# The Formal State Action Doctrine and Free Speech Analysis

John Fee

# THE FORMAL STATE ACTION DOCTRINE AND FREE SPEECH ANALYSIS

JOHN FEE*

*The state action doctrine is fundamental to constitutional law. Its primary value, however, is not as a threshold requirement, as it is usually understood. The proper function of the state action doctrine is analytical: it requires one to isolate the elements of state action in a case from the elements of private action and focus the constitutional questions on the former. State action exists in some form in every case, but the relevant state action is often constitutional. Proper use of the state action doctrine does not lead to extreme results, but it does have a clarifying effect on substantive constitutional rights.*

*A formal approach to state action is a prerequisite to resolving constitutional problems in a principled way, such as the extent of one's right to speak in public places. As applied to this problem, a formal state action doctrine need not change the balance of power between those who would engage in public expression and those who would restrict it, but it would improve the way in which we discuss and interpret the freedom of speech. Ultimately a formal approach to state action would lead to a more consistent focus on whether speakers have adequate means of communication, and would not attach dispositive significance to the way in which property rights are allocated.*



* Associate Professor of Law, Brigham Young University. I am grateful to Fred Gedicks, Jim Gordon, Jim Rasband, Kif Augustine, Cheryl Preston, Jack Welsh, Brett Scharffs and Jim Backman for comments on earlier drafts. I also thank Alec McGinn and Alec Dunn for valuable research assistance.

## INTRODUCTION

According to conventional wisdom, society is divided into two domains: one that is government-controlled and another that is privately controlled. Depending on which domain one is in makes all the difference in how one's constitutional rights are adjudicated. Consider two examples:

> A. A group of citizens are involved in a campaign to recall the governor of their state and seek to collect signatures to place the issue on the ballot. It is summertime in a hot desert climate, so few pedestrians are on city sidewalks. The most feasible place to solicit signatures is at a large indoor shopping mall, where large numbers of people gather. Private mall regulations, however, prohibit political speech on the premises. The campaigners claim that they have a First Amendment right to gather signatures at the mall.[1]
>
> B. A city sells a parcel of land to a private organization for an outdoor plaza, retaining an easement for public pedestrian access, but expressly giving the organization the power to control speech in the area. After the plaza is built, the organization imposes rules restricting public speech. Some

1. Scenario A is based on *Fiesta Mall Venture v. Mecham Recall Committee*, 767 P.2d 719 (Ariz. Ct. App. 1988), in which a private organization sought to put the question whether Arizona Governor Evan Mecham should be recalled to a statewide election. Phoenix area malls denied recallers access to their premises for the purpose of soliciting signatures. The state court of appeals upheld the denial in the face of a constitutional challenge, despite the argument that summer heat had forced pedestrians indoors. *Id.* at 724.

citizens, who would like to protest against the organization, argue that the First Amendment entitles them to use the public easement to communicate their views.[2]

Current law handles these cases in dramatically different ways. In case A, the speakers' First Amendment claim will fail simply because there is no cognizable state action.[3] It does not matter whether there are other feasible locations to gather signatures,[4] nor whether the mall serves in other respects as a public forum.[5] It does not matter if the mall regulations are objectively unreasonable or discriminate on the basis of content.[6] There is no balancing test. For federal constitutional purposes, it is relevant only that the mall is privately owned and that the owner (not the government) has chosen to prohibit the speech in question.[7] In example B, the demonstrators have a much stronger case because the city has retained an easement on the plaza, most likely satisfying the state action requirement. A court will likely apply full First Amendment scrutiny, as if the area

2. Scenario B is based on *First Unitarian Church v. Salt Lake City Corp.*, 308 F.3d 1114 (10th Cir. 2002). Salt Lake City sold a block of Main Street to the Church of Jesus Christ of Latter-Day Saints, retaining a pedestrian easement over the land. Although the easement specified that it did not create a public forum, the Tenth Circuit found that the area constituted a traditional public forum based on objective characteristics, and thereby found the church's speech restrictions invalid. After the ruling, the city agreed to vacate the public easement in exchange for further consideration, giving the church control over both speech and access on the plaza. Heather May, *LDS Plaza Deal Done*, SALT LAKE TRIB., July 29, 2003, at A1, *available at* http://global.factiva.com/eneserch/ss_h1.asp (on file with the North Carolina Law Review).

3. *See* Hudgens v. NLRB, 424 U.S. 507, 520–21 (1976) (rejecting free speech claim against private mall); *Fiesta Mall*, 767 P.2d at 724 (same). Some states have interpreted state constitutional provisions more expansively so as to protect public speech at large shopping malls, see, e.g., *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341, 347–48 (Cal. 1979), but these states remain the exception. *See* Jennifer Niles Coffin, *The United Mall of America: Free Speech, State Constitutions, and the Growing Fortress of Private Property*, 33 U. MICH. J.L. REFORM 615, 625–30 (2000) (collecting cases).

4. In *Hudgens*, for example, an agency found that there were no alternative means for union members to communicate with the employees of a shopping mall except by entering the mall premises, 424 U.S. at 511, but the Supreme Court did not even discuss this concern when it rejected the speaker's First Amendment claim on state action grounds. *See id.* at 512–21; *see also* Schad v. Smith Haven Mall, 488 N.E.2d 1211, 1217 (N.Y. 1985) (declaring that the judiciary is precluded from casting aside the state action doctrine in an effort to achieve a socially desirable result).

5. *Fiesta Mall*, 767 P.2d at 724; *Schad*, 488 N.E.2d at 1217–18.

6. One court upheld a mall regulation prohibiting a customer from wearing an offensive t-shirt that the customer purchased from a store in that mall, while at the same time allowing the store to openly display the shirt. Lantz v. Franklin Park Mgmt. Corp., 720 N.E.2d 1018, 1023 n.4 (Ohio Misc. 1999).

7. *See, e.g.*, *Lantz*, 720 N.E.2d at 1021 (upholding mall regulation prohibiting t-shirt with obscene message).

were a government-owned plaza.[8] Accordingly, if the location is like a traditional sidewalk or park, only limited "time, place, and manner" speech restrictions are constitutionally permissible.[9] It would not matter whether the city or the private organization intended to allow public speech on the plaza.[10] Nor would it suffice that there are other nearby locations where speakers can communicate their views adequately.[11] In a traditional public forum, the First Amendment requires a robust speech environment where even offensive and moderately harmful speech must be allowed.

This dichotomy between public and private spheres affects many areas of constitutional law. It also raises several puzzles. One problem is how to define the boundary between public and private spheres in a world of overlapping interests and roles. In this "golden age of 'privatization,' "[12] where private entities often perform public functions with government-sanctioned authority, it is not easy to identify where the government domain ends and the private domain begins for purposes of constitutional law.

Even more problematic is the practice of making these distinctions based on the allocation of property. Are not all property rights a form of legally created authority? If some constitutional rights exist only in places where the government has a property interest, does this allow the government to control those rights by redefining its property or by conveying its property to private parties? Moreover, if the government has the greater power to eliminate public rights by transferring its property to private entities, why can it not exercise the lesser power of restricting those rights on property that it retains?

---

8. Courts are somewhat divided on this point, but the weight of authority is towards applying the public forum doctrine to places where the government holds an easement. *See First Unitarian Church v. Salt Lake City Corp.*, 308 F.3d 1114, 1121–28 (10th Cir. 2002) (finding a public forum on land where government holds a pedestrian easement); Venetian Casino Resort, L.L.C. v. Local Joint Exec. Bd. of Las Vegas, 257 F.3d 937 (9th Cir. 2001) (same); Citizens to End Animal Suffering and Animal Exploitation, Inc. v. Faneuil Hall Marketplace, 745 F. Supp. 65 (D. Mass. 1990) (mem.) (same). *But see* S.O.C., Inc. v. Mirage Casino-Hotel, 23 P.3d 243 (Nev. 2001) (en banc) (finding that no public forum exists on sidewalk where the government merely has an easement).

9. *See First Unitarian Church*, 308 F.3d at 1128.

10. *See id.* at 1124.

11. *See* Schneider v. Town of Irvington, 308 U.S. 147, 163 (1939) ("[T]he streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.").

12. Paula A. Franzese, *Does It Take a Village? Privatization, Patterns of Restrictiveness and the Demise of Community*, 47 VILL. L. REV. 553, 553 (2002).

The so-called state action doctrine—the principle that only government actors are subject to constitutional rules—implicates these problems and others. It is a doctrine whose relationship to other substantive principles of constitutional law is rich and complex, and yet is seldom discussed in judicial opinions or in academic commentary.[13] Instead, the state action doctrine is treated most often simply as a preliminary test for determining which cases are worthy to proceed to the merits. It serves a boundary-like function for determining whether constitutional rules apply but is seldom thought to affect the substance of individual constitutional rights.

I propose in this Article that the state action doctrine, properly understood, is not so much a boundary or threshold test, but is more usefully applied as an analytical tool. That the state action doctrine affects the extent to which constitutional norms apply to private persons and entities is well understood—for example, whether the First Amendment requires Disneyland to admit patrons who wear offensive t-shirts. But what is less obvious is that the state action doctrine also affects the substance of constitutional law, even as applied to the government.[14] One reason for this is that courts are likely to interpret constitutional provisions in light of their understanding as to how broadly the rules they announce will apply. Courts might, for example, be more willing to require highly speech-protective conditions on government-owned sidewalks if they are confident that such rules will be limited in scope and will not apply to privately owned sidewalks. What is more, the state action doctrine affects the substance of constitutional law by the way in which it

13. Although many scholars have critically examined the state action doctrine, see *infra* note 20, most works address the state action doctrine as an isolated component of constitutional law, treating the constitutional "merits" as a separate subject. While this is consistent with the Supreme Court's treatment of state action, the approach is too limited for some analytical purposes. However, there are notable exceptions to this tendency. *See generally* Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L. REV. 1537 (1998) (defending the public/private distinction as an element of the freedom of speech); Cass Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 263–300 (1992) (examining free speech theory in relation to the state action doctrine); Mark Tushnet, Shelley v. Kraemer *and Theories of Equality*, 33 N.Y.L. SCH. L. REV. 383 (1988) (considering the equal protection aspect of the state action doctrine).

14. In this Article, I use the term "merits," "substantive, and "substance" to refer to the principles of constitutional law that do not concern the identity of the actor, as distinguished from the state action component of constitutional law. I recognize that this distinction is partially misleading. Indeed, one aim of this Article is to show that the supposed "merits" and "state action" components of constitutional law are not so easily separated from one another. I use this terminology only because it reflects the dominant view that the state action issue is something other than a merits issue.

causes constitutional questions to be framed for analysis. Accordingly, it serves an analytical function. It only serves this function well, however, when courts apply the state action doctrine in a particular way.

This Article advocates a formal approach to state action as a method of analyzing constitutional problems at the intersection of public and private power. A formal approach to state action—or, in other words, an approach that is literal and precise, rather than functional—recognizes all forms of government action and even inaction for purposes of constitutional law, including background rules of common law, judicial enforcement of private rights, and omissions of government officials. At the same time, it focuses the ultimate constitutional inquiry on the actual part that the government performed, recognizing without exception that only government actors are subject to constitutional rules. According to the formal approach, courts should not ask bluntly whether there is state action or who should be deemed a state actor; instead, they should ask: what role did the state or federal government actually play in relation to the injury; and in so acting (or failing to act), did the government behave unconstitutionally?

The formal state action approach differs from the way that courts usually frame the state action analysis and would inevitably lead to a new understanding of key constitutional rights. This is a potential advantage. It does not, however, necessarily lead to a broader or narrower application of existing constitutional rules. Indeed, a formal state action doctrine does not by itself dictate any particular outcomes.[15] Its role is analytical and rhetorical. It produces a clearer picture of the questions that courts must ultimately decide in interpreting the Constitution and, in so doing, enables constitutional law to develop in a way that is more thoughtful and consistent. Regardless of how one would interpret such principles as the freedom

15. For this reason, the formal approach to state action should not be confused with the discredited version of legal formalism that proclaims that judges should decide cases solely according to preexisting, objective doctrines and logical deduction. The method proposed here does not deny the role of functional and outcome-based concerns in constitutional interpretation, but would shift those concerns away from the state action stage of analysis—focusing them instead in relation to the particular constitutional right at issue. In this respect, a precise state action doctrine is consistent with legal process theory, which recognizes the authority of legal texts and doctrines, but suggests that judges "rather than simply apply doctrine in a mechanical fashion, use doctrine in the process of reasoning towards a decision." NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 210 (1995). See generally Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988) for a discussion of various concepts of legal formalism, including some that are positive and should be embraced.

of speech, due process of law, or equal protection, our constitutional discourse concerning these rights would significantly improve if we would apply the state action doctrine with literal precision.

The analysis will proceed in two parts. Part I explores the state action doctrine and some of its current problems. It discusses various approaches to identifying state action and suggests that, of these, a formal approach is most likely to lead to sound constitutional analysis and reasonable interpretation of constitutional rights.

Part II applies the formal conception of state action more extensively to the problem of speech in publicly owned and privately owned places. In the public forum speech context, the principal advantage of a formal state action doctrine is not to change the balance of power between those who would engage in public expression and those who would restrict it; rather, it is to improve the way we discuss and interpret the freedom of speech. Ultimately, I suggest that a formal state action doctrine should lead us to focus more directly on the substantive values of the First Amendment—such as whether the government has preserved an adequate means of communication for the speaker—rather than attach dispositive significance to whether the location in question is publicly or privately owned.

