
DEVELOPMENTS IN THE LAW
STATE ACTION AND
THE PUBLIC/PRIVATE DISTINCTION



“The state action doctrine . . . contemplates a search for governmental responsibility, a search that has already probed an almost infinite variety of fact situations.”

G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility*,
34 HOUS. L. REV. 333, 336 (1997) (footnotes omitted).

“We cannot think about [the state action problem] too much; we ought to talk about it until we settle on a view both conceptually and functionally right.”

Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: “State Action,” Equal Protection, and California’s Proposition 13*,
81 HARV. L. REV. 69, 70 (1967).

“In the context of the[] twin concerns about the potential for public corruption in state-directed projects and private coercion in the free market, it is not an accident that the United States developed a preference for balancing public direction with private initiative.”

William J. Novak,
Public-Private Governance: A Historical Introduction,
in GOVERNMENT BY CONTRACT 23, 32
(Jody Freeman & Martha Minow eds., 2009).

“Privatization is now virtually a national obsession. Hardly any domestic policy issue remains untouched by disputes over the scope of private participation in government”

Gillian E. Metzger, *Privatization as Delegation*,
103 COLUM. L. REV. 1367, 1369 (2003).

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I. INTRODUCTION

In the *Civil Rights Cases*,¹ the Supreme Court laid down the bright-line rule of state action:² the federal government does not possess the power to regulate the policies and practices of private entities under Section 5 of the Fourteenth Amendment.³ In the years following this landmark decision, the Court transformed the state action doctrine into one of the most complex and discordant doctrines in American jurisprudence.⁴ Despite a recent lull in scholarly engagement with the doctrine⁵ — perhaps out of sheer frustration⁶ — the task of defining state action and determining its proper limits is no less important today than it was in the previous century. As the public becomes more private,⁷ and the private becomes more public,⁸ the contours of the state action doctrine may come to define the contours of our most basic constitutional rights.⁹ In recent years, increased privatiza-

¹ 109 U.S. 3 (1883).

² *But see* United States v. Cruikshank, 92 U.S. 542, 554–55 (1875) (discussing the principles of state action prior to the doctrine’s more extensive elaboration in the *Civil Rights Cases*).

³ *The Civil Rights Cases*, 109 U.S. at 13 (“[U]ntil some State law has been passed, or some State action through its officers or agents has been taken, . . . no legislation of the United States under [the Fourteenth Amendment], nor any proceeding under such legislation, can be called into activity: for the prohibitions of the amendment are against State laws and acts done under State authority.”).

⁴ *See, e.g.*, Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 505 (1985) (discussing legal commentators’ views of the state action doctrine as so incoherent that it “never could be rationally or consistently applied”); Robert J. Glennon, Jr. & John E. Nowak, *A Functional Analysis of the Fourteenth Amendment “State Action” Requirement*, 1976 SUP. CT. REV. 221, 221 (“[T]here are no generally accepted formulas for determining when a sufficient amount of government action is present in a practice to justify subjecting it to constitutional restraints.”).

⁵ *See, e.g.*, Chemerinsky, *supra* note 4, at 503 (“[B]y the late 1970s, concern about state action seemed to fade . . . [, and the doctrine was] virtually ignored by contemporary commentators.”).

⁶ *See, e.g.*, Kevin Cole, *Federal and State “State Action”: The Undercritical Embrace of a Hypercriticized Doctrine*, 24 GA. L. REV. 327, 327–28 (1990) (noting the complete “savaging” of the doctrine by legal commentators, *id.* at 327).

⁷ *See, e.g.*, *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 325 (1968) (“Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.” (quoting *Marsh v. Alabama*, 326 U.S. 501, 506 (1946)) (internal quotation marks omitted)), *overruled by* *Hudgens v. NLRB*, 424 U.S. 507 (1976).

⁸ *See, e.g.*, *A.B. v. State*, 885 N.E.2d 1223 (Ind. 2008) (reversing the trial court’s delinquency judgment for a student who posted derogatory remarks about her principal on the “private profile” group spaces within MySpace, *id.* at 1227 (internal quotation marks omitted)).

