

This statement excepts abundant commentary claiming that “state action” always exists. See, e.g., Michael L. Wells, Identifying State Actors in Constitutional Litigation: Reviving the Role of Substantive Context, 26 CARDOZO L. REV. 99, 108 (2004) (“The ‘state action/no state action’ distinction does not divide the universe of cases into two groups depending on whether the State is implicated in the events giving rise to the litigation. In the modern world, the State is present in virtually every interaction between persons, if only by choosing whether or not to enforce private agreements.”); Williams, supra note 17, at 367. But see Pollak, supra note 12, at 12 (“Professor Wechsler is asking whether every instance of judicial cognition of private discrimination is state action prohibited by the fourteenth (or fifth) amendment. The answer is ‘No.’”); St. Antoine, supra note 19, at 1008 (“Does this mean that the Shelley doctrine will be applied to the point of forbidding all private discrimination based on a classification the state itself could not properly make, so long as there is state enforcement in the picture? Quite clearly not.”).
responsibility. Preferring “the risks of candor to those of deception,” Van Alstyne and Karst propose that the Court in each case frame this analysis explicitly.

Such analysis essentially would meld the state action inquiry with the merits of the constitutional claim, abandoning the idea of state action as a threshold question. To be sure, such analysis would be flexible enough to successfully confront the three principal objections to current state action jurisprudence. It allows us, for example, to justify Shelley as a “race-case” where state action was present only because, normatively, the right of white residents to exclude non-whites from their neighborhood carried less force than the right of a homeowner to sell to a non-white person. The rule could apply in any number of distinct factual circumstances. Finally, it is vague enough that it does not instruct would-be wrongdoers on how to toe the state action line.

Such analysis, however, would provide lower courts with little guidance. It is a balancing test: If the Defendant is more worthy, against the backdrop of federalism, the court should find that state action exists. If the Plaintiff is more worthy, against the same backdrop, the court should find that state action does not exist. Not only would such a rule be difficult to apply and almost certainly variable in application, it would also require the Court to backtrack on its long-articulated view that state action is a preliminary inquiry, independent of the merits of the claim.

Professor Tom Rowe has proposed another comprehensive theory of state action. He classifies state action cases as presenting an “ordinary” state-action problem when a public official has acted, a “nonordinary” state-action problem when the state is in some way involved with the conduct at issue but did not directly engage in the conduct, or possibly a “borderline” problem that lies at the border between the other two categories. State action exists in all ordinary state-action cases, but the inquiry is more complex in nonordinary cases.

34 See, e.g., William W. Van Alstyne & Kenneth L. Karst, State Action, 14 STAN. L. REV. 3, 7–8 (1961); Kane, supra note 11, at 558 (“It is impossible to predict which standard will be used by a court examining the state actor doctrine.”).

35 Id. at 58.

36 Many commentators have argued that courts decide (and should decide) questions of state action differently in the context of racial discrimination. See, e.g., Henry J. Friendly, The Public-Private Penumbra—Fourteen Years Later, 130 U. Pa. L. Rev. 1289, 1291–92 (1982) (“[M]ore state involvement will be required to produce a holding of unconstitutionality when the constitutional claim is lack of procedural due process, or even infringement of asserted first amendment rights, than when the claim is of racial discrimination. . . . This differentiation seems to me to be entirely justified.”).

37 Rowe, supra note 6, at 747.

38 Id. at 747, 752.
nonordinary cases, a presumption arises against state action.\textsuperscript{39} Litigants may rebut the presumption in many ways, such as by proving that the putatively private actor was carrying out a function traditionally, exclusively performed by the state, or that the state was so entangled with the putatively private behavior that finding against state action would be unfair.\textsuperscript{40} Each line of state-action precedent appears as a distinct way in which a litigant may rebut the presumption of no state action.\textsuperscript{41}

Borderline cases, Professor Rowe argues, look like nonordinary cases in that “the state is not clearly the initiator of the action,” but they differ in that the Court treats the cases the same way it would treat ordinary state-action cases.\textsuperscript{42} The devil is in the line-drawing.\textsuperscript{43} Once the Court begins to treat some cases lacking obvious state action as ordinary state-action cases, “there may be no ready stopping point short of treating all state policies as state action subject to constitutional review on the merits.”\textsuperscript{44} Professor Rowe gets close, but he does not produce a workable rule to distinguish ordinary cases, borderline cases, and nonordinary cases.\textsuperscript{45}

Professor Sidney Buchanan describes the state-action inquiry as being composed of six issues arranged into two competing models of state action. Under the first model of state action, which Professor Buchanan calls the “characterization model,” a court asks whether “the conduct of [a] private actor can be fairly regarded as the act of the state.”\textsuperscript{46} The court answers this question through the nexus test or the public-function test.\textsuperscript{47} Under the second model, the “state authorization” model, a court focuses not on whether the actor can fairly be considered a substitute for the state but rather whether the state has authorized a private actor’s conduct, “by placing the private actor in a position where the actor may ‘gouge’ the challenger with legal

\begin{itemize}
\item \textsuperscript{39} Id. at 747–48.
\item \textsuperscript{40} Id. at 756–57.
\item \textsuperscript{41} Id. at 759–67.
\item \textsuperscript{42} Id. at 752.
\item \textsuperscript{43} See id. at 748, 753 ("It is problematically unclear just what falls within and without this borderline subset of the ordinary category.").
\item \textsuperscript{44} Id. at 767.
\item \textsuperscript{45} See id. ("To be workable, such an approach requires that some definable, justifiable line separate the two categories. However helpful the structure may be for organizing and understanding the Court’s state action decisions, this essential line may be one that cannot be intelligibly drawn and defended.").
\item \textsuperscript{46} Buchanan (pt. 1), supra note 7, at 356.
\item \textsuperscript{47} Id. at 357, 358. Professor Buchanan also describes a “beyond state authority” issue and a “projection of state” issue, both of which he groups as sub-issues to the nexus test. Id. at 358.
\end{itemize}
The state-authorization issue and the state-inaction issue fall into this category.\textsuperscript{49} Professor Buchanan argues that the state-authorization model has fallen into decline since \textit{Flagg Brothers} but urges courts to adopt this model.\textsuperscript{50}

Professor Buchanan’s state authorization model falls prey to the most ubiquitous objection to the state action doctrine: because the state has, by action or omission, authorized all legal private conduct, this rule would make all legal private conduct subject to the Constitution, essentially eliminating the state action requirement.

Though these scholars have each created a foundational conceptual structure for state action analysis, none adequately addresses the above objections while providing a workable, flexible, and firm conceptual framework consistent with the bulk of Supreme Court precedent. The next Part attempts such a conceptual theory.

\section{A Conceptual Structure for State Action}

Although state action case law seems scattered, it can largely be reconciled into a usable, comprehensive structure that successfully overcomes the traditional objections to the conceptualization of the state action doctrine. This part will outline that structure, which involves a three-step approach to determining whether state action exists. The first step is definitional: courts should look to the complaint to identify what action is alleged to be a constitutional violation and what actor is alleged to have taken that action. Second, courts should analyze whether the actor, independent of the action, is public or private in nature. Third, in the event the actor is private, courts should determine whether the state was sufficiently involved with the particular action at issue to make that action fairly attributable to the state.\textsuperscript{51} After outlining each of the three steps of this analytical structure, this Part will apply the structure to Court of Appeals case.

\subsection{Defining the Action at Issue}

The state action inquiry begins by identifying what conduct and whose conduct is alleged to have violated the Constitution. This information should be readily available from the face of

\begin{itemize}
\item \textsuperscript{48} \textit{Id.} at 360.
\item \textsuperscript{49} \textit{Id.} at 363.
\item \textsuperscript{50} \textit{Id.} at 362; \textit{see} G. Sidney Buchanan, \textit{A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility} (pt. 2), 34 \textit{Hous. L. Rev.} 665, 765 (1997) (“The Supreme Court should openly acknowledge that the Constitution does place limits on the extent to which government may authorize one private actor to gouge another private actor with legal impunity.”).
\end{itemize}
the pleadings. For example, in *Flagg Brothers v. Brooks*, a family was evicted from their apartment, and a city marshal placed their belongings with a warehousing company. The family did not pay the warehouseman for moving or storing their belongings, and the warehousemen threatened to sell the belongings if the family did not pay. The family filed a class action to enjoin the sale, claiming the sale would deprive them of their Fourteenth Amendment right to due process. The Court began its state-action analysis by looking to the pleadings, which alleged that “the threatened sale of the goods pursuant to New York Uniform Commercial Code § 7-210’ is an action under color of state law.” This statement framed the Court’s analysis. The relevant actor to the state-action inquiry was the warehouseman, and the relevant conduct was selling the complainants’ belongings. The Court did not focus its analysis on the actions of the city marshal who helped moved the family’s belongings because the complainants did not argue the city marshal had been involved in any wrongdoing.

Generally, the determination of whose conduct and what conduct is at issue is straightforward. This question’s simplicity should not veil its importance. Identifying whose conduct and what conduct is at issue frames the rest of the state-action inquiry and often determines its outcome.