## I. STATE ACTION QUESTIONS

The United States Constitution enables and restrains government power. Its provisions do not directly control the conduct of private individuals and organizations, no matter how harmful their conduct may be.[16] Accordingly, the state action doctrine holds that a claim based on the Constitution must be dismissed if the alleged injury is not the result of government wrongdoing.[17]

The state action doctrine reflects a dichotomy between government and the individual that is fundamental to Western liberalism: government exists to protect individual freedom, and for that purpose it must also be restrained. Limiting the scope of government power (including federal judicial power) through application of the state action doctrine serves not only to preserve individual autonomy[18] but also to further values of federalism and

16. The only exception is the Thirteenth Amendment, which prohibits the practice of slavery. U.S. CONST. amend. XIII.

17. For purposes of this Article, the term "state action" refers to all government action, including federal, state, and municipal.

18. *See* Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 936 (1982) (the state action doctrine "preserves an area of individual freedom by limiting the reach of federal law and

separation of powers by leaving to Congress and the states the primary authority to regulate conduct among individuals.[19]

Although the state action doctrine is fundamental to constitutional law, scholars have widely criticized the judiciary's application of it.[20] Many agree that "the field is a conceptual disaster area."[21] Scholars have faulted the contemporary state action doctrine for its failure to guide concrete cases in a meaningful way,[22] for its tendency to hide the underlying policy issues that courts must balance,[23] and for its harmful effects on the politically powerless.[24] Indeed, the Supreme Court's first use of the state action doctrine was to strike down the Civil Rights Act of 1875 on the basis that Congress had no authority under section 5 of the Fourteenth Amendment to prohibit private racism,[25] and for many decades later the state action doctrine continued to serve as a primary defense for private racist acts.[26] Although more recent state action decisions found creative

---

federal judicial power.").

19. *See* United States v. Morrison, 529 U.S. 598, 620 (2000) (stating that the state action limitation serves "to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government.").

20. *See, e.g.*, Paul Brest, *State Action and Liberal Theory: A Casenote on* Flagg Brothers v. Brooks, 130 U. PA. L. REV. 1296, 1330 (1982) (asserting that the state action doctrine is intellectually inconsistent and invites manipulation); Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503 (1985) (advocating the abolition of the state action doctrine); 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, 333–35 (1995) (describing the contemporary state action doctrine as overly formalistic and in need of reform); Michael J. Phillips, *The Inevitable Incoherence of Modern State Action Doctrine*, 28 ST. LOUIS U. L.J. 683, 683 n.6 (1984) (arguing that the state action doctrine is the product of contradictory liberal ideas and therefore will always be incoherent). During the Civil Rights Era, harsh criticism of the state action doctrine was even more prevalent. *See* Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, And California's Proposition 14*, 81 HARV. L. REV. 69, 91–95 (1967) (reviewing the literature and concluding that "[t]he commentary confirms the inferences we would draw from the decisions. The field is a conceptual disaster area.").

21. Black, *supra* note 20, at 95. Charles Black's famous description has been repeated many times in the scholarly literature. He also called state action a "non-concept," *id.* at 91, and "a map whose every country is marked *incognita*," *id.* at 95.

22. *Id.* at 1690–91, 1698; *see also* Kevin L. Cole, *Federal and State "State Action": The Undercritical Embrace of a Hypercriticized Doctrine*, 24 GA. L. REV. 327, 350 n.114 (1990) (critiquing the emergence and application of the state action doctrine in state courts).

23. *See, e.g.*, Chemerinsky, *supra* note 20, at 540.

24. *See, e.g.*, *id.* at 546, 550; Brest, *supra* note 20, at 1330; *see also* Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 CONST. COMMENT. 319, 319–20 (1993) (exploring the gains that are made by power-holders who are able to characterize their power as private and not public).

25. The Civil Rights Cases, 109 U.S. 3, 17 (1883).

26. Thus, Charles Black critically wrote in 1967 that the state action doctrine:

ways to impute state action in cases involving organized racism, thus bringing those acts within prohibitions of the Constitution,[27] those decisions were often thought to be too creative, or at least imprecise in their rationale, contributing to the impression that the state action concept is both easily manipulated and inherently incoherent.[28] Given these problems, many commentators have argued that the state action doctrine should be abolished altogether and replaced by a balancing test in which interests of individual autonomy are weighed directly and openly against other social interests.[29] Others have argued for more moderate solutions.[30] In any case, it is fair to say that today "commentators have achieved near unanimity in declaring the unitary state action doctrine dysfunctional."[31]

In this Section, I argue that the problems of the state action doctrine arise principally from the way courts frame the issue. While criticisms of the current state action doctrine are valid, we should not abandon the core principle that the Constitution restrains and directs only government actors. In fact, to abandon the state action doctrine might have the unintended consequence of weakening constitutional law in the end. To make the state action doctrine work as it should, we need to state the question more accurately.

### *A. The Conventional Approach: Is There State Action?*

When faced with a state action problem, courts usually focus on "the specific conduct of which the plaintiff complains," then ask whether such conduct is "fairly attributable to the state."[32] In other

---

> [N]ow exists principally as a hope in the minds of racists (whether for love or profit) that "somewhere, somehow, to some extent," community organization of racial discrimination can be so featly managed as to force the Court admiringly to confess that this time it cannot tell where the pea is hidden.

Black, *supra* note 20, at 95.

27. *See generally* Evans v. Newton, 382 U.S. 296 (1966) (applying state action to a segregated park); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (applying state action to a restaurant serving only whites); Terry v. Adams, 345 U.S. 461 (1953) (applying state action to racially exclusive straw polls); Shelley v. Kraemer, 334 U.S. 1 (1948) (applying state action to racially restrictive housing covenants); Smith v. Allright, 321 U.S. 649 (1944) (applying state action to racially exclusive primary elections).

28. *See* Phillips, *supra* note 20, at 685–700; Black, *supra* note 20, at 89–91, 95.

29. *See infra* notes 114–25 and accompanying text.

30. *See, e.g.*, Cole, *supra* note 22, at 389–96 (arguing that there are good reasons why state action doctrine should be less strict as applied to state constitutional law than as applied to federal constitutional law); Krotoszynski, *supra* note 20, at 335–46 (arguing for a more flexible use of state action criteria through meta-analysis).

31. Cole, *supra* note 22, at 343.

32. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295

words, looking to the most proximate cause of the injury, courts ask whether the ultimate decisionmaker was a government officer or whether the action should be attributed to the government for some other reason. For example, if someone sues a private association under the First Amendment for imposing a rule restricting members' speech, the first question framed is whether the rule should be counted as state action.[33] If there is a sufficient basis to find the alleged conduct to be state action, the next step of the analysis proceeds as if the government had directly imposed the rule; if there is not a sufficient basis to find state action in the rule, the claim is dismissed.

Two features of this conventional state action formula are noteworthy. First, the state action inquiry occurs prior to, and separate from, the merits of a constitutional claim. Our current state action doctrine purports to be unitary—that is, it applies without regard to the constitutional right at issue. Some commentators have observed that the nature of a plaintiff's constitutional claim does seem to influence state action determinations (in particular, courts are more likely to find state action in cases involving racial discrimination),[34] but the Supreme Court has not acknowledged this, and its decisions continue to treat the state action issue as if the underlying merits are irrelevant. Second, the state action issue presents an all-or-nothing question. Either there is state action, in which case the ultimate act is attributed to the government, or there is no state action, and the case is dismissed. No middle ground is available.

The Supreme Court's two most recent state action decisions employ this conventional method. In *Brentwood Academy v. Tennessee Secondary School Athletic Association*,[35] the Court found that there was state action in a private interscholastic athletic association's rules governing its members. The Court's opinion only briefly mentions the plaintiff's constitutional claims in a cursory

(2001); Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 50–51 (1999); Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).

33. *See, e.g.*, *Brentwood Acad.*, 531 U.S. at 290–91 (examining "whether a statewide association incorporated to regulate interscholastic athletic competition among public and private schools may be regarded as engaging in state action when it enforces a rule against a member school").

34. *See, e.g.*, William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2331–32 (2002).

35. 531 U.S. 288 (2001).

background description.[36] After finding the rules should be deemed state action on the basis of the organization's general entanglement with government officials, the Court remanded the case for further consideration on the merits without discussing the nature or strength of those claims.[37]

Likewise, in *American Manufacturers Mutual Insurance Co. v. Sullivan*,[38] the Court found that there was no state action in private insurers' decisions to withhold payments pursuant to a state regulatory scheme. Even though the plaintiffs framed their claim as an attack on statutory procedures that the defendants followed,[39] the Court focused on the specific conduct of the private insurers.[40] Finding that the ultimate insurance decisions were not fairly attributable to the state, the Court held that the plaintiffs' claims must fail due to lack of state action.[41]

In both cases, the Court first relied upon general state action criteria[42] to decide whether the relevant action was attributable to the state before even considering particular First or Fourteenth Amendment claims. In both cases, the Court treated state action as an all-or-nothing threshold issue.

The conventional approach to state action does not necessarily produce unreasonable outcomes. It does, however, require certain fictions to be sustained. The first is that some admittedly government conduct does not count as state action for purposes of constitutional law. The second is that some private acts must be deemed state action, as if government officials had performed the actions directly. These fictions are necessary to avoid extreme results under the conventional approach, but they also have a tendency to obscure rather than to assist the values served by the state action requirement.

---

36. *Id.* at 293.
37. *Id.* at 305.
38. 526 U.S. 40 (1999).
39. *Id.* at 50.
40. *Id.* at 51.
41. *Id.* at 58. The Court's state action holding applied to the claims against private insurer defendants and not to claims against public insurers who were also in the case. Interestingly, the Court went on to find that the decisions of public insurers to withhold payments did not violate the Fourteenth Amendment. *Id.* at 58–61. As Justice Ginsburg pointed out in her separate opinion, this holding on the merits made the Court's state action determination unnecessary. *Id.* at 62 (Ginsburg, J., concurring).
42. See *infra* notes 78–86 and accompanying text for a discussion and criticism of the criteria courts purport to apply in state action cases.

1. Fiction One: Background Rules and Remedies

The First Amendment begins with the words "Congress shall make no law . . . ."[43] One might suppose that if anything counts as government action for purposes of the First Amendment, it would be a statute enacted by Congress.

Yet a majority of the en banc D.C. Circuit Court of Appeals held precisely the opposite in *Alliance For Community Media v. FCC*.[44] In that case, the court dismissed a direct First Amendment challenge to section 10 of the Cable Television Consumer Protection and Competition Act of 1992[45] on the basis that there was no state action.[46] The relevant statutory provisions authorized private cable television operators to restrict indecent programming on leased-access channels within their control.[47] The en banc court framed the issue as "whether section 10 and the [implementing] regulations establish a 'sufficiently close nexus' between the government and cable operators regarding indecent programming on access channels so that state action is present."[48] Examining the question at length, the court found the nexus to be insufficient. The court concluded: "Because we find no state action here . . . we do not reach petitioners' First Amendment attack on sections 10(a) and 10(c)."[49]

The Supreme Court later corrected the D.C. Circuit's basis for its holding (affirming the judgment, in part, on the merits).[50] One wonders, however, how could the D.C. Circuit make such an apparent error as to find no state action in a case directly challenging the constitutionality of a statute?

The answer is that courts routinely engage in such fictions when deciding state action issues. When courts frame the state action inquiry in the conventional all-or-nothing way, they must be willing to ignore some forms of literal state action, or every case would pass the state action test. The statute examined by the D.C. Circuit, like many principles of law, merely authorized private parties to act in a particular manner; it did not require cable operators to alter their

43. U.S. CONST. amend. I.

44. 56 F.3d 105 (D.C. Cir. 1995).

45. Pub. L. No. 102-385, 106 Stat. 1460 (codified at 47 U.S.C. 533(f) (2000)).

46. *See generally Alliance For Community Media*, 56 F.3d at 113–23 (dismissing claims that state action existed based on the "close nexus" between government and cable operators and because section 10 has provided "significant encouragement").

47. *Id.* at 113.

48. *Id.*

49. *Id.* at 123.

50. *See* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 772 (1996).

programming, nor did it restrict anyone's programming directly. If the state action requirement serves only a threshold function (as the D.C. Circuit assumed), and if the presence of some background principle of law authorizing private conduct is sufficient to pass that threshold, then everything would be subject to constitutional restraint. A private homeowner's decision to exclude someone from her home on the basis of that person's speech would be subject to First Amendment scrutiny because the common law of property authorized her decision. A private employer's decision to terminate an employee without cause would be subject to due process analysis because employment law authorized the decision.

For this reason, courts are understandably reluctant to recognize mere background principles of law as state action,[51] even though this means (if one takes the principle seriously) immunizing many regulations, statutes, and common law rules from constitutional review on the merits. The alternative, which courts are unwilling to accept, would be to expand constitutional law so broadly as to interfere with genuinely private behavior. The Supreme Court recognized the need for this fiction in *Flagg Brothers v. Brooks*,[52] where it explained:

> It would intolerably broaden, beyond the scope of any of our previous cases, the notion of state action under the Fourteenth Amendment to hold that the mere existence of a body of property law in a State, whether decisional or statutory, itself amounted to "state action" even though no process or state officials were ever involved in enforcing that body of law.[53]

If background laws of property do not count as state action, what about government enforcement of those laws? Puzzlingly, there are some cases (including *Flagg Brothers*, as in the above quote) suggesting that judicial or executive enforcement of private remedies may satisfy the state action requirement, even in situations where the underlying decisional law would not. The most famous of these decisions is *Shelley v. Kraemer*,[54] which held that judicial enforcement

51. *See, e.g.*, Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 52 (1999) (holding that state regulation of private entity is insufficient to meet state action requirement even though plaintiffs made a facial challenge to statutory procedures).