⁹ *See, e.g.*, Sam Kamin, *The Private Is Public: The Relevance of Private Actors in Defining the Fourth Amendment*, 46 B.C. L. REV. 83, 85 (2004) (“[A]s it is currently interpreted . . . , the Fourth Amendment’s coverage depends crucially on the scope of private actors’ conduct. . . . If an individual has allowed private actors access to [an] area, she generally will not be permitted to complain that her rights have been violated when the government seeks access to that area as well.”).

tion,¹⁰ arbitration,¹¹ and deregulation¹² have significantly altered the foundation upon which the traditional understanding of the public/private distinction has been built. There is a need for a continuing discourse on that distinction and on the appropriate bounds of the state action doctrine, as these concepts directly implicate the limits on our constitutional rights. Given the dimming of the once-bright lines, Professor Charles Black's assertion from over four decades ago still carries much weight: "[T]he 'state action' problem is the most important problem in American law."¹³

This Development engages the complexity of the state action doctrine and the corresponding delineation of public and private spheres. Nowhere does it attempt to provide a comprehensive definition of these concepts. It does, however, examine different facets of state action in both descriptive and normative ways.

Part II examines the evolution of the state action doctrine and the debate surrounding its role in American constitutional law. In its original form, the doctrine rested on formal, rigidly applied distinctions that foreclosed judicial inquiries into, and federal legislative remedies for, violations of constitutional rights in the absence of an affirmative act by a governmental entity.¹⁴ During the twentieth century, courts and commentators expanded the concept of state action, stretching it to cover a wide spectrum of government involvement.¹⁵ However, the Rehnquist Court restored the doctrine's formalist underpinnings. Currently, the doctrine attempts to demarcate the public/private distinction upon which it was originally premised.¹⁶ Recent scholarship has

¹⁰ See, e.g., Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003). But see Chris Sagers, *The Myth of "Privatization,"* 59 ADMIN. L. REV. 37, 38 (2007) (arguing that there is no "distinction between the performance of certain functions by government institutions and performance by private ones," but rather merely "two kinds of bureaucracy, which really do not differ much at all").

¹¹ See, e.g., Sarah Rudolph Cole, *Arbitration and State Action*, 2005 BYU L. REV. 1 (discussing different legal arguments in favor of bringing arbitration under the umbrella of state action in order to enable participants to assert rights to procedural due process).

¹² See, e.g., Elizabeth Trujillo, *State Action Antitrust Exemption Collides with Deregulation: Rehabilitating the Foreseeability Doctrine*, 11 FORDHAM J. CORP. & FIN. L. 349 (2006) (discussing the development of state action immunity for private actors under an active regulatory scheme and the consequences of deregulation for such actors).

¹³ Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69, 69 (1967).

¹⁴ See *The Civil Rights Cases*, 109 U.S. 3 (1883).

¹⁵ See, e.g., *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (privately leased restaurant in publicly owned and operated garage); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (state court enforcement of private, restrictive covenant); *Marsh v. Alabama*, 326 U.S. 501 (1946) (state enforcement of trespassing laws on sidewalks of company-owned town); see also Black, *supra* note 13.

¹⁶ See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000) ("[T]he action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of

challenged the analytical soundness of these distinctions, as well as their role in foreclosing open assessment of constitutional claims.¹⁷ This Part argues that each stage in the evolution of the state action doctrine can best be understood in terms of the period of legal thought of which it was a product. Professor Duncan Kennedy's classification of the three periods of legal thought spanning the late nineteenth through twentieth centuries — classical, social, and contemporary legal thought¹⁸ — provides the framework for this argument. Ultimately, this Part aligns the two sides of the current debate over the doctrine's continued role in American constitutional law with the competing elements Kennedy identifies as definitive of contemporary legal thought — neoformalism and balancing. The Part concludes by teasing out implications for the judicial role from each side of the debate and by suggesting that these implications represent a departure from contemporary legal thought.

Part III examines the uncertainty over when private actors may claim qualified immunity when sued as state actors in a suit under 42 U.S.C. § 1983. The Supreme Court has addressed the issue twice, in *Wyatt v. Cole*¹⁹ and in *Richardson v. McKnight*,²⁰ and both times the holding was narrow. This Part argues that the standard adopted by the Court in those cases — a standard that examines the history of immunity and the public policy purposes immunity would serve — has confused the lower courts and caused them to reach contradictory conclusions about which categories of private actors should be granted qualified immunity. Whereas the Court has largely abandoned the historical inquiry for granting public actors qualified immunity, the Court has required some inquiry into the tradition of immunity for private actors. Still, this Part argues that the nature of the inquiry is unclear. While the Court has provided several policy considerations and factors to determine whether public policy supports granting private actors qualified immunity, it has failed to explain how they should be used. This Part examines three categories of private actors whose requests for qualified immunity have been litigated frequently and to whom the Court has suggested that qualified immunity might apply: doctors, lawyers, and those acting pursuant to a government request or order. Because of the confusion over the proper standard, lower courts have

the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." (quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948)) (internal quotation mark omitted).