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53 *Id.* at 153.
54 *Id.*
55 *Id.*
56 *Id.* at 156.
57 See *id.* at 157 (“[T]he only issue presented by this case is whether Flagg Brothers’ action may fairly be attributed to the State of New York.”).
58 See *id.* (“It must be noted that respondents have named no public officials as defendants in this action. The city marshal, who supervised their evictions, was dismissed from the case by the consent of all the parties.”); see also Memorandum from Charlotte Crane, Law Clerk, to Harry A. Blackmun, Associate Justice of the U.S. Supreme Court, Regarding Fourth Draft Circulated 4/10/78, in the *Flagg Bros. v. Brooks* Case File (undated) (on file with the Harry A. Blackmun Papers, Library of Congress, Box 271) (“[T]he original complaint could support the idea that Flagg Brothers acted as the agent of the [city] marshal when it stored respondents’ goods . . . . But the parties and the Court seem determined to decide the case as if § 7-210 clearly applied and the marshal and the eviction had nothing to do with the case, and I think I would be a little uncomfortable reworking the case to such an extent when the respondents have for some reason chosen to ignore it.”).
59 In *Shelley*, for example, if the court had looked to the private neighbor’s behavior rather than the court’s behavior, state action probably would not have existed.
As previously discussed, for example, scholars have long struggled with how to reconcile *Shelley* with the bulk of Supreme Court case law. The case is far easier to explain once we determine whose conduct and what conduct was at issue. Thirty families in a St. Louis neighborhood entered into a racially restrictive covenant contracting with one another that they would not sell their property to “people of the Negro or Mongolian race.”  

In violation of the terms of the restrictive covenant, one of the parties contracted to sell his property to the Shelleys, a black family. Other parties to the restrictive covenant brought suit in St. Louis Circuit Court, asking for an injunction prohibiting the sale. The trial court denied relief, but the Supreme Court of Missouri, sitting *en banc*, reversed and granted the injunction.

On appeal, the U.S. Supreme Court did not analyze whether the neighbors, as parties to the restrictive covenant, violated the Constitution by agreeing to exclude parties on the basis of race. Rather, it analyzed whether the Supreme Court of Missouri violated the Constitution by granting the injunction enforcing the racially restrictive covenant. The Court spent little time on the state action question; a state court is undeniably a state actor. It instead spent the bulk of its analysis determining whether the substantive law of the Equal Protection Clause prohibited a court from upholding such an agreement.

*Shelley*, in short, was very clear that it was analyzing the Supreme Court of Missouri’s actions rather than the actions of private parties. In fact, it explicitly distinguished an earlier case, *Corrigan v. Buckley*, because in that case, the parties had challenged the private behavior of entering into the restrictive covenants rather than the public enforcement of those agreements. The *Shelley* court noted that, in *Corrigan*, “the question of the validity of court enforcement of the restrictive covenants under the Fifth Amendment [was not] properly before the Court. . . . [In *Corrigan,*] the only constitutional issue which the appellants had raised in the lower courts, and hence the only constitutional issue before this Court on appeal, was the validity of the covenant agreements as such.” The *Shelley* Court went on to distinguish the facts before it. In *Shelley*, the briefs had “rais[ed] the question of the validity, not of the private agreements as such, but of the judicial enforcement of those agreements.” A close reading of *Shelley* thus demonstrates that that, despite the volumes written about *Shelley* and the state action

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60 Shelley v. Kraemer, 334 U.S. 1, 5 (1948).

61 *Id.*

62 *Id.* at 6.

63 *Id.*

64 Under the current law of the Equal Protection Clause, such a holding certainly would not violate the Constitution, as one could not say that the Missouri Supreme Court intended to discriminate on the basis of race. Substantive equal protection law, however, may have been different when *Shelley* was handed down. Because this article does not address substantive equal protection jurisprudence, it makes no claim about whether *Shelley* is consistent in this regard.
doctrine, the state action issue addressed by the Court in *Shelley* was cursory; the main issue was one of substantive equal protection law.

**B. Pinning Down the Public-Private Divide**

The second step of the state-action inquiry analyzes the actor identified in the first step to determine whether the nature of that actor is public or private. If the actor is public, its conduct is state action subject to the Constitution, and the state action inquiry ends. If the actor is private, on the other hand, its conduct is subject to the Constitution only if the state became sufficiently involved with the private actor’s behavior—a question the court must answer through a third stage of analysis.

Courts ask two questions in order to determine whether the actor defined in the first step is public or private in nature: (1) whether the actor is governmental or nongovernmental and (2) whether it acted in a public or private capacity during the allegedly unconstitutional conduct. If the answer to either of these questions is yes, the actor is public in nature, and state action exists. If the answer to both is no, the actor is private in nature; and the court must move to the question whether the state was sufficiently involved with the private actor’s behavior.

1. **What is a Governmental Entity?**

Governmental entities include the bodies that make up local, state, and federal governments—such as legislatures, courts, and executive agencies, as well as their on-duty employees such as judges, congressmen, and police officers. Often, the governmental entity is

65 *See*, e.g., *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 400 (1995) (holding that because Amtrak is part and parcel of the state, all of its actions are subject to the Constitution).

66 *Blum v. Yaretsky*, 457 U.S. 991, 1012 (1982) (holding that despite generalized funding, there was no state action because the state did not encourage the particular violation).

67 *See*, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (assessing the constitutionality of legislative action). Governmental entities at any level within the government suffice as state actors. *See*, e.g., *Abernathy*, supra note 12, at 378 (“The Court has found violations of the [fourteenth] amendment by the state courts, legislatures, executives, tax boards, boards of education, counties, and cities, among others.”) (footnotes omitted).

68 *Id.; Barnett*, supra note 12, at 231 n.18 (“The letter of the [Fourteenth] Amendment is that no state shall deprive or deny. Its real meaning is that no one who represents the state, acting for it and in its name, shall deprive or deny. . . . [I]t cannot mean anything else [because], literally speaking, a state cannot act at all. Those representing it as officers or agents alone can act.”). The caveat to this rule is that government “[o]fficers have a dual personality. It is only when they act under state authority or ‘color of state authority,’ under ‘color or pretense’ of law, that their acts are the acts of the ‘state’ under the amendments.” *Barnett*, supra note 12, at 243. A real question exists as to when off-duty government officials act “under color of law,” and the answer depends on the circumstances giving rise to the constitutional challenge. *See* *Abernathy*, supra note 12, at 384–85 (“Such circumstances may be considered as whether the officer (if a peace
easy to identify. In *Shelley*, for example, the Supreme Court had no trouble determining that the relevant government entity was the Supreme Court of Missouri.\(^{69}\)

Entities that are controlled by governmental entities also are a part of the government for state-action purposes.\(^{70}\) In *Lebron v. National Railroad Passenger Corp.*, for example, Amtrak denied an advertiser billboard space because of the advertiser’s political message.\(^{71}\) The Court held that because the federal government created and subsidized Amtrak in furtherance of governmental objectives, appointed the majority of Amtrak’s board members, and held a majority of Amtrak stock, the government controlled Amtrak,\(^{72}\) and Amtrak was therefore no different than any other federal agency.\(^{73}\) The Court explicitly distinguished its opinion from one holding that Amtrak was a *private* actor but subject to constitutional scrutiny because of its connection to the state.\(^{74}\)

Similarly, in *Brentwood Academy v. Tennessee Secondary School Athletic Association*,\(^{75}\) the Court was faced with the question of whether the Tennessee Secondary School Athletic

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69 *See Shelley*, 334 U.S. at 14 (“That the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court.”).

70 *Lebron*, 513 U.S. at 400 (“We hold that where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government. . . .”). Failure to recognize this might allow governments to circumvent the Constitution by allowing private companies to do its bidding. *Id.* at 392 (“That Government-created and -controlled corporations are (for many purposes at least) part of the Government itself has a strong basis, not merely in past practice and understanding, but in reason itself. It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form.”).

71 *Id.*

72 *Id.*

73 *Id.* at 378–79, 400.

74 *Id.* at 378–79 (distinguishing the arguments); *id.* at 400 (“We hold that . . . the corporation is *part of the Government*.”) (emphasis added)).

Association (TSSAA) was a state actor.\textsuperscript{76} TSSAA was a private association with members representing secondary schools throughout Tennessee.\textsuperscript{77} Although the TSSAA was technically private, eighty-four percent of its members were state employees acting in their official capacity representing public schools.\textsuperscript{78} The Court held that, like Amtrak, TSSAA was an extension of the state, as it was controlled by state officials acting in their official capacity. It was not enough that some TSSAA members were Tennessee officials, but when Tennessee officials became so numerous that they controlled TSSAA, the association became governmental in character.\textsuperscript{79}

Post-\textit{Brentwood}, an important, open question in the law is how much state ownership and control must exist before an organization becomes a governmental entity.\textsuperscript{80} Total ownership and control suffices, as in \textit{Lebron}.\textsuperscript{81} Eighty-four percent membership plus control of the board of directors suffices, as in \textit{Brentwood}.\textsuperscript{82} The lower limit of ownership and control necessary to turn an organization into an arm of the government, however, remains unclear.