52. 436 U.S. 149 (1978).

53. *Id.* at 160 n.10. Consistent with this fiction, the Supreme Court declined to find state action in a private shopping mall's exclusion of First Amendment speakers from its property, even though the common law of property authorized the exclusion. *See* Hudgens v. NLRB, 424 U.S. 507, 521 (1976).

54. 334 U.S. 1 (1948).

of a racially discriminatory covenant affecting the sale of housing constituted state action in violation of the Fourteenth Amendment.[55]

*Shelley* is generally considered, however, to be an exceptional case.[56] The problem with taking its rationale too far is that all private rights and background principles of law depend upon the judiciary for enforcement. A principle recognizing judicial enforcement as state action is essentially as broad as a principle recognizing background rules. Accordingly, courts do not always recognize judicial enforcement alone as sufficient to pass the state action test. As the California Supreme Court recently explained in a case involving a property owner's restrictions on speech, broad recognition of the *Shelley* principle "would effectively eviscerate the state action requirement."[57] Although *Shelley* has never been overruled, the Supreme Court has often conspicuously ignored it,[58] leading some to conclude that it has been limited to its facts.[59]

In short, under the conventional state action approach, which asks "Is there state action?" before proceeding to the merits, courts are forced to limit their inquiry to only certain types of governmental acts. Understood in this light, the D.C. Circuit's decision declining to find state action in a case directly challenging a Congressional statute was not extraordinary.[60] The difficulty is that there are no clear rules for when this limiting fiction should be employed. Certainly, one cannot say that all background rules and judicial remedies are immune from constitutional scrutiny. If a state enacts a statute permitting members of the public to trespass on the private property of a disfavored newspaper publisher and interfere with the presses, we should hope that a court would find the statute both reviewable and unconstitutional.[61] Fortunately, courts do not always apply the background rules fiction, and, in any case, there is a second fiction to

55. *Id.* at 13, 19–20.

56. *See* Chemerinsky, *supra* note 20, at 526 (observing that the Supreme Court has largely refused to apply *Shelley*); *see also* Cole, *supra* note 22, at 353 (noting that *Shelley* may theoretically have a broad impact).

57. Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n, 29 P.3d 797, 810–11 (Cal. 2001). In *Golden Gateway*, the court rejected a freedom of speech challenge by residential tenants against a landlord's rules prohibiting the distribution of leaflets in a large private residential community. *Id.* at 810. The court dismissed the claim finding no cognizable state action. *Id.* at 812.

58. Chemerinsky, *supra* note 20, at 526.

59. Cole, *supra* note 22, at 353.

60. *See supra* notes 44–50 and accompanying text.

61. *Cf.* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831–32 (1987) (government action creating a public easement on private property is a taking of private property for purposes of the Takings Clause).

offset it.

2. Fiction Two: Traditional Government Function and Nexus Tests

The second fiction of the conventional state action doctrine is that "the deed of an ostensibly private organization or individual is to be treated sometimes as if a State had caused it to be performed."[62] This expansion of the state action doctrine to encompass some private behavior follows partially from the first fiction. If background rules of law delegating power to private parties do not count as government action (or at least do not usually count), then there must be some other way for courts to prevent egregious conduct that impairs constitutional values. The usual routes are the government function and nexus tests.

According to the government function test, a private person may be treated as a state actor when performing a function traditionally reserved to the sovereign.[63] A leading citation for this principle is *Marsh v. Alabama*,[64] where the Supreme Court held that a member of the Jehovah's Witnesses had the right to distribute literature on the streets of Chickasaw, Alabama, a company-owned town, contrary to the owner's regulations.[65] *Marsh* is often described as an exception to the usual state action rule: the owner of Chickasaw, the Gulf Shipbuilding Corporation, was deemed a state actor because it acted like a government by managing a whole town with streets open to the general public. Accordingly, the corporation was bound by principles of the First Amendment in regulating speech.[66] Understood in this

62. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001).

63. *See* Edmonson v. Leesville Concrete Co. 500 U.S. 614, 621 (1991) ("Our precedents establish that, in determining whether a particular action or course of conduct is governmental in character, it is relevant to examine . . . whether the actor is performing a traditional governmental function"); *id.* at 624 (using public function test to determine a private corporation's "state-actor status").

64. 326 U.S. 501 (1946).

65. *Marsh*, 326 U.S. at 508.

66. This is the contemporary interpretation of *Marsh*. *See, e.g.*, Flagg Bros. v. Brooks, 436 U.S. 149, 158–59 (1978) (noting that *Marsh* applied the municipal function test to Gulf Shipbuilding Corporation, which performed all the municipal functions in the town it owned); Jackson v. Metro. Edison Co., 419 U.S. 345, 353 (1974) (reasoning that the exercise by a private entity of powers traditionally exclusively reserved to the state may constitute state action); *see also* Henry C. Strickland, *The State Action Doctrine and the Rehnquist Court*, 18 HASTINGS CONST. L.Q. 587, 627–28 (1991). It is interesting to note, however, that the Supreme Court's opinion in *Marsh* does not rely upon the fiction that the Gulf Shipbuilding Company should be deemed a state actor; rather, the Court focused on the State of Alabama's acquiescence in the corporation's property rights and its enforcement of those rights through judicial proceedings to base its decision on state

manner, the government function test does not take literally the rule that only government actors may violate the Constitution.[67] The Supreme Court has applied the government function test narrowly but continues to acknowledge its validity as one means of restricting private conduct through constitutional rules.[68]

Courts also deem private conduct to be state action if "there is such a close nexus between the state and the challenged action that seemingly private behavior may be fairly treated as that of the State itself."[69] A leading example of the nexus principle is *Burton v. Wilmington Parking Authority*,[70] where the Supreme Court deemed a private restaurant's policy of racial discrimination to be state action because the restaurant leased space from a government agency, thereby creating a symbiotic relationship between the government and the restaurant.[71] The nexus test is highly flexible and takes in a variety of criteria. These criteria include, among other things, whether government officials encouraged or coerced the private conduct at issue,[72] whether there is an interdependent relationship between the government and the private actor,[73] whether the state and the private actor are joint participants in a public endeavor,[74] and whether government officials are entangled in the management or

---

action. *See Marsh*, 326 U.S. at 501, 507.

67. *See* Hudgens v. NLRB, 424 U.S. 507, 513–21 (1976) (discussing the public function test as an exception to state action doctrine); *see also* Strickland, *supra* note 66, at 627 ("[T]he government function doctrine permits the application of the Fourteenth Amendment to private conduct in which there is no official involvement.").

68. In *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), the Supreme Court reasoned that conduct traditionally reserved exclusively to the state may qualify as a government function for purposes of deeming a private entity to be a state actor. *Id.* at 353. Since then, the Supreme Court has only once found state action under this theory, and it was not the sole basis for the Court's opinion. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 624 (1991) (holding that participation in the selection of a jury through the use of peremptory challenges is a traditional government function and therefore subject to the Fourteenth Amendment).

69. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (191) (internal quotation marks omitted).

70. 365 U.S. 715 (1961).

71. *Burton*, 365 U.S. at 715.

72. *Brentwood Academy*, 531 U.S. at 296 (attributing private conduct to the state "when the state provides significant encouragement, either overt or covert" (quoting Blum v. Yaretsky, 457 U.S. 991, 1004 (1982)).

73. *See, e.g.*, *Burton*, 365 U.S. at 723–25 (reasoning that the interdependent relationship between a restaurant and the Wilmington Parking Authority created by lease made the restaurant a state actor).

74. *See, e.g.*, Lugar v. Edmondson Oil Co., 457 U.S. 922, 941–42 (1982) (finding that private holding party's joint participation with state officials in the seizure of disputed property rendered them state actors).

control of a private entity.[75]

Like the government function test, the nexus test also represents a fiction. By application of the test, private conduct may be transformed into government conduct "as if a State had caused it to be performed."[76] Granted, the nexus test requires some degree of actual state involvement or presence, but it does not require that the state participate in, or even have knowledge of, the specific decision that ultimately is deemed state action. Nor does the nexus test require such government control that the private actor would be a government agent according to agency law.[77] The nexus test effectively allows a court to attach the label of state action to every link in a causal chain, even though the actual state action may have involved only one tenuous link. Then, when the issue proceeds to the constitutional merits, it is forgotten whether the government was thoroughly involved or only partially involved, for everything is attributed as state action.

The government function and nexus tests follow from treating the state action doctrine as an all-or-nothing threshold inquiry. Because there is a component of state action in the background of every case, courts must focus their inquiry on the specific act producing injury and ask whether the state is fairly responsible. If it were strictly required, however, to show that government officials performed the final discretionary act for a claim to be cognizable, constitutional law would be highly ineffective, so courts must sometimes resort to functional doctrine to impute such conduct to the government.

For the same reason that the government function and nexus tests are needed under the conventional state action approach, they are also hopelessly indeterminate. As courts have discovered, it is impossible to develop any set rules for determining when a private person should be fairly considered a state actor, so instead they have created a list of criteria that are highly flexible and easily manipulated. The product has been a string of outcomes based on questionable distinctions:

---

75. *See, e.g.*, *Brentwood Academy*, 531 U.S. at 298 (holding that entwinement of state officials in management and control of private athletic association rendered the association a state actor).

76. *Id.* at 295.

77. Agency law requires both assent of the principal and control of the agent by the principal for the existence of an agency relationship. *See* RESTATEMENT (SECOND) OF AGENCY § 1 (1957); RESTATEMENT (THIRD) OF AGENCY § 1.01 (Tentative Draft No. 2, 2001). Neither assent nor control, however, are required elements of state action under the nexus test.

The owner of a company town is a state actor because it performs a traditional government function (even though many private company towns have existed in the United States, some even in the early 1800s).[78]

A public utility that supplies a community's electricity, however, is not a state actor because it does not perform a function "traditionally exclusively reserved to the State."[79]

A large regional shopping center is not a state actor (although, like a company town, it operates a community of businesses and sidewalks open to the public) because it does not also own a public sewer system and residential areas.[80]

A creditor who seizes a debtor's private property in the presence of a sheriff is a state actor.[81]

A creditor who sells a debtor's property pursuant to statutory-authorized self-help remedies is not a state actor.[82]

The Jaybird Democratic Association (a private political association in Texas) is a state actor when it excludes racial minorities from its county election poll because the poll is virtually certain to determine the outcome of county elections.[83]

---

78. *See generally* Richard M. Candee, *Early New England Mills Towns of the Piscataqua River Valley*, *in* THE COMPANY TOWN: ARCHITECTURE AND SOCIETY IN THE EARLY INDUSTRIAL AGE, 112–202 (John S. Garner ed. 1992); *Introduction* to THE COMPANY TOWN: ARCHITECTURE AND SOCIETY IN THE EARLY INDUSTRIAL AGE, 3–12 (John S. Garner, ed. 1992). Indeed, in *Marsh*, the Supreme Court noted the commonality of company towns as part of the basis for its opinion. *See* Marsh v. Alabama, 326 U.S. 501, 508–09 & n.5 (1946). More recent state action cases, however, unconvincingly explain *Marsh* on the grounds that Chickasaw performed functions traditionally reserved to governments. *See* Flagg Bros. v. Brooks, 436 U.S. 149, 158–59 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974).

79. *Jackson*, 419 U.S. at 352–53.

80. *See* Hudgens v. NLRB, 424 U.S. 507, 516 (1976) (declaring that *Marsh* allows private property to be treated as public only when all the aspects of a town are present, including residential buildings, streets, a system of sewers, a sewage disposal plant, and a business block). *But cf. id.* at 539 (Marshall, J., dissenting) ("[T]he crucial fact in *Marsh* was that the company town owned the traditional forums essential for effective communication; it was immaterial that the company also owned a sewer system and that its property in other respects resembled a town.").

81. Lugar v. Edmondson Oil Co., 457 U.S. 922, 941–42 (1982).

82. *Flagg Bros.*, 436 U.S. at 157–66.

83. Terry v. Adams, 345 U.S. 461, 469–70 (1953).

> The California Democratic Party, however, is not a state actor when it wishes to exclude members of other parties from voting in its primary election.[84]
>
> A state interscholastic athletic association for secondary schools is a state actor because of entanglement with government officials.[85]
>
> The National Collegiate Athletic Association, acting in concert with a state-funded university, however, is not a state actor.[86]

It is no wonder that so many commentators have expressed bewilderment at the Supreme Court's state action jurisprudence. It has become a list of results and abstract criteria that are separated from both the facts of state action as well as underlying constitutional norms.

Courts are not really looking for state action when they decide state action issues; current doctrine allows courts both to ignore state action where it is literally present and to impute state action where it is absent. Such free-wheeling functionalism might be excused if courts were at least applying constitutional norms instead of rules. But, here too, the conventional state action doctrine comes up short. The state action doctrine purports to be a totality-of-the-circumstances test, but it routinely excludes the most relevant set of interests: those of the plaintiff and those of the government. Because state action is separated from the merits, courts do not balance values of freedom of speech, due process, or equal protection when deciding state action issues (at least not so openly), but rather are left to balance government functions, symbiotic relationships and pervasive entanglements without any grounding in constitutional text or purpose.