¹⁷ See, e.g., MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS* 161–62 (2008).

¹⁸ Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT* 19 (David M. Trubek & Alvaro Santos eds., 2006).

¹⁹ 504 U.S. 158 (1992).

²⁰ 521 U.S. 399 (1997).

reached inconsistent conclusions about which factors are dispositive and when those factors are present, resulting in qualified immunity being granted in some cases and denied in other cases with similar facts. This Part concludes by suggesting that these differences across jurisdictions and the attendant litigation needlessly result in costs to privatization efforts and to society, and that the Court or Congress should provide a clearer national standard.

Part IV examines the relationship between the state action doctrine and the Establishment Clause. The Supreme Court's Establishment Clause jurisprudence has begun, in the past decade, to trend toward an approach that amounts to a specialized application of the state action doctrine.²¹ Nonetheless, the touchstone for Establishment Clause cases ostensibly remains the test articulated in *Lemon v. Kurtzman*.²² This Part argues that, where the challenged action is found to be religious, courts should apply the state action doctrine instead of the *Lemon* test to evaluate Establishment Clause claims. Applied in this manner, the state action doctrine is a better tool than the *Lemon* test for clearly and succinctly distinguishing religious activities protected by the First Amendment's Free Exercise Clause from those prohibited by the Establishment Clause. Moreover, such an application would bring Establishment Clause jurisprudence into harmony with other suits alleging constitutional violations under 42 U.S.C. § 1983.²³ This Part then examines three recent circuit court cases that demonstrate how the application of the state action doctrine instead of the *Lemon* test results in greater clarity and coherence.

Part V examines the Supreme Court's government speech doctrine and its application to an area that has seen a substantial amount of litigation in recent years: specialty license plates. The government speech doctrine allows the state to express its opinions on controversial issues by precluding First Amendment viewpoint discrimination suits when the government refuses to represent all sides of an issue. As such, the doctrine implicates many of the same issues as the state action doctrine: the Court has not set forth a clear test for differentiating government speech from private speech, leaving the distinction between actions of the state and those of private citizens unclear in this realm as well. Drawing on Justice Souter's suggested approach to government speech in *Pleasant Grove City v. Summum*,²⁴ this Part

²¹ See *Mitchell v. Helms*, 530 U.S. 793, 809 (2000) (plurality opinion); Michael W. McConnell, *State Action and the Supreme Court's Emerging Consensus on the Line Between Establishment and Private Religious Expression*, 28 PEPP. L. REV. 681 (2001).

²² 403 U.S. 602 (1971).

²³ 42 U.S.C. § 1983 (2006).

²⁴ 129 S. Ct. 1125 (2009); see *id.* at 1142 (Souter, J., concurring in the judgment) ("[T]he best approach . . . is to ask whether a reasonable and fully informed observer would understand [an]

seeks to delineate a new speech category for state regulation of specialty license plates. It concludes that specialty license plates constitute hybrid speech and that the government should be permitted to engage in viewpoint discrimination when issuing new license plate designs, meaning that any given vehicle may bear any plate that is acceptable to both the driver and the issuing state.