2. What is Acting in a Public Capacity?

The other question relevant to determining the public or private nature of an actor is whether the actor is acting in a public or private capacity in the course of the allegedly unconstitutional conduct. Commentators have put forth a number of theories about when a non-governmental entity is acting in a public capacity. One theory posits that non-governmental entities act in a public capacity when they affect a large number of people.\textsuperscript{83} Although this theory is persuasive from a policy perspective, it rests on the distinction between powerful and

\textsuperscript{76} Id. at 291.

\textsuperscript{77} Id.

\textsuperscript{78} Id.

\textsuperscript{79} In \textit{Tarkanian}, for example, a minority of NCAA members were public officials from the State of Nevada. These Nevada officials in no way controlled the NCAA, however; they did not even make up a majority. The NCAA, therefore, was not deemed to be a public actor.

\textsuperscript{80} Some scholars have interpreted \textit{Brentwood} as changing prior case law by creating a new “entwinement” test. \textit{See}, e.g., Michael A. Culpepper, Case Note, \textit{A Matter of Normative Judgment: Brentwood and the Emergence of the “Pervasive Entwinement” Test}, 35 U. RICH. L. REV. 1163, 1164, 1188 (2002). Whether \textit{Brentwood} actually creates a new doctrine of law or belongs to the Court’s line of cases dealing with governmental ownership or control is beyond the scope of this Article.

\textsuperscript{81} \textit{Lebron}, 513 U.S. at 400.

\textsuperscript{82} \textit{Brentwood Acad.}, 531 U.S. at 291.

weak that has for the most part been rejected by courts in the state action context. The Court has instead defined public capacity through the public function doctrine, which identifies actions “traditionally, exclusively” reserved for the state.

The classic example of a function traditionally, exclusively reserved for the state is the function of owning and controlling a town. In *Marsh v. Alabama*, the Gulf Shipbuilding Company owned the town of Chickasaw, Alabama. Chickasaw was a town in the traditional sense of the word; it contained “residential buildings, streets, a system of sewers, a sewage disposal plant and a ‘business block’ on which business places [were] situated.” The Gulf Shipbuilding Corporation provided all traditional municipal services, including enforcement of city ordinances. Within Chickasaw, the Corporation had promulgated an anti-solicitation policy and posted signs to that effect. In keeping with that policy, the town sheriff asked a Jehovah’s Witness to stop distributing religious literature on the Chickasaw sidewalk. The Jehovah’s Witness refused to do so, and she was arrested by the town sheriff and ultimately convicted of trespass. She contested her conviction, arguing that it violated her First Amendment rights to speak. The Corporation responded that because it was a private actor, it was not subject to the Constitution. The Supreme Court disagreed and held that the Gulf

84 *See* Jackson v. Metro. Edison Co., 419 U.S. 345 (1974) (refusing to take the size or power of the defendant into account and holding that a monopoly utility company was not a state actor). *But see* Adolph A. Berle, *Constitutional Limitations on Corporate Activity--Protection of Personal Rights from Invasion Through Economic Power*, 100 U. Pa. L. Rev. 933, 942 (1952) (arguing descriptively before *Jackson* that corporations with market power were becoming subject to the Constitution; “The emerging principle appears to be that the corporation, itself a creation of the state, is as subject to constitutional limitations which limit action as is the state itself.”).

85 *Jackson*, 419 U.S. at 351.


87 *Id.*

88 *Id.* at 503.

89 *Id.*

90 *Id.*

91 *Id.* at 503–04.

92 *Id.* at 504.

93 *Id.* at 505.
Shipbuilding Corporation was a state actor, subject to the Constitution, because by running a

town it was undertaking a role traditionally exclusively reserved for the state.\textsuperscript{94}

Similarly, in \textit{Terry v. Adams}, the court held that holding an election to select a candidate

for public office is a public function.\textsuperscript{95} The Jaybirds, a private political organization, were

established in Fort Bend County, Texas in 1889 for the sole purpose of disenfranchising the

black citizens of the County.\textsuperscript{96} Before each Democratic Primary, the Jaybirds held an election in

which blacks could not vote.\textsuperscript{97} Although the winner of the Jaybird Primary was not legally

entitled to become the Democratic nominee, white citizens in the area rallied around the Jaybird

winner, who nearly always won the Democratic Primary and the general election.\textsuperscript{98} Although

blacks could technically vote in the democratic primary and the general election, these votes had

no influence on the outcome;\textsuperscript{99} in practice, the winner was decided in the Jaybird Primary.\textsuperscript{100}

Black citizens who had been denied the right to vote in the Jaybird Primary filed suit, arguing

that the Jaybirds violated the Constitution by excluding blacks from voting rolls.\textsuperscript{101} The Jaybirds

responded that because they were a private group, the Constitution did not apply.\textsuperscript{102} The Court

held that although the Jaybirds were private actors, they were exercising a public function that

had historically been reserved for the state.\textsuperscript{103} The club was therefore a state actor bound by the

Constitution.

Despite the rulings in \textit{Terry} and \textit{Marsh}, the public function doctrine is very narrow and

has very rarely been applied to find state action; there are, by definition, few cases of private

\begin{flushright}
\textsuperscript{94} \textit{Id.} at 508.

\textsuperscript{95} The \textit{Terry v. Adams}, 345 U.S. 461 (1953), majority conceptualized the Jaybirds as a non-

governmental party exercising a public function. However, the \textit{Terry} concurrence, written by

Justice Jackson, conceptualized the Jaybirds as a governmental entity much like the

governmental entities at issue in \textit{Brentwood} and \textit{Lebron}. The concurrence held that the Jaybirds

were “part and parcel” of the Democratic Party, stressing how the same people who controlled


\textsuperscript{96} \textit{Id.} at 462–63.

\textsuperscript{97} \textit{Id.} at 464.

\textsuperscript{98} \textit{Id.} at 465.

\textsuperscript{99} \textit{Id.}

\textsuperscript{100} \textit{Id.}

\textsuperscript{101} \textit{Id.} at 462.

\textsuperscript{102} \textit{Id.} at 462–63.

\textsuperscript{103} \textit{Id.} at 466.

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parties taking on roles that, traditionally, only states have undertaken. In Flagg Brothers, for example, the plaintiff argued that a private creditor acted in a public capacity when it took advantage of a self-help statute, because historically the government has handled the resolution of disputes between its citizens. In defense of the plaintiff’s position, Justice Marshall wrote in letter to the conference:

Cases like this one require us to develop some core notion of what governments do. We would all presumably agree that, if a State turned over its function of issuing driver’s licenses to a private company, the company could not refuse to issue a license to an individual because it did not like his race. This case involves another area of traditional state involvement: the nonconsensual resolution of disputes.

The majority disagreed. It held that a private action is likely to be a state function only if the action has been, more or less, exclusively reserved for the state in the past. The Court gave the specific example of elections, referencing Terry. Because there are very few instances of private parties holding elections for public office, holding an election for public office qualifies as a public function traditionally exclusively reserved for the state. Historically, however, the Court held that there have been many different dispute resolution methods, only some of which involved the court system. Dispute resolution, therefore, was not a public function traditionally, exclusively reserved for the state.

In Flagg Brothers, the Court explicitly left open the question of whether a different, less restrictive rule should apply in cases where the the private party forecloses the entire function at issue, making it so that the government no longer performs the role. In Jackson v. Metropolitan Edison Co., however, the Court clarified that, even where a private company forecloses the government from performing a role, the role is not a public function if there is a

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104 E.g., Hudgens v. NLRB, 424 U.S. 507 (1976) (expressly overruling a prior decision that interpreted public function more broadly).


107 Flagg Bros., 436 U.S. at 157–58.

108 Id. at 158.

109 Id. It is notable that there were at least some instances of private elections, as evidenced by the fact that the Jaybirds had existed since the 1890s. Terry v. Adams, 345 U.S. 461, 463 (1953).

110 Flagg Bros., 436 U.S. at 162.

111 Id. at 158–59.
history of private parties performing it. In *Jackson*, a private company with a monopoly to provide power in a given area was not public in nature, despite the fact that it had completely foreclosed the role, because there was an established history of states granting monopolies to private utility companies.

The case law indicates that a private actor acts in a public capacity where it offers a service that has traditionally only been offered by the state, and for which there is no substantial history of private behavior. Although this is by no means a bright line rule, it is at least a workable standard that could be implemented by lower courts.

3. Four Types of Actors

By asking the two questions discussed above, whether the actor is governmental or non-governmental and whether the actor is acting in a public or private capacity, we can identify four categories of actors: (1) governmental entities acting in a public capacity; (2) governmental entities acting in a private capacity; (3) non-governmental entities acting in a public capacity; and (4) non-governmental entities acting in a private capacity. Although the Supreme Court has never explicitly used this mode of analysis, the outcomes of its case law demonstrate that actors in the first three categories are public, meaning their actions are state actions subject to constitutional scrutiny. Non-governmental entities acting in a private capacity are private, subject to the Constitution only when the state is sufficiently supportive of the challenged conduct. Subpart C, *infra*, discusses exactly when the state becomes sufficiently supportive to make private conduct fairly attributable to the state.