The most serious problem of the conventional state action doctrine is that it is an empty exercise. It does not necessarily produce wrong results. Rather, it is so malleable that no outcome is excluded. Unfortunately, the factors that lead to current case outcomes seem both artificial and incapable of principled application. We should recognize that as long as courts continue to treat state action as a threshold test, the doctrine will always have this problem. Whether the conduct of X in performing Y is fairly attributable to Z

84. Cal. Democratic Party v. Jones, 530 U.S. 567, 573 (2000).
85. *Brentwood Acad.*, 531 U.S. at 291, 298 (2001).
86. Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191–99 (1988).

will never be decided sensibly in the abstract.

### B. *The Formal Approach: What Is the Nature of the State Action? And Is It Constitutional?*

The Supreme Court has never discussed why it so often treats the state action issue prior to the merits or why it phrases the question in an all-or-nothing way. Nothing in the Constitution requires this. Moreover, the Supreme Court does not uniformly apply the state action doctrine in this manner. However there are some areas of constitutional law where the Court has taken a different course.

Consider the First Amendment principle that government may not establish religion. Certainly, the distinction between what is a government act and what is a private act is as crucial to Establishment Clause jurisprudence as it is to any other area of constitutional law. And yet, in all the years the Supreme Court has been struggling to define state action, not one of its Establishment Clause cases has involved a disputed state action issue. This is a remarkable fact, especially considering that so many difficult Establishment Clause issues involve complicated relationships between government and private actors. Indeed, Establishment Clause cases often raise the same themes found in state action cases: problems of government influence, entanglement between public and private officials, and government assistance for private causes.

The reason that state action disputes do not appear in Establishment Clause cases is that that the Supreme Court analyzes the public/private relationship as a constitutional merits issue. This does not mean that the state action doctrine does not apply to the Establishment Clause. It certainly does apply. Without a state action limitation, the Establishment Clause would prohibit any person, public or private, from establishing religion or favoring one religion over another. In Establishment Clause cases, however, courts define the elements of state action more precisely than in other areas of constitutional law. As a consequence, state action findings seldom are disputed, and the difficult questions are reserved for the constitutional merits. In Establishment Clause cases, there are no state action fictions; there is no threshold test. The only question is whether the state's actual conduct violates the Constitution.

For example, in *Santa Fe Independent School District v. Doe*,[87] the Supreme Court considered an Establishment Clause challenge to a school district policy that allowed student-led, student-initiated

87. 530 U.S. 290 (2000).

prayer at high school football games.[88] The policy allowed students to elect a representative, who, at the commencement of each home football game, could voluntarily choose to deliver a message or invocation to "solemnize" the event.[89] By a divided vote, the Supreme Court found the policy unconstitutional as an establishment of religion.[90]

The Court's method of analysis in *Santa Fe* is as noteworthy as its conclusion. If the Court had applied the conventional state action framework, the case would have turned on whether the final decisionmaker, the student representative, fairly should be considered a state actor while praying before a captive audience. If the student representative was deemed a state actor, then it would be unconstitutional for that state actor to lead a captive audience in prayer. If the student was not a state actor, then the prayer was private, and there would be nothing unconstitutional about the act. The dispositive issue, in other words, would have been the state action issue.

But neither the majority nor dissenting opinions framed the issue in this way. Instead, both opinions focused on the government's actual conduct: its policy permitting and arguably encouraging student-led prayer, not the student representative's conduct.[91] The difficult issue on which the Justices disagreed was not whether the district policy was state action (they knew it was), or whether the student's conduct was state action (they knew it was not), but whether the element of state action that was present—the district's policy—amounted to an establishment of religion. The Supreme Court has also sometimes employed a similar approach to state action in cases

88. *Id.* at 290.

89. *Id.* at 298 n.6.

90. *Id.* at 317.

91. *See id.* at 301 (quoting the question on which the Court granted certiorari: "Whether [the school district's] policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause."); *id.* at 301–17 (examining throughout whether "the policy" is constitutional). *But see id.* at 318–26 (Rehnquist, J., dissenting) (arguing the school district's policy does not violate the Establishment Clause). There is one sentence of the majority's opinion that might be interpreted as slipping into the conventional state action way of framing the issue, by focusing on the ultimate prayer, rather than the school's policy: "The delivery of such a message—over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer—is not properly characterized as 'private' speech." *Id.* at 310. But this sentence is not made in the context of a state action finding, and in any case does not appear to be necessary to the opinion. Indeed, as the Court later explains, it is not even important to the Court's holding whether a prayer has even yet occurred under the policy. *Id.* at 313–16.

involving the Takings Clause[92] and substantive due process.[93]

Two features of the formal or precise approach to state action are worth noting. First, the formal approach recognizes all types of state action. Background laws, common law rules, judicial and administrative remedies, and even government inaction are all cognizable for purposes of constitutional law.[94] This means that state action is always present, and there is no role for a threshold state action test.[95]

Second, and equally important, the formal approach recognizes only what the government has done (or not done) as state action. In other words, the mere fact that there is a component of state action in every case does not mean that every component consists of state action. Nothing is attributed to the government except what the government has actually done. If government officers stand idly by and do nothing while one man destroys the property of another, the question should be whether the government acted unconstitutionally by doing nothing, not whether the private action should be attributed to the government. A formal approach makes the definition of state action easier, but sometimes makes the merits questions more difficult.

The principal advantage of the formal approach is that it frames the difficult questions in a way that allows courts to apply the appropriate tools of interpretation. This does not make hard cases easy, as the Court's Establishment Clause cases demonstrate, but it

92. *See, e.g.*, Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831–32 (1987) (affirming government action that allows members of the public to traverse private land is a taking of private property, even though private individuals ultimately cause the injury).

93. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 70, 73 (2000) (holding that state law allowing grandparents to acquire child visitation rights unconstitutionally denies parents the fundamental right to control a child's upbringing, although grandparents are the ultimate actors).

94. While state inaction may seem to be the antithesis of state action, there are many ways in which government officials may violate the Constitution by failing to perform a constitutional duty. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), provides a famous example. *See id.* at 166–67 (explaining that an individual who is injured by an officer's failure to perform a constitutional duty has recourse in courts of law). We therefore cannot categorically exclude state inaction from constitutional scrutiny.

95. Several commentators have made this point persuasively. *See, e.g.*, Chemerinsky, *supra* note 20, at 520–26 (arguing that positivism instructs that all private infringements of rights involve state action); Cass R. Sunstein, *State Action Is Always Present*, 3 CHI. J. INT'L L. 465, 467–68 (2002) (arguing that state action is always present and that the issue is rather the applicable constitutional guarantee). Too many commentators, however, conclude from the truism that state action always exists in some form (if only because the state has failed to prevent the injury in question) that there is no legitimate role for a state action doctrine, other than a balancing function. *See infra* note 114. For a critique of balancing proposals, see *infra* notes 126–30 and accompanying text.

does make the inquiry substantially more meaningful. A formal approach to state action brings the relevant constitutional policies and normative values to bear upon the subject instead of forcing courts simply to choose outcomes based on abstract verbal criteria and raw intuition.

Consider, for example, the recent school voucher case, *Zelman v. Simmons-Harris*.[96] In that case, the Court considered whether it violated the Establishment Clause for Ohio to provide tuition aid to certain students in the Cleveland City School District to attend private schools of their choice, including religious schools.[97] By identifying the Ohio funding program as the relevant state action, the Court applied a formal state action approach.

Rather than ask whether Ohio violated the Establishment Clause by providing vouchers for religious education, however, what if the Supreme Court had attempted to resolve the case using the clumsy conventional state action fictions? The Court might have reframed the issue as whether ostensibly private religious schools should be deemed state actors based upon their acceptance of voucher funds and other nexus factors. Under this approach, if the Court had deemed the schools to be state actors, it would have followed that they cannot teach religion. On the other hand, if the Court had not deemed them to be state actors, then a participating school's ultimate act of teaching religion would be exempt from constitutional scrutiny, and the case would have been dismissed (ignoring, as the conventional state action doctrine typically does, the government's actual conduct that occurred prior to the ultimate act).

This approach to *Zelman* would have only confused the issue. Even from the perspective of the dissenters who argued that the Ohio program was unconstitutional, state action fictions were unnecessary to the result they sought.[98] There is no reason to make the state action doctrine do the substantive work that the Establishment Clause itself can do. All nine members of the Court treated *Zelman*, appropriately, as a difficult Establishment Clause case, not as a difficult state action case. The conventional state action model

96. 536 U.S. 639 (2002) (upholding Ohio school voucher program, which allowed state aid to religious schools through the private decisions of parents and students, against Establishment Clause challenge).

97. *See id.* at 643–48 (describing the Ohio program's details); *see also id.* at 649 (describing the central question of the case as "whether the Ohio program . . . has the forbidden 'effect' of advancing or inhibiting religion.").

98. *See id.* at 684–86 (Stevens, J., dissenting) (arguing that the Ohio program constitutes an establishment of religion); *id.* at 686–728 (Souter, J., dissenting) (same).

provides no advantages and tends only to transform difficult constitutional questions into more abstract ones. By identifying the component of state action in every case with precision, courts have a more accurate picture of the merits.

This is not to say that the conventional state action factors should be irrelevant to constitutional analysis. It may matter a great deal that government actors have encouraged or facilitated certain private behavior or that government and private actors have become entangled in such a way that private decisions have the appearance of official endorsement. The relevance and weight of such factors, however, are not apparent under the conventional state action formula. They become apparent only when one identifies the relevant state action literally, then considers the functional considerations as part of the constitutional claim that is made, whether that is an Establishment Clause claim, an Equal Protection Clause claim, a Speech Clause claim, or some other constitutional claim.

For example, why should we care that a private entity performs a function traditionally reserved to governments? Does not the government function test discourage states from experimenting with new forms of privatization that may be beneficial? Proponents of the conventional state action approach provide no answer except to suggest that we must have some way of distinguishing what is government and what is private other than by formal labels.[99] The distinction between government function and private function, however, is both difficult to apply and flawed in principle. The same distinction has been discredited in other areas of constitutional law.[100] There are very few things that sovereign governments do that are not also done by private entities.[101] In fact, it is possible that the only

99. Laurence H. Tribe justifies the public function test on essentially these grounds. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1705 (2d ed. 1988); *see also* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001) ("If the Fourteenth Amendment is not to be displaced . . . its ambit cannot be a simple line between States and people operating outside formally governmental organizations."). However, Professor Tribe's own example of a core government function, directing traffic at a pedestrian street crossing, *see* TRIBE, *supra*, at 1705, shows the difficulty of this distinction, for there are private universities who employ private policemen to direct automobile and pedestrian traffic on their campuses.

100. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 538–47 (1985) (discussing at length the Court's failed efforts to distinguish traditional sovereign functions from non-sovereign functions in the fields of tax immunity and regulatory immunity, and overruling earlier holdings based on that distinction).

101. Private homeowners associations, for example, impose land use regulations on their members and impose taxes in the form of assessments. *See* Robert Ellickson, *Cities*

truly exclusive governmental functions are those that governments are constitutionally obligated to perform, such as providing jury trials before inflicting criminal punishment. If a state delegates a function that it is constitutionally obligated to provide, however, the delegation itself may become the basis of a constitutional complaint. One does not need to impute state action to a private entity to hold that states cannot privatize certain functions with constitutional significance.[102] On the other hand, if a state is not constitutionally obliged to provide a particular service, such as sewer service, it should not matter if by coincidence only government entities have provided such services in the past.

Moreover, one does not need the public function test to determine who is the government in the first instance. Under a formal approach, state actors include the United States, the fifty states, and all officers, agencies, and divisions thereof. Moreover, cities are state actors because they are created with state authority by the non-unanimous consent of their subjects.[103]

To be sure, if the United States, states, and cities are able to decide by designation who qualifies as a government officer of agency for purposes of constitutional law, there must be some way to ensure that these designating governments do not use private actors to

---

*and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1521–26 (1982) (finding no functional distinction between cities and homeowners associations). Other private entities provide police services, operate streets and traffic lights, have elections, and engage in civil dispute resolution.

102. Moreover, there are likely some functions that states may constitutionally delegate to private actors but that they must ensure are constitutionally adequate, such as legal counsel for criminal defendants and health care for prisoners. Once again, there is no need to impute state action to make the state's constitutional obligation meaningful. In these circumstances, if a private actor fails to perform, we may say that *the state* has failed its constitutional duty to ensure that adequate services are provided. Whether a private actor who is delegated a constitutionally significant duty may be personally liable for errors under 42 U.S.C. § 1983 is a separate question of statutory interpretation. *Compare* Polk County v. Dodson, 454 U.S. 312, 345 (1981) (holding that public defenders do not act "under color of state law" for purposes of § 1983, although paid by the state), *with* West v. Atkins, 487 U.S. 42, 54 (1988) (holding that physician acted "under color of state law" when treating prisoner under contract with the state). However, the content of the state's constitutional obligation does not require imputing state action to private individuals.

103. As Robert Ellickson has shown by comparing private residential associations to municipalities, the defining distinction between government entities and private entities is not the set of functions that they perform (which in all outward respects may be identical), but the source of their power. Private associations are formed only by the unanimous consent of those who are bound by the association, whereas sovereign governments are formed by the non-unanimous will of the people. *See* Ellickson, *supra* note 101, at 1523–26. This distinction further explains why government associations and private coercive associations often receive differing legal treatment. *Id.* at 1523.

accomplish unconstitutional ends. As the Supreme Court's Establishment Clause cases show, it is possible to prevent abuses by applying the merits of constitutional law.[104] The same approach may just as easily work for other constitutional rights.