Part VI explores the extent of free speech protections on private property, and the very different outcomes the U.S. Supreme Court and the California Supreme Court have reached in this area despite their similar reliance on state action doctrine. At one point both federal and California state jurisprudence had affirmed that private owners had some duty to recognize free speech rights on their property.²⁵ The U.S. Supreme Court has since reversed this position, holding that there is no state action when private owners restrict speech rights,²⁶ while California has continued to expand speech rights on private property in its shopping mall line of cases.²⁷ Although the California cases rely on the California Constitution instead of the First Amendment, cases in the past decade indicate that California is engaging with a national debate on the extent of free speech rights. Most notably, the California Supreme Court has expressly returned to requiring a showing of state action in its shopping mall cases — although it defines state action more expansively than does the U.S. Supreme Court. This Part argues that the U.S. Supreme Court's and the California Supreme Court's different conceptions of state action reflect different — and evolving — senses of what it means for a space to be “public” and of the values the state action doctrine is meant to protect in free speech cases. The U.S. Supreme Court's emphasis on public ownership in its state action framework emphasizes property rights and autonomy, while the California Supreme Court's emphasis on public use in its state action doctrine reflects a broader emphasis on expressional rights in changing public spaces. As privately owned public spaces — such as shopping centers — continue to proliferate, the clash between the different conceptions of state action will continue. This Part concludes that protecting the rights of owners and speakers will require courts to account for the increasingly malleable nature of public and private when determining the reach of free speech rights on private property through the state action requirement.

expression to be government speech, as distinct from private speech the government chooses to oblige . . .”).

²⁵ Compare *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 325 (1968), with *Schwartz-Torrance Inv. Corp. v. Bakery & Confectionery Workers' Union, Local No. 31*, 394 P.2d 921, 924 (Cal. 1964).

²⁶ *Hudgens v. NLRB*, 424 U.S. 507 (1976).

²⁷ See, e.g., *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341 (Cal. 1979).

II. THE EVOLUTION OF THE STATE ACTION DOCTRINE AND THE CURRENT DEBATE

Despite the decades-old and intermittently revived characterization of the state action doctrine as “a conceptual disaster area,”¹ the doctrine — along with the surrounding debate — persists in U.S. constitutional law. The state action doctrine establishes a threshold requirement for judicial consideration of constitutional claims and congressional enforcement of constitutional rights: absent some action on the part of a state entity, the doctrine holds, there can be no constitutional violation.² While other commentators have described the historical development and continued incoherence of the state action doctrine in terms of underlying substantive concerns³ or institutional dynamics,⁴ this Part offers an alternate exposition. It examines prominent examples of stages in the doctrine’s evolution through the lens of Professor Duncan Kennedy’s generalized classification of three periods of legal thought — classical, social, and contemporary — spanning the late nineteenth and twentieth centuries.⁵ Each of the periods that Kennedy distinguishes captures a discrete moment in the metamorphosis of the state action doctrine and related scholarship: the original reasoning behind the doctrine accords with classical legal thought; mid-twentieth-century challenges to and manipulations of the doctrine represent social legal thought; and the current division between for-

¹ Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: “State Action,” Equal Protection, and California’s Proposition 13*, 81 HARV. L. REV. 69, 95 (1967); see also Henry J. Friendly, *The Public-Private Penumbra—Fourteen Years Later*, 130 U. PA. L. REV. 1289, 1290 (1982) (noting that Professor Charles Black’s characterization “would appear even more apt today”).

² The state action doctrine issues from the Supreme Court’s Fourteenth Amendment jurisprudence. See, e.g., *United States v. Morrison*, 529 U.S. 598, 621 (2000) (“[T]he Fourteenth Amendment, by its very terms, prohibits only state action.”); *The Civil Rights Cases*, 109 U.S. 3, 11 (1883) (holding that the Fourteenth Amendment gives Congress the power “to provide modes of relief against State legislation, or State action, of the kind referred to”). The doctrine comprises two distinctions: the distinction between state and nonstate actors, and the distinction between action and inaction. See Robin West, *Response to State Action and a New Birth of Freedom*, 92 GEO. L.J. 819, 823–24 (2004).

³ See, e.g., G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility* (pt. 1), 34 HOUS. L. REV. 333, 336 (1997) (“The state action doctrine . . . contemplates a search for governmental responsibility . . .”); Martin A. Schwartz & Erwin Chemerinsky, *Dialogue on State Action*, 16 TOURO L. REV. 775, 781 (2000) (arguing that the underlying subject matter, specifically the absence or presence of race discrimination, determines the Court’s willingness to find state action).

⁴ See, e.g., Terri L. Peretti, *The Rise and Fall of the State Action Doctrine 1940–1990*, at 47–48 (Dec. 23, 2008) (unpublished working paper, on file with the Harvard Law School Library), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1319822 (arguing that a “regime politics” model, accounting for cooperation between the Court and Congress, explains the various turns of the state action doctrine).