Governmental actors acting in a public capacity are the prototypical state actors. Examples include a state court handing down a judgment, a police officer making an arrest, and a fire department responding to an emergency. These actors’ conduct is state action subject to the Constitution. In *Shelley v. Kramer*, for example, the Supreme Court held that a state court entering a judgment was a state actor:

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113 *Id.*

114 See, e.g., *Lebron*, 513 U.S. at 400; *Terry*, 345 U.S. at 462–65.
We have no doubt that there has been state action . . . in the full and complete sense of the phrase. The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers, and contracts of sale were accordingly consummated. It is clear that, but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.  

Governmental actors acting in a private capacity are also public actors subject to the Constitution. In Lebron, for example, the governmental entity Amtrak was treated as a public actor even though it was operating in the private capacity of running a transportation business. State officials, furthermore, are considered public even if they exceed their authority and violate state policy or law. In Home Telephone & Telegraph Co. v. Los Angeles, for example, a telephone company attempted to enjoin a city ordinance as a violation of the federal Constitution. Officials answered that the ordinance did not constitute state action because it violated a state-level law. The Court disagreed, holding that “the [Fourteenth] Amendment contemplates the possibility of state officers abusing the powers lawfully conferred upon them.”

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115 Shelley v. Kraemer, 334 U.S. 1, 19 (1948). The Court ultimately ruled this action unconstitutional. Id. at 20, 23. As a result of how the Court framed its state-action inquiry and subsequent constitutional analysis, the racially restrictive covenant was unenforceable but not void.


117 The breadth and applicability of 42 U.S.C § 1983, which provides a private right of action against persons who violate the constitution under color of state law, is beyond the scope of this Article. Because § 1983 only provides a remedy where there is a constitutional violation, any case holding a police officer who exceeds his authority liable under § 1983 also implicitly holds that that police officer is a state actor capable of violating the Constitution. See Monroe v. Pape, 365 U.S. 167, 187 (1961). In Monroe, police officers ransacked a suspect’s apartment in violation of official policy and law. Id. at 169. Even though they acted in contravention of law, the Court held that the officers could be held liable under § 1983, implicitly holding that they were state actors capable of violating the Constitution. Id. at 187. Twenty-one years after Monroe, in Lugar, the Court held that the § 1983 “under color of” law requirement and the constitutional state action requirement are identical. Lugar v. Edmonson Oil Co., 457 U.S. 922, 927 (1982).

118 Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913).

119 Id. at 281.

120 Id. at 287.

121 Id. at 288.
State action also exists in the rare case where a non-governmental actor acts in a public capacity.\textsuperscript{122} The Court finds this situation only where, as in \textit{Terry} and \textit{Marsh}, a private party takes on a role traditionally, exclusively reserved for the state.\textsuperscript{123} If there is any substantial history of private parties undertaking the function at issue, the court will not find action in a public capacity.

State action does not necessarily exist, however, when a non-governmental actor acts in a private capacity. For the action to be subject to constitutional scrutiny, the government must have encouraged or ratified it sufficiently to make the action fairly attributable to the state.\textsuperscript{124}

C. Determining Whether Private Conduct Can Fairly Be Attributed to the State

In the fourth category of actors discussed above, where a non-governmental actor is acting in a private capacity, the question whether the deprivation is state action proceeds to a third step: analysis whether the state’s interaction with the non-governmental actor is sufficient for the deprivation to be fairly attributable to the state. This analysis differs depending on whether the state’s subpart discusses the third step of analysis that occurs when an actor is private in nature.

State interaction with the non-governmental actor occurs before, during, or after the private deprivation. If the state interaction occurs before the deprivation, for example if the state funds or regulates the actor, the deprivation is fairly attributable to the state if the state encourages or compels it, but not if the state merely permits it. If the state cooperates during or after the deprivation, for example by police or judicial enforcement, the deprivation is fairly attributable to the state if the state gives special assistance, over and above ordinary law enforcement, to further it.


\textsuperscript{123} Often, \textit{Terry} and \textit{Marsh} are classified with cases where the state delegates a role for the purpose of getting around the constitution, but in both the presence of state action was based solely on the behavior of the private party. The question is only what the private party is doing, not how the private party came to be doing it. A nongovernmental entity may act in a public capacity irrespective of whether the entity gained power through governmental delegation or through its own fortitude. Delegation cases, on the other hand, are based on the cooperation between the state and a private actor, two analytically distinct parties. This article therefore distinguishes delegation cases, grouping them below in Part III, which examines when state cooperation makes private action fairly attributable to the state.

\textsuperscript{124} Given that the state may encourage or ratify, or discourage or condemn, a private actor’s conduct, no conduct can be wholly separate from state involvement. \textit{See generally} Sunstein, \textit{supra} note 14, at 886. Nevertheless, courts view the actor and the state as analytically distinct when a non-governmental actor has acted in a private capacity; state action will only exist if the state sufficiently encouraged or ratified the allegedly unconstitutional conduct.
1. When is Prior State Involvement Enough to Make a Private Action Fairly Attributable to the State?

The state does something to influence every private action before it occurs. For example, the state might take an express position that an action is good or bad, requiring, prohibiting, or authorizing it. Any branch of the government—legislative, judicial, or executive—could express such a position. Alternatively, the state might take an implied position on an action. It might, for example, promulgate a policy that would reasonably be thought to encourage the action. On top of this, the state might take a more proximate position. It might, for example, facilitate a private action through funding or regulation. Even if the state does not take any active express or implied position on an action, the state passively permits the action, which, of course, is a position in itself.

The state’s influence on any private action can be classified by placing the relationship between the state and the private action on a spectrum. On this spectrum, the state might mandate a private action, encourage it, permit it, discourage it, or prohibit it. This is true of any private action, but it is most relevant to the state action inquiry in situations where the private action, were it undertaken by the state, would be an unconstitutional deprivation. This article refers to this category of private actions as “private deprivations.” To give a few examples, a state would mandate a private deprivation if it passed a law requiring all private clubs to exclude blacks from membership. A state would prohibit a private deprivation if it required utility companies to provide due process before cutting off a customer’s service.

The spectrum of relationships between the state and a private deprivation spans from prohibition to discouragement to permission to encouragement to mandate. At one end of the spectrum are state prohibitions of private deprivations. Prohibit means “to officially forbid something” or “to prevent a particular activity by making it impossible.” Next are state actions that discourage private deprivations. Discourage means “to prevent or try to prevent something happening or someone doing something, by making things difficult or displeased, or by showing disapproval.” A state, by discouraging a deprivation, aims at preventing its occurrence. In the center of the spectrum are state actions that permit or authorize private

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125 This point is the basis for many protean objections to the state action doctrine. Many have argued that since government has always taken a position on our behavior, there is always state action. However, we do not find this objection fatal to the doctrine. Although it is true that some obvious state action always exists, it is not true that that obvious state action influences the private action in such a way that it becomes attributable to the state. See infra.


deprivations. Permit is defined as “to allow something,” and authorize means only to officially permit something. When a state permits or authorizes an action it does not take a normative stance on the issue, it merely allows the action to occur. Because the state’s action neither promotes nor undermines the private action, permission has little influence over which actions private parties will take. Next are state actions that encourage private deprivations. Encourage means “to make someone more likely to do something, or to make something more likely to happen,” “to talk or behave in a way that gives someone confidence to do something.” Finally, at the end of the spectrum are state actions that mandate private deprivations. To mandate an action is “to order someone to do something.”

This article reconciles Supreme Court precedent by drawing the line for finding state action between permission and encouragement. Where the state merely authorizes or permits a deprivation, the state action is not constitutionally significant; however, where the state encourages a deprivation, it becomes attributable to the state. In Reitman v. Mulkey, for example, the Court found that the state’s encouragement of private racial discrimination was sufficient for a finding of state action. In Rendell-Baker, however, the Court explained that “a State normally can be held responsible for a private decision only when it has exercised such coercive power or has provided such significant encouragement that the choice must in law be deemed to be that of the State.” The line between permission and encouragement is therefore important to pin down with specificity.

The Supreme Court has given no explicit directions, but it has dropped hints that the distinction between permission and encouragement should be based on the state’s intent towards the private deprivation. Again and again, the Court has refused to find state action in cases where the state’s actions “[w]ere [not] intended either overtly or covertly to encourage [a private deprivation].” In keeping with these outcomes, this article proposes that to determine whether

129 See Cambridge Dictionaries Online, http://dictionary.cambridge.org/define.asp?key=4956&dict=CALD (last visited Mar. 8, 2008) (“Authorize, verb, to give official permission for something to happen or to give someone official permission to do something.”).
a law encouraged a particular behavior, we look to whether the state took some action that it intended to make the specific private deprivation more likely to occur. Because a state, as an artificial entity, cannot be said to intend anything, such a rule would look at the intent of the state officials responsible for the action that arguably encouraged the private deprivation. To determine whether a law encouraged a private deprivation, for example, such a rule would look at whether the legislators responsible for the law intended, by passing the law, to make the specific private deprivation more likely to occur.