For example, if it is constitutionally troubling for government actors to become "entangled" with private associations who restrict the speech of their members on the basis of content, a court could explore this relationship using the values associated with the freedom of speech. Is such public versus private entanglement troubling because it could serve to mask an illegitimate government purpose to suppress speech? Is it troubling because it creates the public appearance that the government endorses the organization's speech restrictions? Or is it troubling because the relationship simply results in the suppression of too much speech? No matter what the free speech concerns, we would do better to focus on them directly and openly, asking whether the government (meaning the United States, a state, a city, or some official department thereof) has acted unconstitutionally in its relationship to the private actor who caused harm, rather than to employ some vague attribution principle to reach the desired outcome.[105] There is no added value in rephrasing the constitutional issue as whether a formally private association should be deemed a state actor.[106]

An advantage of the formal state action approach is that it allows courts to tailor the scrutiny of government actor and private actor

104. *See supra* notes 87–93 and accompanying text.

105. Indeed, in the area of Establishment Clause jurisprudence, the Supreme Court has significantly refined its entanglement test by considering its relation to the role of the Establishment Clause. *See* Agostini v. Felton, 521 U.S. 203, 232–33 (1997) (explaining the factors that are relevant to entanglement and concluding "[I]t is simplest to recognize why entanglement is significant and treat it ... as an aspect of the inquiry into a statute's effect"). It is unlikely that such a refinement would be possible under a conventional state action approach.

106. Of course, it may be that some formally private entities are so thoroughly controlled by government officers that it would be unconstitutional in all circumstances for the state to allow them to behave contrary to the same constitutional rules that bind actual government agencies. Thus, we might say, for brevity, that these entities should be "deemed" state actors. *See* Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 400 (1995) (holding that Amtrak is a state actor because it furthered government objectives, for which it was statutorily created, and was subject to government control); *see also* Krotoszynski, *supra* note 20, at 327 (discussing other government-controlled corporations). This is the only circumstance in which this deemed-a-state-actor terminology works well, and in any case, we should recognize that it is only an abbreviation for what we are really saying under the merits: government may not create private entities that in all relevant respects are controlled by the government and do the work of the government, without ensuring that those entities adhere to constitutional rules.

relationships to the particular constitutional right at stake. Rather than employ a one-size-fits-all functional test to protect a wide range of constitutional values, a formal state action doctrine examines the public versus private relationship, including functional aspects of that relationship, in relation to the text and values of specific constitutional provisions. Given the variety of provisions, normative values, and historical experiences that make up constitutional law, this flexibility and precision is essential for reasonable constitutional analysis.

Accordingly, some constitutional provisions, like the Takings and Due Process Clauses, should in general prohibit the government from authorizing private actors to do those things that are also forbidden to the government. For example, government may not authorize, without compensation, one individual to trespass permanently on the land of another, regardless of the government's intent.[107] One does not need a functional state action test to reach this result; it is the government's *authorization* for the trespass that is unconstitutional. In some cases, these clauses might even impose an affirmative duty on government officials to protect rights of life, liberty, and property against private injury.[108]

Other provisions, such as the Establishment and Speech Clauses, do not generally prevent the government from authorizing private conduct that would be forbidden to the government. Otherwise, it would be unconstitutional for the government to give a building permit for the construction of a private church. Instead, the Establishment Clause prohibits government authorizations of religious conduct only where there is an illegitimate governmental purpose or discriminatory effect behind the authorization or where the authorization creates the appearance of government endorsement.[109]

Yet another provision, the Equal Protection Clause, should inquire further into broader social effects and a historical concern for particular groups. Thus, while it may generally be constitutional for government to allow private individuals to act in a racially

107. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982).

108. *But see* Deshaney v. Winnebago County Dep't of Soc. Serv., 489 U.S. 189, 201 (1989) (holding that the Due Process Clause imposes no affirmative duty on state welfare agencies to prevent private child abuse).

109. *See, e.g.*, Allegheny County v. ACLU, 492 U.S. 573, 600–01 (1989) (holding that the county decision to allow a private Christian group to display nativity scene at courthouse was unconstitutional, as conveying a message of government religious endorsement).

discriminatory manner (something, of course, government itself may not do), and even sometimes to enforce the racist choices of private property owners, there is a limit to this principle where property rights are used systemically to block minorities from important benefits such as housing. The issue in *Shelley v. Kraemer*,[110] therefore, more accurately should have been phrased as whether the state's enforcement of privately created, racially discriminatory covenants caused such a severe disparate impact for African-Americans that such enforcement would deny equal protection of the law,[111] rather than whether the racist terms of the covenant should be attributed to the government, as if the government had authored them directly. Understood in this manner, *Shelley* is distinctively an equal protection/housing case; it does not imply that all private covenants must comply with all constitutional rules if they are to be enforceable.

Given the variety of rights and values that the Constitution protects, it is implausible to expect a generic functional state action doctrine to police adequately the relationship between government and private actors for all constitutional purposes. A formal approach to state action does not try. Instead, it serves appropriately to frame and limit the relevant constitutional question, which in every case must be decided under some specific constitutional provision.

### C. *The Anti-Doctrinal Approach: Whose Interests Weigh More?*

A third approach to state action, supported by several scholars[112] and one state court,[113] differs from both the conventional and formal approaches. Under this approach, the state action doctrine is replaced with a general balancing test. Enough commentators, in fact, have suggested that courts should give up the search for state action in favor of direct weighing of interests that we may call it the conventional scholar's solution.[114]

---

110. 334 U.S. 1 (1948). *See supra* notes 54–59 and accompanying text (discussing *Shelley*).

111. See Tushnet, *supra* note 13, at 384–91, for a discussion of how one might rephrase *Shelley*'s holding in substantive equal protection terms, rather than in conventional state action terms.

112. *See infra* note 114.

113. State v. Schmid, 423 A.2d 615 (N.J. 1980). *See* discussion *infra* note 119 and accompanying text.

114. Mark Tushnet has referred to the balancing approach as the "conventional analysis" of scholars, which they "are almost unanimous in accepting." *See* Tushnet, *supra* note 13, at 389–91. Notable examples include: Chemerinsky, *supra* note 20, *passim*; Robert J. Glennon, Jr. & John E. Nowak, *A Functional Analysis of the Fourteenth*

Erwin Chemerinsky is the strongest proponent of the idea that courts should abolish the state action doctrine.[115] According to Chemerinsky, the state action doctrine serves to shield private wrongdoers who violate the rights of innocent victims for no legitimate reason.[116] To the extent that it is important to preserve a sphere of individual autonomy for some private actors, courts would do better to balance that interest directly against the rights of victims, rather than use arbitrary state action criteria to protect many wrongdoers.[117] By eliminating the state action limitation, Chemerinsky suggests, "the Constitution would be viewed as a code of social morals, not just of governmental conduct, bestowing individual rights that no entity, public or private, could infringe without a compelling justification."[118]

Most courts have consistently rejected this approach by adhering to some form of the state action doctrine. One exception, however, is the New Jersey Supreme Court, which has applied this very balancing approach for purposes of state constitutional law. In *State v. Schmid*,[119] the court considered whether the speech clause of the New Jersey State Constitution required Princeton University to allow the public to enter its campus and engage in political speech. The court held first that the state action doctrine does not apply to the state constitution's freedom of speech guarantee; instead, the state constitution prohibits public or private persons from unreasonably restricting the speech of others.[120] Accordingly, whether the public may engage in expressive activities on Princeton's private property should be determined by balancing the owner's property rights against the public's right of free expression.[121] Applying the test, the court found that because Princeton had opened its campus to the

---

*Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221, 259–61 (1976); Harold W. Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208, 208–09, 221 (1957); Jerre S. Williams, *The Twilight of State Action*, 41 TEX. L. REV. 347, 389–90 (1963). While some commentators do not phrase their proposed solution in terms of abolishing the state action concept, *see, e.g.*, Glennon & Nowak, *supra*, at 261, their analysis is similar to the others in that they would interpret the Constitution to proscribe some private behavior and use a balancing test to determine when that is, avoiding both conventional state action fictions and formal state action limitations. *See id.* at 261.

115. *See generally* Chemerinsky, *supra* note 20, at 550–57.
116. *Id.* at 540.
117. *Id.* at 536–42.
118. *Id.* at 550.
119. 423 A.2d 615 (N.J. 1980).
120. *Id.* at 628.
121. *Id.* at 629–30.

public in a way that should be conducive to public dialogue and had made the pursuit of knowledge its mission, the balance favored the public's right to use the private campus to spread its political ideas.[122]

This post-modernist rejection of the state action doctrine, supported by Chemerinsky and the New Jersey Supreme Court, shares some advantages with the formal approach. It avoids the artificial distinctions of the conventional state action doctrine and its tendency to hide the underlying values that matter in state action decisions. The balancing approach is therefore more open than the conventional approach. By focusing a court's inquiry on the consequences of its decision for the parties, a balancing approach may do a better job of protecting some societal interests that are overlooked by a blind application of abstract state action criteria. For example, the balancing approach might recognize that private property rights—particularly where they are divided unevenly in society—have the potential to deprive some people, for all practical purposes, of their freedom of speech, and that private property rules can be just as oppressive as the government's own statutes restricting speech.

The balancing approach, as its proponents point out, is also sufficiently flexible that in theory it need not lead to extreme results.[123] This is because a private actor's interests in being free to violate constitutional norms are part of the balancing test. Many would be legitimately troubled, for example, if the Constitution were interpreted as prohibiting any private homeowner from discriminating on the basis of religion, race, or speech viewpoint in deciding whom to invite for dinner. If application of a particular constitutional rule to a private person would interfere with that person's freedom of association,[124] however, a court could hold that the freedom of association outweighs the other constitutional interests at stake. The same kind of answer may be given in any case where the application of a constitutional rule to a private person would seem to cause unjust results.[125]

Notwithstanding its openness and flexibility, however, the balancing approach is an unwise solution to current state action

122. *Id.* at 630–32.

123. *See* Chemerinsky, *supra* note 20, at 538.

124. *Cf.* Hurley v. Irish-Amer. Gay, Lesbian and Bisexual Group, 515 U.S. 557, 559 (1995) (holding that private parade sponsor has a federal constitutional right to exclude a group on the basis of viewpoint from participation in the parade even though state law would prohibit the sponsor's discrimination).

125. *See* Chemerinsky, *supra* note 20, at 538.

problems. It does much more than open the decisionmaking process of courts to scrutiny. It also applies some far-reaching assumptions about the meaning of constitutional rights and the role of courts in enforcing those rights. Among these assumptions are that courts generally should enforce constitutional rights by balancing the interests of affected individuals; that private parties ideally should adhere to the same standards of conduct as governments (absent some convincing reason to the contrary); and, notably, that the judiciary has the power and responsibility to impose constitutional standards of conduct on private parties.

These assumptions are not warranted, at least not as generalizations for all of constitutional law. The enthusiasm of scholars to suggest balancing as a solution to difficult state action questions tends to overlook other tools of interpretation that should come first, as well as structural considerations that limit the power of courts. If we understand the Constitution as law, and not merely as a tool of judicial power, the role of balancing is at most secondary. The question courts should ask in the first instance is not whether it would increase social utility for a federal court to prohibit X from harming Y, but rather, whether it is unconstitutional for the government to allow X to harm Y. This might lead to a balancing resolution, or it might not, but it is a mistake for courts to jump straight to balancing without first considering the legal meaning of the constitutional right in question. The balancing approach, in effect, asks courts to do precisely this.

The presumption that private parties are subject to constitutional norms absent some compelling reason to the contrary is especially dangerous.[126] As a matter of constitutional interpretation, this presumption is untenable, unless we revise the traditional understandings of many core constitutional rights. Not only are the Constitution's provisions explicitly written as restraints on government power, they are designed to prevent evils that for the most part are distinctly governmental in nature.[127]

126. Some scholars, including Chemerinsky, would have courts begin with this as the presumptive rule and ask whether there are adequate reasons to exempt a private individual's conduct. *See, e.g.*, *id.* at 550 (arguing that a "compelling justification" should be required to exempt private actors from constitutional standards); Black, *supra* note 20, at 100–03 (supporting prima facie rule that private actors are bound by constitutional norms); Black, *supra* note 20, at 94–95 (discussing other commentators).

127. *See* Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144, 146–47 (2003) (arguing that the purpose of rights is not to protect individuals from coercion, but rather to protect individuals from coercion by the wrong type of institution).

Take government censorship of speech. What is most troubling about government speech censorship is not that a speaker's message is subject to viewpoint discrimination per se. The Speech Clause, in fact, presupposes that private listeners and distributors of information, such as bookstores and newspapers, must have the freedom to make viewpoint-based decisions that will affect the ability of speakers to spread their message.[128] The constitutional norm against censorship is linked to the government's special role as a sovereign. The Speech Clause, in effect, provides that government should not restrict speech on the basis of disagreement with the speaker's message *precisely so that* private parties will have the freedom to make their own viewpoint-based and content-based evaluations.[129] Therefore, to speak of a private person violating another's freedom of speech by engaging in viewpoint-based censorship (even as a mere presumption) is to change, and in a sense turn upside down, the core meaning of the freedom of speech.[130]

Or, imagine a dispute under the Establishment Clause between a person who builds a religious monument on private land and a neighbor who finds the monument offensive. In a balancing regime, a court would "eliminate completely the state action inquiry and, in each case, ask directly whose liberty should be upheld, the violator's or the victim's."[131] As applied to an Establishment Clause claim, however, this test is highly misleading. The primary flaw is not that religious adherents have a constitutional right to the free exercise of religion (the balancing test is capable of recognizing this), but more fundamentally that the Establishment Clause is not concerned with

---

128. *See, e.g.*, Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 254–58 (1974) (upholding newspaper's right to refuse to publish a response by someone whose reputation is questioned in an earlier article).

129. For example, in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000), the Court explained:

> When a student first encounters our free speech jurisprudence, he or she might think it is influenced by the philosophy that one idea is as good as any other, and that in art and literature objective standards of style, taste, decorum, beauty, and esthetics are deemed by the Constitution to be inappropriate, indeed unattainable. Quite the opposite is true .... What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.

*Id.* at 818.

130. Of course, private censorship may cause real harm, but the harm is qualitatively different from that of government censorship. An author may lose money or be offended if bookstores choose not to carry a book because of its content, but the author is likely to be outraged and feel civilly wronged if the government bans the book from stores.

131. Chemerinsky, *supra* note 20, at 537.

private religious establishments. By proposing that courts balance two supposed liberty interests—one person's interest in religious worship, and another person's interest in not being exposed to someone else's religious worship—when one of those interests is not grounded in the Constitution, the balancing approach invites manipulation and devaluation of actual constitutional rights. It not only purports to place weight on interests that should be irrelevant to constitutional analysis (and thus, should more properly be a subject for zoning authorities rather than federal courts), but may also divert attention away from government action that is relevant.[132]

The New Jersey Supreme Court may have made this very mistake in *Schmid*. By upholding the public's right to use Princeton's campus as a public forum, the court enhanced the rights of some people. But two aspects of the decision are troubling from the perspective of private liberty (interests which the court neglected to balance). First, the court substituted its own judgment for that of Princeton University in deciding how the University's educational mission is best accomplished on its campus—a questionable intrusion into academic and institutional freedom.[133] Second, the court gave no consideration to the University's own freedom of speech interests, including its right to participate in the search for knowledge free of government-imposed speech rules. The court only valued Princeton's interests as a property owner, not as a First Amendment speaker in its own right.[134] The balancing test was therefore slanted towards error. If the primary value of the freedom of speech is to prevent government-imposed orthodoxy,[135] *Schmid* has it backwards.[136] It

132. Suppose, in the example given, that the city planning authority engaged in religious discrimination in authorizing or promoting the particular religious monument. The private interests of two property owners may be no different, but the legal authorization for the monument would be unconstitutional because of the government's discriminatory actions. A balancing approach would not necessarily recognize the significance of how *the government* treats others in like circumstances.

133. State v. Schmid, 423 A.2d. 615, 631 (N.J. 1980) (finding that the defendant's speech was not incompatible with the University's professed educational goals); *id.* at 632 (finding unreasonable a University's rule requiring prior approval to disseminate materials on campus).

134. As Julian Eule and Jonathan Varat remark in criticism of *Schmid*: "The notion that a university might embrace free speech but give it a different cast—and that this very process of definition might itself be protected by the First Amendment—seems never to have occurred to the New Jersey court." Eule & Varat, *supra* note 13, at 1577–18 (footnote omitted).

135. As Justice Jackson famously wrote: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ." W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

holds, in essence, that to engage in higher education, a private institution must follow the model of government universities with regard to campus speech, or at least have a convincing reason for choosing to deviate.

Even if one agrees with the outcome in *Schmid*, the case illustrates a danger of abandoning the state action doctrine. Interest balancing is an inherently subjective process,[137] particularly where one supposed constitutional right is "weighed" against another. If courts become too comfortable with this method, it may not always serve to prevent tyranny; rather, it may result in a new form of tyranny. It is far safer for courts to recognize the Constitution solely as a limitation and authorization of government power, not as grounds for a judicially prescribed code of social conduct.

### *D. Summary*

The state action doctrine is not so much a boundary as it is a mode of constitutional analysis. The three modes of analysis discussed here—the conventional approach, the formal approach, and the balancing approach—are all able to prevent conduct that violates constitutional norms. All three are also flexible enough to allow room for individual autonomy. The primary difference between these approaches is in the questions that they ask prior to reaching a conclusion. The conventional approach asks, "is there state action?," but must take a flexible view of what counts as state action. The formal approach asks, "what is the nature of the state action and is it constitutional?" The balancing approach disregards the state action inquiry altogether and asks instead, "whose interest weighs more?"

Of the three approaches, the formal approach is the most likely to lead to well-reasoned analysis and accurate constitutional results. It is also the most neglected mode of state action analysis, both in cases and commentary, perhaps because it is so simple. It does not require the problematic fictions of the conventional state action doctrine. It also avoids the distortions and dangerous presuppositions of the balancing approach. It is more faithful than either of these alternatives to the concept that the Constitution only restrains government power and leaves to Congress and the states the primary authority to regulate private conduct.

---

136. *See* Eule & Varat, *supra* note 13, at 1575–80, 1617–34 (critiquing *Schmid* and similar intrusions into private association freedoms on anti-orthodoxy grounds).

137. *See* Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 788–90 (2001) (describing the misleading nature of the balancing metaphor in First Amendment analysis).

## II. HOW STATE ACTION AFFECTS THE MERITS: THE PUBLIC FORUM EXAMPLE

One reason that the courts may feel compelled to apply a flexible state action doctrine may be that they are assuming a fixed understanding of certain substantive constitutional rights. To apply a formal state action doctrine across the full range of constitutional law without also reexamining the merits of constitutional law would, in fact, cause serious problems. This may indicate, however, that courts are distorting state action doctrine to compensate for other problems in constitutional law. If courts would consider reexamining the substantive merits of constitutional law, the formal approach to state action doctrine would become both feasible and useful. Indeed, its primary value might be to improve the way we understand and discuss basic rights such as the freedom of speech, equal protection, and due process.

This Section will explore this aspect of state action doctrine by examining in greater depth the problem raised in the introduction: the freedom of speech in government-owned and privately owned places.[138] I conclude that the freedom of speech public forum doctrine is arguably both overly strict as applied to government property and under-inclusive as applied to private property and that the conventional state action doctrine is responsible for both problems. A formal approach to state action, by contrast, suggests a uniform flexible standard for both public-property and private-property speech restrictions.

### *A. The Public Forum Doctrine's Relationship to State Action*

Under current First Amendment interpretation, whether a person has a right to use government-owned land for freedom of speech purposes depends largely upon how the location is classified. The Supreme Court has identified several classifications of government property for this purpose. These include the traditional public forum (in general, sidewalks and parks), the designated public forum, and the nonpublic forum.[139] In a traditional or designated

138. *See supra* notes 1–12 and accompanying text.

139. *See* Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 676–78 (1998); Int'l Soc'y of Krishna Consciousness v. Lee, 505 U.S. 672, 678–79 (1992). In *Forbes*, the Court also suggested a fourth category of analysis—where the resource is "not a forum at all." 523 U.S. at 678. The defining characteristic of this category, however, does not appear to be geographically based, but rather based on the type of government decision at issue. *See id.* at 674–75 (noting that public broadcasting editorial decisions are not generally subject to forum scrutiny, although political candidate debates are an exception).

public forum, the government bears a heavy burden to justify restrictions on speech, even when there are other nearby locations where speakers may effectively engage the public.[140] In a nonpublic forum, speech restrictions are easier to justify, but must still be reasonable and viewpoint-neutral.[141]

How to distinguish between a traditional public forum—where heightened scrutiny applies—and a nonpublic forum—where lower scrutiny applies—has proven to be a difficult problem in the law, both practically and theoretically. Cases suggest that a traditional public forum is identified by objective characteristics not solely by government intent.[142] But what kinds of objective characteristics define a traditional public forum, and why should these characteristics matter for purposes of measuring a person's freedom of speech? Difficult forum classification cases have included sidewalks serving specific buildings,[143] common areas of airports,[144] and pedestrian plazas with distinctive architectural characteristics.[145]

Some commentators who have explored forum classification problems have concluded that the distinction between traditional public forums and nonpublic forums is unsupportable.[146] Some, such

140. *See Lee*, 505 U.S. at 678 (explaining that a restriction on speech in a public forum is subject to the "highest scrutiny" and must be "narrowly drawn to achieve a compelling state interest").

141. *Id.* at 685.

142. *See, e.g.*, United States v. Grace, 461 U.S. 171, 180 (1983) (" 'Congress . . . may not by its own *ipse dixit* destroy the "public forum" status of streets and parks which have historically been public forums . . . .' " (quoting U.S. Postal Serv. v. Greenburgh Civic Assoc., 453 U.S. 114, 133 (1981))); *see also* United States. v. Kokinda, 497 U.S. 720, 737–38 (1990) (Kennedy, J., concurring) ("[W]e must recognize that certain objective characteristics of Government property and its customary use by the public may control the case.").

143. *Compare Kokinda*, 497 U.S. at 730 (plurality opinion) (finding that a postal sidewalk is a nonpublic forum), *with id.* at 737–38 (Kennedy, J., concurring) (suggesting that a postal sidewalk might be a traditional public forum under an objective test), *and id.* at 742–43 (Brennan, J., dissenting) (stating that postal sidewalk is a traditional public forum).

144. *Compare Lee*, 505 U.S. at 680–81 (finding that an airport is a nonpublic forum), *with id.* at 693–96 (Kennedy, J., concurring) (stating that an airport is a traditional public forum).

145. *Compare* First Unitarian Church of Salt Lake City v. Salt Lake City Corp., 308 F.3d 1114, 1124 (10th Cir. 2002) (ruling that a public plaza is a public forum, regardless of government intent), *with* Hotel Employees & Rest. Employees Union v. City of N.Y. Dept. of Parks & Recreation, 311 F.3d 534, 553 (2d Cir. 2002) (finding that a public plaza is a either a limited public forum or nonpublic forum), *and* Hawkins v. City of Denver, 170 F.3d 1281 (10th Cir. 1999) (holding that a pedestrian area at the center of a performing arts complex is not a public forum).

146. For criticisms of the modern public forum doctrine as formalistic, see Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and*

as Geoffrey Stone, propose instead that all government-property speech restrictions should be subject to a uniform heightened standard that asks whether private speech would be compatible with the government's normal use of the property.[147] Why should the First Amendment's scrutiny of time, place, and manner regulations be relaxed, they say, simply because the location in question does not look or function like a traditional sidewalk or park, if it would be equally compatible for public speech?

Commentators who critique the Supreme Court's forum classification approach, however, often define the problem narrowly: what level of scrutiny should apply to speech regulations affecting government property? The general debate about public and nonpublic forums, in other words, has occurred within a framework that assumes that only government property would be subject to whatever uniform rule is imposed—that the First Amendment generally provides no right of access to the private property of another for purposes of communicating a message. This assumption is consistent with current state action cases. Nevertheless, it has an effect on the arguments concerning the public forum doctrine. It is easier to argue persuasively for heightened scrutiny of speech regulations affecting government property if this is the only domain where such scrutiny would apply. Moreover, if private property speech restrictions are pervasive and cannot be challenged under the First Amendment, this raises the stakes for speech on government property, strengthening the case for why courts should jealously protect speech in that domain.[148]

Taking a different approach, there are other scholars such as

---

*Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1226–35 (1984); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1758–64 (1987); Keith Werhan, *The Supreme Court's Public Forum Doctrine and the Return of Formalism*, 7 CARDOZO L. REV. 335, 399–410 (1986).

147. *See* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 94 (1987); Geoffrey R. Stone, *Forum Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233, 253–61 (1971). For similar proposals, see Mark Cordes, *Property and the First Amendment*, 31 U. RICH. L. REV. 1, 68–69 (1997) (proposing a uniform compatibility standard); Werhan, *supra* note 146, at 410–26 (proposing a uniform functional standard); see also Farber & Nowak, *supra* note 146, at 1235–45 (proposing a uniform balancing test based on the nature of the restraint). The Supreme Court once suggested a uniform compatibility standard for government property speech restrictions in *Grayned v. Rockford*, 408 U.S. 104, 116–17 (1972), but more recent decisions have entrenched the forum-classification approach. *See supra* note 139 and accompanying text.

148. *See* Stone, *Content-Neutral Restrictions*, *supra* note 147, at 88 (discussing practical importance of government property to the freedom of speech, especially since private owners often do not make their property generally available for speech).

Curtis Burger who argue that the freedom of speech should apply more expansively to privately owned locations that bear the characteristics of traditional public forums, such as regional shopping malls and private university campuses.[149] They would, in other words, challenge the conventional state action doctrine.

Interestingly, these are not the same scholars who would replace the public forum doctrine with a uniform time, place, and manner standard, although both groups seek to strengthen the freedom of speech. There are both practical and theoretical reasons why these positions do not coalesce. First, a rule that would subject all property—public and private—to a uniform heightened free speech standard, regardless of public forum characteristics, would be intolerably broad. Second, those such as Burger who argue that speech restrictions should apply more expansively to some privately owned locations emphasize the objective similarities between traditional public forums and comparable locations that are privately owned.[150] To make this comparison, they affirmatively rely on the kinds of objective criteria (such as whether the location serves as a center of commerce or has multiple points of entry) that those who criticize the public forum doctrine argue should not affect the standard of review.