Under this rule, intent could be proven objectively or subjectively. Subjective intent could be shown by actions or statements by state officials demonstrating a desire to make the private violation more likely. If such statements did not exist, however, intent could be proven objectively, by showing the state had such a significant interest in the deprivation’s occurrence that it permitted the deprivation for its own benefit. A rule finding state action in cases where state officials take some action intended to make a specific private deprivation more likely to occur is consistent with decisions handed down by the Warren Court, as well as with later decisions that are generally considered to be more restrictive.

b. Permission and encouragement in the context of the Warren Court’s race decisions.

Because encouragement is more likely when the state’s and the private violator’s interests align, encouragement is highly dependent on the historical and extra-legal context. As the Court adeptly noted in Burton, “[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the state in private conduct be attributed its true significance.”

During the Warren Court era, for example, many state and local governments shared with white citizens an impetus to maintaining racial segregation. In this historical context, governments were especially likely to encourage private parties to violate the constitutional rights of black Americans. The Court on multiple occasions relied on this backdrop to objectively prove that a state or local government encouraged a private violation.

Burton and Reitman are two apt examples to illustrate the context-dependent definition of encouragement and state intention. The controversy in Burton began when the Wilmington Parking Authority, a Delaware state agency, undertook to build a large parking deck in

135 See Rendell-Baker, 457 U.S. at 841 (finding no state action because the state did not in any way influence the physician’s decision to downgrade medical care).


137 Burton v. Wilmington Parking Auth., 365 U.S. 715, 723–24 (1961) (“Neither can it be ignored, especially in view of Eagle’s affirmative allegation that for it to serve Negroes would injure its business, that profits earned by discrimination not only contribute to, but also are indispensable elements in, the financial success of a governmental agency.”)

138 Id. at 722.
After it had purchased the lots and begun construction on the facility, the Authority realized that it was not going to bring in enough income to cover its debt. It decided, as a result, to lease part of the projected deck as commercial space. The highest bidder, Eagle Coffee Shop, won the lease. Because Eagle’s financial success was important to the Parking Authority, the Parking Authority covenanted in its lease to pay for the Eagle’s utilities and make all repairs. It also agreed to complete the decorative finishing, including utility connections, toilets, tile, and stairs, at no cost to Eagle. When it completed construction, the Parking Authority placed signs on the building indicating its public character and flew the American flag from the roof. Although the Authority had the power to regulate Eagle’s use of the coffee shop, it did not require Eagle to make its services available on a nondiscriminatory basis. Unsurprisingly, then, when the coffee shop opened, Eagle refused to serve black patrons, on the grounds that doing so would be bad for business. A black person who was turned away on the basis of his race sued the shop, and the case was appealed to the Supreme Court.

The justices split 4-1-4. Justice Clark wrote the plurality opinion, which held that Eagle was a state actor and subjected Eagle’s behavior to constitutional scrutiny. He emphasized that the Authority permitted and arguably encouraged Eagle’s behavior by paying

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139 Id. at 719.
140 Id.
141 Id.
142 Id.
143 Id.
144 Id. at 720.
145 Id.
146 Id.
147 Id.
148 Id. at 716.
149 Id. at 724.
150 Id. at 721.
151 Id. at 716.
152 Id. at 725.
many of Eagle’s costs and failing to include a nondiscrimination provision in the lease.\textsuperscript{153} Though the authority’s actions alone arguably constituted merely authorization for Eagle to act, when the historical context is taken into account, the Authority’s failure to prohibit Eagle from discriminating constituted tacit encouragement,\textsuperscript{154} given both the highly politicized desegregation battle\textsuperscript{155} and the fact that the Parking Authority stood to financially gain from Eagle’s discrimination.\textsuperscript{156} The encouragement in \textit{Burton} can be proven objectively by the circumstances surrounding it.

Based on these considerations, the Court held that

\begin{quote}
[b]y its inaction, the Authority . . . has elected to place its power, prestige, and service behind the admitted discrimination. The state has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so ‘purely private’ as to fall without the scope of the Fourteenth Amendment.\textsuperscript{157}
\end{quote}

\textit{Reitman} v. \textit{Mulkey}, even more than \textit{Burton}, illustrates how a highly publicized context can transform what is technically mere permission into encouragement. In \textit{Reitman}, the people of California passed a proposition amending the constitution to allow – as a right – racially restrictive covenants.\textsuperscript{158} The proposition came on the heels of two highly controversial laws, the Unruh Act and the Hawkins Act, both of which prohibited some racial discrimination in housing.\textsuperscript{159} Its “immediate design and intent” was to overturn these laws.\textsuperscript{160} As in \textit{Burton}, the Court in \textit{Reitman} voted 4-1-4 to find state action.\textsuperscript{161}

\textsuperscript{153} \textit{Id.} at 720.

\textsuperscript{154} \textit{See id.} at 725 (“[T]he Authority . . . has elected to place its power, prestige, and service behind the admitted discrimination.”).

\textsuperscript{155} \textit{Burton} was decided only three years before the hotly contested Civil Rights Act of 1964.

\textsuperscript{156} \textit{Burton}, 365 U.S. at 724.

\textsuperscript{157} \textit{Id.} at 725.

\textsuperscript{158} \textit{Reitman} v. \textit{Mulkey}, 387 U.S. 369, 374 (1967).

\textsuperscript{159} \textit{Id.}.

\textsuperscript{160} \textit{Id.}.

\textsuperscript{161} \textit{Id.} at 369.
On its face, the amendment merely permitted homeowners to discriminate and did nothing to encourage the discrimination. However, a plurality of the Court held that the amendment should be examined in terms of its “immediate objective, its ultimate effect, and its historical context.” When it did so, the Court held that the amendment encouraged – rather than merely permitted – private race discrimination. The Court stressed that lawmakers wanted the law to foster private discrimination to keep a segregated housing market. It noted, “the state [took] affirmative action designed to make private discriminations legally possible.” As a result, “[t]hose practicing racial discriminations need no longer rely solely on their personal choice. They could [instead] invoke express constitutional authority . . . .” Thus, the ultimate impact of the amendment was to “encourage and significantly involve the State in private racial discrimination.”

c. Permission and Encouragement in the Context of Funding and Regulation

Given the distinction between permission and encouragement, it is logical that funding and regulation do not by themselves generally constitute encouragement. If the state funds a private party without any intention that the private party will in the future deprive another of constitutional rights, the state is not encouraging the specific deprivation at issue. This is true even if the money does in fact make the deprivation possible, or at least easier. In 1982, the Burger Court decided two cases on the same day that both dealt with the question of when state funding and regulation could make private action fairly attributable to the state. Both of these cases turn on the distinction between permission and encouragement laid out above.

In Rendell-Baker v. Kohn, the Court considered whether a private remedial school was a state actor. The school, New Perspectives, had been established to accommodate students who

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162 See id. at 371 (quoting the text of the proposition).

163 Id. at 373. The Court went on to note that it “frequently” takes historical context into account when evaluating the constitutionality of statutes. Id. (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886); McCabe v. Atchison, Topeka, & Santa Fe Ry. Co., 235 U.S. 151 (1914); Lombard v. Louisiana, 373 U.S. 267 (1963); Robinson v. Florida, 378 U.S. 153 (1964); Turner v. City of Memphis, 369 U.S. 350 (1962); Anderson v. Martin, 375 U.S. 399 (1964)).

164 Reitman, 387 U.S. at 375.

165 Id. (emphasis added).

166 Id. at 377.

167 Id. at 376.


could not succeed in the public school system.\textsuperscript{170} Local school districts referred troubled students to New Perspectives and paid New Perspectives for that student’s education.\textsuperscript{171} Although technically private, New Perspectives received 90% of its budget from the state and was in general highly regulated.\textsuperscript{172} With regard to personnel management however, there was little regulation.\textsuperscript{173} New Perspectives was required only to “maintain written job descriptions and written statements describing personnel standards and procedures.”\textsuperscript{174} New Perspectives fired a teacher for disagreeing with the principal, and the teacher sued, claiming that by firing her, the school violated her \textit{First Amendment} rights of expression.\textsuperscript{175} New Perspectives argued that it was a private actor, so the Constitution did not apply.\textsuperscript{176}

The Court held for the school, stating, “a State normally can be held responsible for a private decision only when it has exercised such coercive power or has provided such significant encouragement that the choice must in law be deemed to be that of the state.”\textsuperscript{177} The Court held that funding and regulation might be relevant in some situations; however, here, the funding and regulation did not encourage the specific decision to fire the teacher.\textsuperscript{178} “Indeed, in contrast to the extensive regulation of the school generally, the various regulators showed relatively little interest in the school’s personnel matters.”\textsuperscript{179} The Court distinguished \textit{Burton} because in that case, the state profited from and encouraged the restaurant’s specific discriminatory conduct.\textsuperscript{180} In \textit{Rendell-Baker}, in contrast, the state had no interest in whether or not New Perspectives fired the teacher.\textsuperscript{181} In his concurrence, Justice White also emphasized that the state had not encouraged the specific violation: “the critical factor is the absence of any allegation that the

\textsuperscript{170} \textit{Id.} at 832.
\textsuperscript{171} \textit{Id.}
\textsuperscript{172} \textit{Id.}
\textsuperscript{173} \textit{Id.} at 833.
\textsuperscript{174} \textit{Id.}
\textsuperscript{175} \textit{Id.} at 833–34.
\textsuperscript{176} \textit{Id.}
\textsuperscript{177} \textit{Id.} at 840.
\textsuperscript{178} \textit{Id.} at 841.
\textsuperscript{179} \textit{Id.}
\textsuperscript{180} \textit{Id.} at 842.
\textsuperscript{181} \textit{Id.}
employment decision itself was based upon some rule of conduct or policy put forth by the state.\textsuperscript{182}

\textit{Blum v. Yaretsky} concerned a private nursing home that participated in the Medicaid program.\textsuperscript{183} Like the school in \textit{Rendell-Baker}, the nursing home in \textit{Blum} was heavily regulated and primarily funded by the state.\textsuperscript{184} Because the nursing home participated in Medicaid, eligible citizens could go to the nursing home to receive medically necessary care.\textsuperscript{185} Once they were admitted, nursing home physicians were required to periodically assess Medicaid patients to see if they should be transferred to a higher or lower care facility.\textsuperscript{186} The plaintiffs in \textit{Blum} were transferred from the nursing home to a lower level of care.\textsuperscript{187} They sued state officials in charge of the Medicaid program, seeking to hold those officials liable for the actions of the nursing home doctors.\textsuperscript{188} They argued that they had been deprived of their property rights to Medicaid benefits without due process of law.\textsuperscript{189}

As in \textit{Rendell-Baker}, the \textit{Blum} Court held that regulation is not dispositive in determining state action.\textsuperscript{190} The relevant question is not whether the private party is regulated but rather whether the regulation encouraged the alleged constitutional deprivation. Specifically, the question was whether the state’s regulations and funding encouraged the nursing home to downgrade the plaintiffs’ care without affording due process.\textsuperscript{191} The plaintiffs in \textit{Blum} argued that the state mandated the downgrade. If the nursing home physicians found that the plaintiffs did not need to stay in the nursing home, the state \textit{required} it to downgrade or discharge them. The Court, however, disagreed with this characterization. It emphasized that the decision about whether the medical care was necessary was entirely in the discretion of the physician, noting, “there is no suggestion that those decisions were emphasized in any degree by the State’s obligation to adjust benefits in conformity with changes in the cost of medically necessary

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\textsuperscript{182} \textit{Id.} at 844 (White, J., concurring).

\textsuperscript{183} \textit{Blum v. Yaretsky}, 457 U.S. 991, 995 (1982).

\textsuperscript{184} \textit{Id.}

\textsuperscript{185} \textit{Id.}

\textsuperscript{186} \textit{Id.}

\textsuperscript{187} \textit{Id.}

\textsuperscript{188} \textit{Id.}

\textsuperscript{189} \textit{Id.}

\textsuperscript{190} \textit{See id.} at 1004.

\textsuperscript{191} \textit{Id.}
\end{flushleft}
According to the Court, because the state was not involved in the physician’s decision, the state did not encourage the deprivation.

Neither *Blum* nor *Rendell-Baker* called into question the rule that state encouragement of the specific deprivation is enough to create state action. Rather, these opinions analyzed the facts before them and held that in the specific situations at issue, state officials did not intend to make the specific deprivation more likely. In *Rendell-Baker*, the state had no interest in whether or not New Perspectives fired the teacher. Similarly, in *Blum*, the plaintiffs failed to allege that the state encouraged nursing homes to discharge patients without due process. Permission and acquiescence is not sufficient; encouragement is.

d. Permission and Encouragement in the Context of Monopolies

For reasons similar to those in the funding and regulation context, a state’s grant of a monopoly does not create state action per se. The Court, in *Jackson v. Metropolitan Edison Co.*, interpreted *Moose Lodge v. Irvis* to hold that a state does not, by granting a monopoly, necessarily encourage the monopolist to violate specific constitutional rights. In neither *Jackson* nor *Moose Lodge* was there evidence to suggest that the state intended to encourage a private deprivation.

In *Moose Lodge*, the plaintiff, a black man, was excluded from a private social club because of a whites only membership policy. He sued the club, challenging its policy as a violation of the Equal Protection Clause. The club responded that because it was a private actor, the Constitution did not apply. The plaintiff argued that the club should be considered a state actor because the state liquor and control board licensed and regulated it. The majority held that the board did not, by regulating the club and granting it a liquor license, encourage the club to discriminate, especially given that the state had no interest in seeing the discrimination take place. It noted that “the Pennsylvania statutes and regulations governing the sale of liquor are [not] intended either overtly or covertly to encourage discrimination.” This makes sense

192 *Id.* at 1005.

193 As an aside, the situation would be quite different if the state were to fund a private party in order to make it more likely that the funded party would deprive another of constitutional rights.


195 *Id.* at 165.

196 *Id.* at 171.

197 *Id.*

198 The Court did note one exception: “Even though the Liquor Control Board regulation in question is neutral in its terms, the result of its application in a case where the constitution and bylaws of a club required racial discrimination would be to invoke the sanctions of the State to enforce a concededly discriminatory private rule.” *Id.* at 178–79. Accordingly, “[A]ppellee was
under the permission and encouragement distinction discussed above. There is no evidence in *Moose Lodge* to suggest that the liquor and control board did anything to make it more likely that Moose Lodge would exclude members on the basis of race.

In *Jackson*, a private utility company cut off a customer’s service without due process. Because the state had granted the company a monopoly and heavily regulated it, the plaintiff argued the company was a state actor. The Court relied on *Moose Lodge* to hold that despite granting monopoly status, the state did not sufficiently cooperate with the utility to make the utility a state actor.\(^{199}\) Although it may be true that the monopoly made the company more likely to treat customers badly, there was no allegation in *Jackson* that the government intended this consequence when the monopoly was issued, and there was certainly no allegation that the government intended the particular consequence of a procedural due process violation.

2. **When is State Involvement During or After the Violation Sufficient to Make the Private Action Fairly Attributable to the State?**

When the state influences a private deprivation after the fact, for instance, by upholding or enforcing the deprivation, ordinary enforcement or adjudication is not sufficient to transform a private deprivation into state action. An officer’s or a judge’s actions of simply upholding a law are insufficient to convert a private party into a state actor. Instead, for the deprivation to be fairly attributable to the state, a state must give special assistance, over and above ordinary law enforcement, to further the deprivation. This rule mirrors the permission and encouragement distinction discussed above. In both cases, it is not enough for the state to treat the private actor as an ordinary citizen; courts will not find state action unless the state shares the goals of the private deprivation.

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\(^{199}\) As an aside, there is reason to question the *Jackson* court’s reliance on *Moose Lodge* for this point. In *Moose Lodge*, the dissent stressed that the quota was full and had been for many years and that the grant of a license was similar to the grant of a monopoly. This fact, however, was not addressed by the majority. That might be because it was discovered by Justice Douglas after the briefs were submitted. Because it was outside the record, it is possible that the majority did not consider it. In a memo, one of Justice’s Blackmun’s clerks wrote that many of the justices would be reluctant to consider the newly discovered information. Furthermore, the majority opinion stated, “there is no evidence *in this record* that Pennsylvania law discriminates against minority groups either in their right to apply for club licenses or in their right to purchase and be served liquor.” *Moose Lodge*, 407 U.S. at 173 (emphasis added). If the *Moose Lodge* majority did not consider the full quota, its opinion should not be read to say anything about monopolies. Despite this, two years later, *Jackson* relied on *Moose Lodge* to hold that the grant of a monopoly was not sufficient cooperation to make the private action fairly attributable to the state.
In *Black v. Cutter Laboratories*, a private company fired an employee for being an active member of the communist party. It defended its decision with the employment contract, which allowed termination for-cause. The California Supreme Court upheld the employment contract as applied, despite the employee’s First Amendment rights. The U.S. Supreme Court affirmed and allowed the private company to deprive the employee of her First Amendment rights. In doing so, it implicitly held that the California Supreme Court’s decision allowing the deprivation did not make the employer’s conduct fairly attributable to the state.