Thus, in deciding how to analyze the public forum doctrine, one must make an initial choice. By limiting time, place, and manner scrutiny to government property only, it is easier to argue for a more speech-protective standard in that domain. Alternatively, by limiting heightened scrutiny to locations that serve objectively as traditional public forums, it is easier to argue that privately owned public forums such as shopping malls should also be included. Accordingly, one group argues in the interest of free speech that there is something special about government property;[151] another group argues in the interest of free speech that there is nothing special about government

149. *See* Curtis J. Berger, Pruneyard *Revisited: Political Activity on Private Lands*, 66 N.Y.U. L. REV. 633, 654–59 (1991); *see also* Erwin Chemerinsky, *More Speech is Better*, 45 UCLA L. REV. 1635 (1998) (arguing that free speech interests of individuals are generally more important than the speech interests of private institutions); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 1008–10 (1982) (arguing that the property rights associated with an expansive commercial setting are outweighed by the personal right of freedom of speech); Sunstein, *supra* note 13, at 294–95 (promoting free speech around areas such as "mailboxes, airports, train stations, [and] broadcasting stations").

150. *See* Berger, *supra* note 149, at 654–55.

151. Cordes, *supra* note 147, at 27–28; Stone, *Content-Neutral Restrictions*, *supra* note 147, at 88–94.

property.[152]

This division shows that there is a probable trade-off between the stringency of our public forum protections and the range in which those protections apply. It is likely that courts appreciate this balance, even in applying and formulating existing First Amendment standards. If so, then the content of our public forum doctrine, and the arguments concerning it, depend directly upon how one understands and applies the state action doctrine. Integral to the question of what type of First Amendment standard should protect speech on government-owned land is the question of whether this standard should also apply to the domain of private property.

### *B. Speech Boundaries Under the Traditional State Action Approach*

The starting point of the traditional state action doctrine is simple and talismanic. There is no state action when government punishes a trespasser for speaking on private property without permission from the owner, unless the owner operates a company town.[153] Of course, this is a fiction,[154] but it is a fiction deemed necessary for the protection of individual autonomy and private property values.[155]

The current state action doctrine's broad exemption of private property for constitutional purposes makes the argument for heightened speech protection on government property stronger. If government-owned places are the only locations to which the First Amendment public forum doctrine applies, it is even more crucial to form a policy perspective that jealously guards speech in this domain so there remain adequate avenues for public expression. Moreover, this geographic limitation allows courts to strengthen the public forum doctrine while doing less damage to competing social interests (such as the value of privacy, autonomy, and variety in land use), since the doctrine only applies to government-owned places.[156]

---

152. Berger, *supra* note 149, at 655–59 (concluding that public or private ownership is irrelevant to whether a location has the traditional characteristics of a public forum).

153. Hudgens v. NLRB, 424 U.S. 507, 513–17 (1976).

154. As Jeremy Bentham wrote, "Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases." Jeremy Bentham, THEORY OF LEGISLATION 113 (Hildreth trans., 1871).

155. *See, e.g.*, Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n, 29 P.3d 797, 808, 811 (Cal. 2001) (holding that a tenants association had no state constitutional right to distribute unsolicited newsletter); *see also supra* Part I.A.1.

156. See *supra* notes 142–46 and accompanying text for a discussion of the tension between those who would strengthen free speech by expanding its protections evenly to private property and those who would strengthen free speech by emphasizing that there is

In the long run, however, this heightened protection may not be worth much. The current approach not only leads to poor analysis but also creates harmful incentives that may ultimately undermine the public forum doctrine. A serious problem arises because the boundary between public and private property is fully within the government's control and is generally shifting toward privatization.[157]

The sharp contrast between constitutional treatment of public property and private property creates an incentive for states and cities (and private parties who engage in land transactions with them) to privatize areas such as sidewalks, plazas, and shopping centers as a way of avoiding more stringent First Amendment scrutiny. For example, Salt Lake City, Utah, recently vacated a public pedestrian easement in a downtown plaza after the Tenth Circuit held that the presence of the government-owned easement required that the plaza be treated as a public forum.[158] Other cities have taken similar steps towards privatization to avoid the public forum doctrine.[159] When the law encourages governments to privatize in this manner, it does not further the freedom of speech and often leads to the loss of other public advantages associated with government ownership.[160]

Perhaps even more significantly, the dichotomy between public and private property skews private market decisions and the character of new developments. If people prefer to shop, work, or obtain medical services in places where they are not confronted by

---

something constitutionally special about government property.

157. See generally Franzese, *supra* note 12 (describing the trend toward governmental privatization).

158. *See* May, *supra* note 2. The LDS Church, which purchased and developed the plaza property, compensated the city for the easement. *Id.* As a result of the court's decision, however, the city and church lost the advantages of their original bargain, which was to have a plaza subject to a public easement while at the same time allowing the church the benefit of controlling the speech environment. *Id.* Because the advantages of private control were paramount, leading to a second transaction, the court's ruling ultimately failed to further the freedom of speech on the plaza. Rather, the ruling only caused the elimination of a valuable public right of way. *Id.*

159. For example, Ann Arbor, Michigan, tried to vacate a public sidewalk easement near an abortion clinic so the clinic could bar anti-abortion demonstrators, although a court ultimately found the action unconstitutional. *See* Thomason v. Jernigan, 770 F. Supp. 1195, 1203 (E.D. Mich. 1991). Similarly, Richmond, Virginia "privatized" the sidewalks around a public housing complex by transferring title to a housing authority, which in turn placed signs on the sidewalk stating that the property is private and that unauthorized persons are not allowed. *See* Virginia v. Hicks, 539 U.S. 113, 115–18 (2003).

160. For Salt Lake City pedestrians, this meant the loss of a right-of-way that they once enjoyed over Main Street Plaza, something that was originally part of the bargain between the City and the LDS Church, that was presumably important to some residents. *See* May, *supra* note 2. For others, this might mean the loss of public regulatory control and access relating to sidewalks, parks, shopping areas, and transportation centers.

political or religious demonstrators, their private consumer decisions will reflect this. This encourages the development of private shopping centers, office parks, and medical clinics that are surrounded by private sidewalks and parking lots, whereon public speech is generally forbidden. Because current law does not allow cities to impose similar restraints on city sidewalks, this may contribute to the public abandonment of downtown city areas that once served as primary First Amendment forums.

In the end, the dichotomy is likely to harm the freedom of speech. A robust public forum doctrine that protects the public's right to demonstrate on government-owned sidewalks is of little value if one lives in a city that does not own any sidewalks except ones that are usually empty. In an increasing number of communities, particularly suburbs, the real public gathering places are now privately owned. Ironically, the strictness of our public forum doctrine as applied to government property, coupled with the virtual absence of First Amendment scrutiny for private property, encourages this type of development.

Finally, the emphasis that current law places on whether property is government-owned or privately owned leads to arbitrariness and inequality. It creates radically different speech environments in different communities, based solely on the way property is allocated. This hurts potential speakers in heavily privatized environments; it also hurts those who are affected by harassing speakers in other environments. In one community, say a typical suburb, a woman may drive to an abortion clinic parking lot, enter the clinic, and leave the same way, without even noticing any anti-abortion protesters because there are no public sidewalks near enough to be useful for protesters.[161] In another community, say a traditional urban environment, a woman may have no option but to enter a clinic directly from a public sidewalk where she is likely to be confronted at close range by hurtful and potentially harassing speech.[162] The difference in the two women's experiences is stark, and it is solely a function of the false distinction between government

161. *See* State v. Scholberg, 412 N.W.2d 339, 344 (Minn. Ct. App. 1987) (ruling that anti-abortion protesters have no right to demonstrate on a private sidewalk surrounding an abortion clinic, even where there is no other way to communicate to the intended audience).

162. *See* Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 377–80 (1996) (holding an injunction requiring abortion protestors on public property to remain fifteen feet from patients entering or leaving a clinic unconstitutional, even where law enforcement officers found it difficult to prevent illegal harassment, such as grabbing, yelling, and spitting).

property and private property speech rights.

No matter where one thinks the ideal balance lies between speech and privacy in a free society, the traditional state action approach—with its categorical emphasis on property allocation—does a poor job of achieving such balance consistently across time and across varying communities.

### C. *Public Speech Under a Formal State Action Approach*

A formal approach to state action begins by recognizing that property law is a form of state action. If the police arrest and remove a person from private land for attempting to demonstrate against the owner's wishes, the government is, in fact, acting in a way that restrains speech.

At the same time, a formal approach would not impute a private owner's motives or policies directly to the government. If a speaker is expelled because the private owner of that place does not appreciate the person's speech, one should not analyze the case as if the government's purpose is to suppress speech, even if that is the private owner's purpose. Rather, the relevant government action consists of enforcing a general system of land allocation, whereby private owners are allowed to exclude others from defined locations based on their own private preferences.[163] The question for the merits becomes whether this form of state action is consistent with the freedom of speech.

Examining the component of state action closely, and distinguishing it from the component of private action, we might view private property law as a delegation of power.[164] It is comparable to many other government delegations that place private individuals and entities in the position of controlling the speech of others. The federal government allows certain private corporations to control the use of domain names on the Internet, including the power to refuse domain names that are offensive;[165] it allows a private entity to decide who may use the word "Olympic" for promotional or commercial

163. *See supra* notes 148–52 and accompanying text.

164. For a comparable method of analyzing the constitutionality of regulatory and legislative programs creating public-private partnerships, *see* Gillian E. Metzger, *Privatization as Delegation* 103 COLUM. L. REV. 1367 *passim* (2003).

165. For several years, the government allowed Network Solutions, Inc. exclusive control over private domain name registration. *See* Island Online, Inc. v. Network Solutions, Inc., 119 F. Supp. 2d 289, 292–95 (E.D.N.Y. 2000) (describing background of government's cooperative agreement with Network Solutions, Inc. and rejecting a First Amendment challenge to its policy against obscene domain names). The registration of domain names is now managed by multiple private corporations. *Id.* at 294.

purposes;[166] it allows cable television operators to ban indecent programming on leased-access channels;[167] and it allows copyright owners to prohibit the duplication or public performance of certain creative works.[168]

In each of these contexts, the government has affirmatively created a system that allows private parties to restrict the speech of others. The resulting speech restrictions are often substantial, and are enforceable by law. In most cases, the Constitution would not allow the government to impose such speech restrictions directly.[169] Because the restrictions arise through a process of private decisionmaking, however, the state's actions are likely constitutional.

Why might the presence of a private intermediary matter for purposes of the First Amendment, if a legal system created by state action still ultimately restricts speech? A reasonable answer might have to do with government's purposes for its actions in relation to the content of the speech that is excluded. Courts have long recognized that government actions that single out speech on the basis of content raise heightened First Amendment concerns;[170] such censoring laws are subject to strict scrutiny.[171] By contrast, where government acts in a manner that is neutral with respect to the content of speech, or in a way that is designed to facilitate speech in

166. 36 U.S.C. § 220506 (Supp. 2000); *see also* S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 541 (1987) (upholding the restriction on use of the word "Olympic" against freedom of speech challenge).

167. 47 U.S.C. § 532(h) (1994); *see also* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 737–53 (1996) (upholding private delegation to cable operators concerning leased-access channels).

168. 17 U.S.C. § 106 (2000).

169. In *Denver Area*, for example, the Court held unconstitutional one provision of the Cable Television Consumer Protection and Competition Act requiring operators to segregate indecent programming that they chose not to prohibit. 518 U.S. at 753–60. The Court found this provision to distinguishable from other delegation provisions because it "does not simply permit, but rather requires, cable system operators to restrict speech." *Id.* at 753.

170. *See, e.g.*, Ashcroft v. ACLU, 124 S. Ct. 2787, 2788 (2004) ("Content-based regulations . . . have the constant potential to be a repressive force in the lives and thoughts of a free people."); Police Dept. of Chi. v. Moseley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."). For a discussion of the reasons supporting this distinction, see Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 194–97 (1983) (stating that the Supreme Court applies a "more stringent standard to content-based than to content-neutral restrictions").

171. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000) (declaring that content-based regulations must be "narrowly tailored to promote a compelling Government interest"); *id.* at 818 ("It is rare that a regulation restricting speech because of its content will ever be permissible.").

general, a lower level of scrutiny applies.[172] For the most part, laws that delegate to private parties the authority to control speech within certain domains are content-neutral, at least insofar as the government's role is concerned; in many cases, such laws even serve important speech-promoting functions.

Within this framework, we can explain, without resorting to state action fictions, why the general law of private property is consistent with the freedom of speech. The government has many reasons that are both compelling and content-neutral for recognizing and enforcing private property rights. Private property is the most effective way we know for society to allocate resources efficiently, to provide incentives for production, and to provide for the private use and enjoyment of things and places. The law of private property even serves the same liberal values that the freedom of speech serves.[173] It is a vehicle for individual autonomy and self-expression. For many people, the freedom to exercise private dominion over certain things and places, much like the freedom of private thought and imagination, is an aspect of personal identity.[174]

Indeed, the general law of property—including the right of private owners to exclude others on the basis of viewpoint—is not only neutral with respect to speech content, it is an integral part of the freedom of speech. For freedom of speech to flourish, the government must allow private individuals a way to use certain resources such as printing presses, assembly halls, broadcast facilities,

---

172. *See, e.g.*, Thomas v. Chi. Park Dist., 534 U.S. 316, 323–24 (2002) (stating that a time, place, or manner regulation does not require the same procedural safeguards as subject matter censorship). Similarly, in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), the Court explained that:

> Our cases make clear . . . that even in a public forum the government may impose reasonable restrictions on the time, place or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."