*Cutter Laboratories* is different than a situation in which the state gives the private party more assistance with the deprivation than it would give an ordinary citizen. In *Adickes v. Kress*, for example, a white schoolteacher wished to eat lunch with six of her black students at the Kress restaurant in Hattiesburg, Mississippi. She was denied service as a “white person in the company of negroes.” When the teacher left the restaurant, a police officer who had witnessed the controversy arrested her on “a groundless charge of vagrancy.” The Court held that the “Kress employee, in the course of employment, and [the] Hattiesburg policeman somehow reached an understanding to deny Miss Adickes service in the Kress store, or to cause her

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201 *Id.*

202 *The Cutter Laboratories* opinion is also interesting in that it examines whether the California Supreme Court violated the Constitution by holding for the employer. This inquiry was entirely separate from the question of whether the court decision made the private violation fairly attributable to the state. At the time *Cutter Laboratories* was decided, a court decision itself could violate constitutional rights, independently of an alleged private deprivation. See *Shelley v. Kraemer*, 334 U.S. 1 (1948). There was no question that in *Cutter Laboratories*, just as in *Shelley*, the court was a state actor. The question was whether the court violated substantive constitutional guarantees. On this point, the *Cutter Laboratories* majority distinguished *Shelley*, holding that the California Supreme Court’s holding was constitutional, despite extreme anti-communist language. The U.S. Supreme Court stated,

> This Court . . . reviews judgments, not statements in opinions. At times, the atmosphere in which an opinion is written may become so surcharged that unnecessarily broad statements are made. In such a case, it is our duty to look beyond the broad sweep of the language and determine for ourselves precisely the ground on which the judgment rests. This means no more than that we should not pass on federal questions discussed in the opinion where it appears that the judgment rests on adequate state grounds.

*Cutter Labs.*, 351 U.S. at 297–98.


204 *Id.*

205 *Id.*
The state’s special assistance was sufficient to subject the private action to constitutional scrutiny because it was not a normal arrest made because of a violation of a law. Rather, it was an arrest made because the state official colluded in the restaurant’s discriminatory views.

Special assistance is, in many ways, like encouragement. Both standards look at the ways the state ratified the specific violation, not the ways in which the state ratified the actions of the private actor generally. Also, both look to the subjective intent of the responsible state officials, sometimes proven objectively, to determine whether state action is present. Finally, and most importantly, both require that the state do more than treat the deprivor like an ordinary citizen; the state must favor the deprivor’s action over other actions.

Admittedly, the rule that mere enforcement of a previously existing law is not sufficient cooperation to create state action is inconsistent with the Court’s decision in *Lugar v. Edmondson*. In *Lugar*, a private creditor followed a self-help procedure laid out by statute to attach a debtor’s property. Unlike the self-help statute in *Flagg Brothers*, the statute in *Lugar* required the creditor to get a writ of prejudgment attachment from the court and then use the sheriff to enforce the writ. The debtor sued the creditor for violating his procedural due process rights. The creditor objected that it was a private actor, not subject to constitutional scrutiny. The Court held that state action exists when: (1) “the deprivation [is] caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible; and (2) “the party charged with the deprivation must be a person who may fairly be said to be a state actor.” Therefore, because the legislature laid out the procedure beforehand and because the sheriff assisted the creditor in the deprivation, the deprivation was fairly attributable to the state.

By helping the creditor, the sheriff merely permitted the creditor to invoke the laws. The sheriff was not, as in *Adickes*, conspiring with the creditor to reach some common goal. As

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206 *Id.* at 152.

207 *Id.*

208 See *id.*


210 *Id.* at 924.

211 *Id.* at 925.

212 *Id.* at 936.

213 *Id.*

214 *Id.* at 944 (Powell, J., dissenting) (“There is no allegation that respondent conspired with state officials to deny petitioner the fair protection of state or federal law.”).
Justice Burger pointed out in dissent, “[the creditor] did no more than invoke a presumptively valid state prejudgment attachment procedure available to all.” 215 “Invoking a judicial process, of course, implicates the State and its officers, but does not transform essentially private conduct into actions of the State.” 216 Justice Powell similarly emphasized the ordinary law enforcement relationship between the sheriff and the creditor: “There is no allegation that respondent conspired with state officials to deny petitioners the fair protection of state or federal law.” 217 His dissent argued that the majority’s holding that a private citizen who did no more than commence a legal action of a kind traditionally initiated by private parties thereby engaged in “state action” was absurd. 218

*Lugar*, taken to its limit, implies that when the state enforces previously existing laws that allow a private citizen to deprive another of constitutional rights, there is sufficient state cooperation to make the private action subject to the Constitution. Such a rule could not withstand one of the most powerful objections to the state action doctrine: “Anyone who believes that his or her rights have been violated can sue in state court. If the court dismisses the case because the state law does not forbid the violation, there is state action sustaining the infringement of the right.” 219 If, as *Lugar* held, ordinary law enforcement is sufficient cooperation, the state action doctrine becomes protean.

Although narrowly reading *Lugar* to hold only that police enforcement, not court action, is state action, would address the protean objection, this interpretation has its own problems. First, *Lugar* relied on the fact that defendant used a court to issue an ex parte writ of attachment. Second, a rule allowing private parties to violate constitutional norms only when they don’t have to call the police to do it would have strange results. Private parties would have an incentive to take the law into their own hands and settle disputes without the assistance of police or other state enforcement institutions.

Furthermore, if police but not court enforcement were sufficient cooperation, only those strong enough to violate constitutional rights without calling upon the police would be immune from suit. Assume, for example, that there are two identical shopping centers. One is large and well—established, and the other is new and on shaky financial ground. Animal rights advocates arrive at both shopping centers and begin to protest. The large shopping center uses private security to remove the protesters, but the small shopping center has no choice but to call the police. Under *Lugar*, the small shopping center would be liable for violating the Constitution but

215 *Id.* at 943 (Burger, J., dissenting).

216 *Id.* (citing Dennis v. Sparks, 449 U.S. 24 (1980)).

217 *Id.* at 944 (Powell, J., dissenting).

218 *Id.*

the large shopping center would not. Because of these problems, rather than attempt to fit Lugar into our approach to state action, we accept that case as an outlier.220

D. Illustrating the Consistent Applicability of the Theory

The Court has already accepted and fleshed out many of the separate pieces of the above approach. However, it has never applied it as a comprehensive whole. For that reason, lower courts have had little to work with when they decide novel state action cases. To illustrate how lower courts might use the conceptual approach to state action proposed in this Article in a logical and comprehensive manner, this Part will walk through this approach using the facts of Mendez v. Belton,221 a case actually decided by the United States Court of Appeals for the First Circuit in 1984.

Dr. Mendez worked at the Public Health Services’ Outpatient Clinic in San Juan, Puerto Rico and performed services in concert with her employment at Presbyterian Hospital.222 Presbyterian Hospital was a private, non-profit corporation, tax-exempt and subject to extensive federal health care regulations.223 The hospital received financial assistance through the Hill-Burton program for an addition to the hospital and Medicare and Medicaid funds.224 The hospital maintained detailed requirements for staff membership.225

In December of 1978 Dr. Mendez received a letter from Dr. Belton, the Chief of Clinical Services at the Clinic.226 The letter criticized her for allegedly performing unnecessary surgery on two Clinic patients at Presbyterian Hospital and neglecting to follow various Public Health Services Regulations.227 Dr. Belton also sent copies of this letter to administrators and doctors at Presbyterian Hospital.228 The medical director at Presbyterian Hospital requested that Dr.

220 Furthermore, the main issue in Lugar was whether the “under color of” law requirement of §1983 and the state action doctrine were identical. Most of the Justices’ notes were dedicated to that issue. It is possible, then, that the state action implications were simply overlooked.

221 Mendez v. Belton, 739 F.2d 15 (1st Cir. 1984).

222 Id. at 17.

223 Id.

224 Id. at 18.

225 Id. at 17.

226 Id.

227 Id.

228 Id.
Mendez respond to the letter. She responded, denying the allegations. She was nevertheless suspended from the hospital staff and was unsuccessful in her appeals to the hospital’s Judicial Review Committee and Board of Directors. She filed suit alleging that the hospital was a public actor and that it had violated federal law and her constitutional rights. She also alleged that Dr. Belton was a federal official and that he had violated her equal protection rights under the Fifth Amendment’s due process clause by discriminating against her on the basis of race.

The first step in the state action inquiry is to identify whose and what conduct is at issue. Dr. Mendez made two allegations. First, she alleged that Dr. Belton racially discriminated against her. Here, Dr. Belton was the relevant actor, and the racial discrimination was the relevant action. Second, she alleged that the hospital deprived her of due process by revoking her staff privileges. For that allegation, the hospital was the relevant actor, and the revocation was the relevant action. These allegations must be analyzed separately to determine the existence of state action.

As to the allegation that Dr. Belton discriminated against Dr. Mendez, the second step asks whether Dr. Belton, the relevant actor, was public in nature. Dr. Belton was a Public Health Service Official, a government employee, acting in the course of his job as the Director of Clinical Services. As a governmental actor acting in a public capacity, Dr. Belton was a public actor and his actions were state action subject to constitutional scrutiny. Because this step is determinative, the state action inquiry regarding Dr. Belton is complete. The only remaining question is whether Dr. Bolton’s conduct violated the substantive guarantees of the Constitution.