*Id.* at 791 (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

173. We might even say, as James Madison did, that the freedom of speech is a species of property right grounded in natural law. James Madison, *Property*, *in* 14 THE PAPERS OF JAMES MADISON 266, 266 (Robert A. Rutland et al. eds., 1983). According to this view, property cannot be in conflict with the freedom of speech, because one of its components is the freedom of speech. *Id.*; *see also* John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, *passim* (1996) (expounding on the Madisonian view that the freedom of speech is a property right and its implications for modern law).

174. For a powerful development of the personhood theory of property, see generally Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

and sidewalks for the communication of their ideas. The government must even allow those speakers to sometimes use those resources exclusively.[175] Otherwise, the noise and clutter of too many messages in one place would weaken everyone's ability to communicate. The law of private property enables the orderly and exclusive use of valuable communicative resources, and accordingly serves a crucial First Amendment function. As Jed Rubenfeld has written, "Turning all private property—homes, private schools, newspapers, movie theatres—into viewpoint-neutral free speech zones would be the realization ... not of a First Amendment dream, but of a First Amendment nightmare."[176]

This explains why, under a formal state action approach, the general law of private property is consistent with the First Amendment, even though it is a form of state action that substantially restricts speech. One need not resort to state action fictions to save private property from the First Amendment. Indeed, it is difficult to imagine how the freedom of speech could meaningfully exist without the state's willingness to enforce actively rules of private property.

At the same time, reconciling private property and the First Amendment in this manner has important implications for the way we analyze both public and private property speech restrictions. Note that it is not the formal label of private property that justifies most private-property speech restrictions under the First Amendment. Nor is it a general conclusion that one person's property "rights" must outweigh another person's freedom of speech.[177] Instead, the validity of private property law has to do with its structure—allowing private decisionmakers, rather than the government, to control speech in certain contexts—and the reasons for which the government recognizes such private rights, which in most cases are legitimate and content-neutral.

This explanation for property means two things. First, if the government acts with respect to private property in a way that is not

175. *See, e.g.*, Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 254–55 (1974) (holding that the state may not force newspapers to print replies to articles it publishes by private individuals whose character is questioned).

176. Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 28 (2002).

177. This is how the New Jersey Supreme Court treated the question in *Schmid*, balancing one owner's supposed property rights against the free speech interests of others. *See* State v. Schmid, 423 A.2d 615, 629–30 (N.J. 1980). By contrast, under the formal state action approach, the proper balancing question would compare the government's interests as a regulator and enforcer of private property against the speaker's interest in free expression.

content-neutral or that does not satisfy whatever lower level of scrutiny applies to content-neutral speech regulations, then the action might still be unconstitutional. Private property is not categorically exempt from First Amendment scrutiny. Second, if there is nothing special about the status of private property that justifies exempting it, then there is also nothing special about government property that justifies heightened First Amendment scrutiny. It is entirely possible, given the reasons why private property exclusions are usually valid, that many regulations affecting speech on government property ought also to be considered valid. When government restricts speech on public property in ways that are content-neutral (either through direct regulation or by delegating to private decisionmakers the authority to restrict speech)[178] the same kind of deference that justifies private property is appropriate.

A formal approach to state action therefore suggests that content-neutral private property laws and content-neutral regulations of government property should receive the same scrutiny when they ultimately restrict speech, whatever form of scrutiny that turns out to be. As far as the government's actions are concerned, private property laws are another form of content-neutral regulation restricting the time, place, and manner of speech.

### *D. Reexamining Time, Place, and Manner Scrutiny*

To identify property law as a form of content-neutral speech regulation produces practical and analytical advantages for the freedom of speech. Uniform treatment of public-property and private-property speech restrictions would eliminate artificial incentives for governments and land developers to privatize land.[179] It would also reduce the contrast between speech rights in urban and suburban environments that arise because of varying distributions of property.[180] It would thus enable more consistent protection of the freedom of speech across time and across a wider variety of communities.

---

178. Such delegations might take the form of licenses, as in *United Auto Workers, Local No. 5285 v. Gaston Festivals, Inc.*, 43 F.3d 902, 904–11 (4th Cir. 1995) (upholding authority of private festival organizer to control who may use public streets and sidewalks for festival purposes), or they might take the form of a permanent private property right that coexists with government property interests, as in *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1124 (10th Cir. 2002) (examining a public easement subject to the underlying owner's authority to control speech).

179. *See supra* notes 142–46 and accompanying text.

180. *See id.*

What is more, the formal approach to state action would provide a clearer and more complete framework in which to question the appropriate scrutiny for content-neutral speech regulations. The approach should force one to ask fundamentally, without regard to property labels, what is it that the freedom of speech minimally guarantees in a society where geographic restrictions on speech (including those imposed by property law) are pervasive and are usually well-justified? This is not an easy question to answer. It encompasses many smaller questions and considerations, about which reasonable people may differ. By framing the inquiry in this manner, however, it is more likely at least that courts and legal analysts will see the full problem with which they are dealing. It is more likely that the discussion of content-neutral standards will consistently track the values of the First Amendment, while recognizing other values that often justify speech limitations.

This approach might lead to the conclusion that the appropriate First Amendment standard for content-neutral regulations (including property laws) lies somewhere between the heightened scrutiny that currently applies to traditional public forums and the absence of scrutiny that applies to privately owned locations. There are few who would wish to interpret the First Amendment in a way that would significantly undermine the advantages of private property. At the same time, some forms of public expression, including oral speech, leafleting, picketing, and sign-waiving, are valuable enough that we should be reluctant to conclude that such rights can be made purely contingent on the preferences of other people. Even laws that are content-neutral must leave adequate space for some essential forms of communication.[181]

A reasonable way to resolve the tension between public speech values and the values served by private property would be to conclude that the First Amendment requires governments to provide minimally adequate opportunities for public communication. What is an adequate means of communication would likely vary according to the speaker's intended audience. When a speaker wishes to communicate with the general public about an issue of social

181. *See, e.g.*, City of Ladue v. Gilleo, 512 U.S. 43, 56 (1994) (finding that ordinance restricting signs did not leave open ample alternative means for communication, and was therefore unconstitutional); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50, 53–54 (1986) (ruling that zoning of sexually oriented businesses must leave "reasonable alternative avenues of communication"); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) (holding that regulations affecting the time, place, and manner of speech must "leave open ample alternative channels for communication").

importance, one might conclude that the First Amendment guarantees the speaker the right to engage the general public in person. In other words, every community must have meaningful public forums where views of all types are permitted, where leafleting is allowed, where loud speech is allowed, and where large numbers of people actually go. If a city's public sidewalks and parks do not meet these criteria, a government may be required to open some privately owned areas for these purposes, such as sidewalks around shopping malls and grocery stores.

As a speaker's intended audience becomes more specific, however, what is an adequate means of communication would likely change; he or she might have to be satisfied with more limited or remote means. Speakers who would target the patients of a specific abortion clinic, or the members of a specific church, for example, might have to be satisfied with picketing from a distance, rather than engaging the audience up close.[182] When a speaker wishes to send an unsolicited message to a specific person, without an invitation, even the opportunity to mail a letter should even satisfy that speaker's First Amendment rights.

Adequacy of communicative means is the most persuasive normative principle explaining why the government is limited in its ability to restrict speech through rules that are content-neutral.[183] The most troubling thing, for example, about a regulation that would prohibit all leafleting, soliciting, or advocacy to strangers in all parts of a city is that it would foreclose an invaluable method of communication for many people.[184] A society that does not allow face-to-face advocacy of ideas to the general public, at least in some places, does not allow adequate means of communication, and therefore violates the freedom of speech. The same principle should apply whether it is private property or a government regulation that stands in a speaker's way of communicating.[185]

---

182. *Cf.* Lechmere v. NLRB, 502 U.S. 527, 540 (1992) (stating that under the National Labor Relations Act, union organizer's right to communicate with employees is satisfied if unions are able to picket near the entrance of workplace parking lot).

183. *See* Stone, *Content-Neutral Restrictions*, *supra* note 147, at 57–59.

184. *Cf.* Martin v. City of Struthers, 319 U.S. 141, 146 (1943) ("Door to door distribution of circulars is essential to the poorly financed causes of little people.").

185. This is the standard that already apply is some parts of First Amendment law, *see City of Ladue*, 512 U.S. at 56; *Clark*, 468 U.S. at 293, and is the standard the federal labor law imposes on employers who wish to exclude union organizers from speaking on their private property. *See Lechmere*, 502 U.S. at 531–41 (finding that it is an unfair labor practice under the NLRA for employers to deny union organizers access to private property for purposes of communicating with employees where union has no other reasonable means of communicating with the employees).

The principle that government must allow adequate means of communication explains *Marsh v. Alabama*'s holding that one has a right to engage the public in a company-owned town.[186] The fact that the town's owner was performing a public function does not persuasively explain the case or distinguish it from other private-property situations.[187] However, the outcome in *Marsh* does make sense on the grounds that where the government allows an owner to hold a very large share of property, which the owner then uses to create an isolated community that would otherwise have no reasonable access to public speech, the First Amendment prevents the government's enforcement of the owner's speech-repressive property rules.[188] While it would be permissible to ban speech in some locations in the town, the First Amendment should prohibit the application of laws that fail to allow reasonable locations for traditional public expression. To hold otherwise would suggest that government could privatize all aspects of society and all modes of communication, placing society's speech at the whim of private decisionmakers.

If adequacy of communicative means is the appropriate measure of the freedom of speech in privatized environments, the First Amendment should require no more or less in communities where the government owns most or all of the land. As the Supreme Court has sometimes said, "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."[189] This suggests that governments should have greater flexibility to restrict speech on

186. Marsh v. Alabama, 326 U.S. 501 (1946).

187. *See* discussion *supra* notes 164–74 and accompanying text.

188. Some language in the Supreme Court's *Marsh* opinion supports this interpretation, *see* 326 U.S. at 507–09, as opposed to the public function theory of the case that more recent state action decisions have imposed upon it. *See supra* note 66.

189. Adderly v. Florida, 385 U.S. 39, 47 (1966). The logic of using private property rights by analogy to justify public property regulations originates with Justice Holmes's opinion in *Commonwealth v. Davis*, 39 N.E. 113 (Mass. 1895), *aff'd sub nom.* Davis v. Massachusetts, 167 U.S. 43 (1897), in which he wrote: "for the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house." *Id.* at 113. While Justice Holmes's opinion equating public and private property has been criticized based on the supposition that it would allow the government plenary control to eliminate speech on public property, *see, e.g.*, Calvin Massey, *Public Fora, Neutral Governments, and the Prism of Property*, 50 HASTINGS L.J. 309, 313–14 (1999), this conclusion only follows if one assumes that private property rights are unlimited by the First Amendment. Under the analysis proposed here, both private property and public property speech restrictions would be limited by a singular principle that government must allow adequate forums for public communication.

public property (even traditional sidewalks or parks) than current law allows, as long as they do so in ways that are content-neutral and that leave adequate forums for public communication. Certain site-specific factors such as current use, ownership, historical expectations, or compatibility with speech (which sometimes enter into current law), may be relevant as to *which* places should be open for speech. But there is no apparent reason why the First Amendment should take decisions affecting the location of public forums away from state and local governments who regulate property and land use, as long as those governments leave adequate forums for public speech. Only when a government fails through its laws to allow a speaker an adequate means of communication should a federal court apply site-specific policy criteria—such as compatibility of the location for public speech, history, or ownership—to determine which places at a minimum must be open for expression.[190]

Recognizing private property as a content-neutral restriction on speech, which in most applications is constitutional unless it goes so far as to deprive speakers of adequate means of communication, may not be the only plausible way to rationalize private property and free speech law. It is, however, one workable way to do so, and suffices to show that state action fictions are not necessary to achieve a fair balance between privacy and speech interests. The conventional all-or-nothing state action framework tends only to obscure the difficult interpretive decisions that, one way or another, courts must resolve. By applying the state action doctrine literally, courts are more likely to develop standards for protecting speech that are logically consistent and that work across a wider range of circumstances.

## CONCLUSION

The state action doctrine is essential to constitutional law. Its primary value, however, is not as a preliminary requirement that constitutional plaintiffs must satisfy before their claims will be heard on the merits. All injuries are causally linked in some way to state action. Most injuries are also caused to some degree by private action. The function of the state action doctrine ought to be to isolate the elements of state action in a case from the elements of private action and focus the constitutional questions on the former. In other words, the state action doctrine serves an analytical function. It only

190. This suggests that courts should reconsider the holding of *Schneider v. Town of Irvington*, 308 U.S. 147, 151–52 (1939), which states that, insofar as public streets and sidewalks are concerned, the adequacy of other alternative public forums is irrelevant.

serves this function well, however, when courts identify the component of state action with precision.

As shown by the public forum example, a formal approach to state action need not produce extreme results. It does, however, significantly affect how one thinks about constitutional rights. It provides a more complete picture of the constitutional questions and interests that courts must resolve, thereby recasting the interpretation of specific constitutional doctrines in a positive way. If a formal state action doctrine works well for Establishment Clause cases, and if it would improve the analysis of public forum speech issues, then we should expect that it would work well for other areas of constitutional law. In the end, a formal and precise application of the state action doctrine is useful not only for purposes of determining the scope of constitutional law, but also for determining its substance.