We ask the same second-step question with regard to the allegation that the hospital deprived Dr. Mendez of due process. If the hospital was either governmental or acting in a public capacity, the hospital was a state actor and its actions were subject to constitutional scrutiny. Unlike Dr. Belton, the hospital was not governmental. The hospital was nominally private, and there was no evidence that the government ran or controlled the hospital. Furthermore, the hospital was not acting in a public capacity. In order to find that the hospital was acting in a public capacity, the court would have to find that the provision of health care was a service traditionally, exclusively reserved for the state. Given the long history of private companies offering health care facilities, this was not the case. As a non-governmental actor acting in a private capacity, therefore, the hospital was a private party.

Because the hospital was private in nature, the inquiry moves to a third step to determine whether the government was sufficiently involved with the hospital’s deprivation to make that deprivation fairly attributable to the state. In this step, we ask whether the state encouraged the

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229 Id.
230 Id.
231 Id.
232 Id. at 18.
233 Id. at 19.
revocation of Dr. Mendez’s staff privileges before the fact. Even though it was a private actor, the hospital might still have been subject to the Constitution if the state had encouraged or specially assisted its revocation of Dr. Mendez’s staff privileges.

Here, the government regulated and funded the hospital as part of the Medicare and Medicaid programs and under the Hill-Burton act for construction of an addition. In doing so, however, it did not necessarily intend to make the revocation of Dr. Mendez’s staff privileges more likely. There was no subjective proof that the government intended for the hospital to revoke Dr. Mendez’s staff privileges. Furthermore, the government had no interest in whether Dr. Mendez’s privileges were revoked, so it would be difficult to prove intent objectively. It appears the government’s actions were neutral as to whether the hospital should terminate Dr Mendez’s privileges. The hospital, not the government, controlled personnel decisions and maintained detailed staffing requirements. Since the state did not take a normative stance or act to make it more likely that the hospital would terminate Dr. Mendez, its position cannot be said to encourage the termination. Thus, the hospital’s revocation of Dr. Mendez’s privileges is not fairly attributable to the state, nor is it subject to constitutional scrutiny.

The case of Dr. Mendez is just one of endless factual scenarios to which this approach could be applied. This conceptual structure could in fact be applied to every conceivable factual scenario that requires a state action inquiry. It is also useful because it is consistent with the bulk of Supreme Court precedent and able to withstand the myriad critiques of the state action doctrine and its application presented above.

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234 It is interesting to note that Dr. Mendez actually alleged a greater influence on the hospital’s staffing practices by the government. *Id.* at 18. She alleged, without citation to the record, that “the Puerto Rico Government Development Bank approved the financing for the new wing of the hospital on the condition that the hospital maintain a staff subject to the approval of the bank.” *Id.* She further alleged that this information was absent from the record because the hospital refused to comply with discovery requests, including those ordered by the court. Ultimately the Court found this information unimportant to its decision. This information is interesting because it is precisely the type of funding that might indicate encouragement, not just permission, on the part of the state.

235 The First Circuit’s state action inquiry ultimately came to the same conclusion in this case as the application of this new approach—that Dr. Belton was a state actor but the hospital was not. *Id.* at 18–20. With regard to the hospital, it came to its decision simply by citing to other lower court cases which found funding and regulation to be inadequate for a state action finding. *Id.* at 18. Though this approach led the court to the same conclusion here, as presented it could have accounted for non-neutral funding and regulation that had the specific impact of encouraging the revocation of Dr. Mendez’s privileges—the kind of funding alleged but not cited to by Dr. Mendez. Thus we find even this case illustrates the flexibility of this approach to account for any factual nuances which might be present and relevant to the state action inquiry.
III. DEFENDING THE CONCEPTUAL STRUCTURE

Because the conceptual structure laid out in Part II arises from Supreme Court precedent, it is no surprise that it is consistent with the bulk of that case law. The real challenge for such a structure is whether it withstands the criticisms of a comprehensive state action doctrine that have been presented over the years. This Part attempts to defend the theory against the three broad categories of state action criticism that were presented in Part I.

First, as discussed, commentators argue that any state action doctrine is limitless because states are never wholly removed from private conduct and accordingly all action is state action. Since private rights are based in state law, and state adjudication and enforcement is state action, every private action has some root in state action. Because states “act” when they implicitly or explicitly compel, encourage, permit, or forbid behavior and when they make and enforce judgments, some scholars have argued every action is attributable to the state.

This objection would certainly apply to some theories of state action; however, the state action doctrine is not necessarily protean just because the state is always in some way involved with all private behavior. To successfully confront this objection, a state action doctrine must separate state involvement that is sufficient to attribute private action to the state from state involvement that is not.

This article’s theory does this in third step of the analysis. The third step draws a clear line between those actions that encourage the private behavior and those actions that merely permit it. Similarly, it distinguishes between ordinary enforcement and special assistance when the state becomes involved after the fact. This approach recognizes the pervasiveness of state actions but distinguishes those actions which encourage or provide special assistance to private actors from those which are merely permissive or the result of ordinary enforcement. The state’s involvement will not be sufficient to make the private action state action when the state merely treats the private actor as it would any member of society—for example by allowing him to exercise common law or statutory rights or by allowing him to invoke the judicial processes to protect those rights. In the ordinary situation, then, the state’s cooperation will not be enough to make the private action fairly attributable to the state.

Second, because the state action question arises in limitless factual scenarios and the Court’s state action jurisprudence has been seemingly inconsistent, commentators have argued that it is impossible to reduce to a single approach. As a result, they have found the state action to be a “conceptual disaster area” and a “muddled mess.” The factual situations in which the state action inquiry arises are so varied that, they argue, no single principle can meaningfully answer whether or not state action exists in all circumstances. Although the Court has developed a number of tests to deal with divergent scenarios, it has not instructed when lower courts should use which line of precedent.

The wide variation of factual scenarios to which any state action doctrine must apply does make it more difficult to frame a workable doctrine; however, it also makes doing so all the more important. The wider the variation of factual scenarios, the more difficult it is for lower courts to rely on analogical device. This article’s theory applies to any of the wide variety of
possible factual scenarios. It does this by using a set of principles rather than a single test. It engages in several inquiries, dependant on the facts of the particular case, which are intended to encompass the various principles underlying the objectives of the state action doctrine and thus apply to any of the various factual scenarios which would present a state action question. The theory’s major contribution is that it instructs lower courts how to link the Supreme Court’s divergent lines of inquiry together. Put differently, it answers the question of when to use which test.

Finally, third, commentators argue that the clearer the state action doctrine, the easier it will be for public entities to find loopholes to evade constitutional scrutiny and that a comprehensive state action doctrine will underprotect civil rights and liberties. We have sought to create a theory of state action which is sufficiently comprehensive to thwart attempts to circumvent constitutional scrutiny. A public entity could not simply create and control private entity, for example. In such a case, our theory would deem the technically private entity to be public. Furthermore, under our theory, there would be state action in any situation where the public entity intended to make a private deprivation more likely. Any attempt to circumvent constitutional review would inevitably involve such intent. Additionally, since our theory takes into account the historical and extra-legal context as well the intention of the state, any social or political movements, like those of the Warren Court Era, which enable states to discriminate under the cover of private action will be discovered and found to be state action under the third step in the analysis. Ultimately, however, no theory of constitutional interpretation can prevent all wrongdoers from circumventing or evading the law all the time. The ability of wrongdoers to understand the limits of the law along with other citizens is a function of the law itself.

This article simply does not address the normative concern of whether there should be a state action doctrine in the first instance. Rather, it assumes that a state action doctrine exists, and within that confine, tries to develop a theory that is usable. It does, however, attempt to address the structural objection that is implicated by the normative objection: that rigid state action tests which only apply in particular situations fail to protect civil rights. These rigid tests fail to cover those situations that fall close to but outside the tests. This theory has particular strength when looking at cases from the United States Courts of Appeal, which tend to find state action only where the particular factual situation has been addressed by the Supreme Court. Our theory, because it uses a spectrum of relationships, or a simple bar for action, is not susceptible to this criticism. Every possible state-private relationship will fall somewhere along the spectrum. The fact that the particular factual situation has not been previously addressed does not matter. Since placement on the spectrum, or a relationship that is special in nature, is determinative of the state action question, the spectrum approach guarantees that state-private relationships amounting to state action will not be excused for failing several separate and distinct tests. Furthermore, though this theory does not hold independently powerful private actors to constitutional stringency, it does provide flexibility which holds those private actors accountable for constitutional violations when they act in concert state actors.

Though this theory does not address every concern presented against state action theories, it fares well against the broad categories of criticism traditionally presented. Other criticisms might, over time, crop up, for instance, that the spectrum lends itself to becoming a mechanical and inflexible placement of distinct categories next to one another which leave no room for blending between the categories. To the extent that these criticisms are foreseeable and
damaging, this article attempts to deal with them. In addition to withstanding the traditional
criticisms of state action theories, this theory also comprehensively explains the Supreme Court
cases on state action and provides a workable tool for lower court analysis.