⁵ Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT* 19 (David M. Trubek & Alvaro Santos eds., 2006).

malist defenses⁶ and functionalist rejections⁷ of the doctrine, stemming from classical and social legal thought, respectively, highlights a disjunction specific to contemporary legal thought.

A. *Classical Legal Thought and the Civil Rights Cases*

The first articulation of the state action doctrine adhered to formalist reasoning and was premised on the classical conception of powers that are autonomous within their spheres. Kennedy defines classical legal thought as “a way of thinking about law as a system of spheres of autonomy for private and public actors, with the boundaries of spheres defined by legal reasoning understood as a scientific practice.”⁸ Dominant in the late nineteenth century, this way of thinking conceived of law as a system with a “strong internal structural coherence based on the three traits of exhaustive elaboration of the distinction between private and public law, ‘individualism,’ and commitment to legal interpretive formalism.”⁹ Each of these traits is identifiable in the state action doctrine propounded by the Court in the *Civil Rights Cases*.¹⁰

The *Civil Rights Cases* invalidated the Civil Rights Act of 1875¹¹ on the ground that Congress had no authority to enact legislation directly regulating private race discrimination under the enforcement provision of the Fourteenth Amendment.¹² Writing for the eight-Justice majority,¹³ Justice Bradley demarcated “private wrong[s]” from

⁶ See, e.g., *Morrison*, 529 U.S. 598.

⁷ See, e.g., RICHARD H. FALLON, JR., *THE DYNAMIC CONSTITUTION* 254–57 (2004); Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 *GEO. L.J.* 779 (2004); Cass R. Sunstein, *State Action Is Always Present*, 3 *CHI. J. INT’L L.* 465 (2002); Mark Tushnet, *State Action in 2020*, in *THE CONSTITUTION IN 2020*, at 69 (Jack M. Balkin & Reva B. Siegel eds., 2009).

⁸ Kennedy, *supra* note 5, at 20–22.

⁹ *Id.* at 25. The distinction between public and private law rests on an understanding that the latter is scientific in nature and independent of the political concerns that characterize the former. See *id.* at 31–32. “Individualism” refers to the promotion of individual self-realization, understood in part as necessitating the protection of a zone of private conduct. See *id.* at 26. Lastly, legal interpretive formalism refers to “deduction within [a] coherent and autonomous legal order” as the preferred technique of legal analysis. *Id.* at 21.

¹⁰ 109 U.S. 3 (1883); see also *United States v. Harris*, 106 U.S. 629, 639 (1883); *United States v. Cruikshank*, 92 U.S. 542, 554 (1876).

¹¹ The Civil Rights Act of 1875 imposed civil damages and criminal penalties on private owners of places of public accommodation or amusement who discriminated on the basis of race or color. See *The Civil Rights Cases*, 109 U.S. at 9.

¹² *Id.* at 25.

¹³ Justice Harlan dissented. *Id.* at 26 (Harlan, J., dissenting) (“I cannot resist the conclusion that the substance and spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism.”). At least one commentator has argued that the majority opinion is best understood in terms of racism. See Francisco M. Ugarte, *Reconstruction Redux: Rehnquist, Morrison, and the Civil Rights Cases*, 41 *HARV. C.R.-C.L. L. REV.* 481, 496–501 (2006) (“Not only was the state action doctrine framed to debilitate rather than promote the Fourteenth

violations of constitutional rights, asserting that “civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals.”¹⁴ Where the wrongful act of an individual is not “sanctioned in some way by the State, or . . . done under State authority,” he continued, the rights of the victim “remain in full force, and may presumably be vindicated by resort to the laws of the State for redress,”¹⁵ but not by resort to the Constitution.

In this manner, Justice Bradley relied on a distinction between private and public law derived from a conception of separate spheres for private and public actors, thereby displaying the first trait of classical legal thought. Rigidly upholding the boundaries between these spheres, he treated the violation of the constitutional rights of one individual by another as a conceptual impossibility. These boundaries served to promote the individualist goal of self-realization,¹⁶ consistent with the second trait of classical legal thought, by protecting the sphere of private conduct from judicial inquiry, so long as such conduct abided by state statutory and common law.¹⁷ Having established the formal distinctions between private individuals and the state and between private and public law, Justice Bradley proceeded in deductive fashion to the conclusion that section 5 of the Fourteenth Amendment confers no authority on Congress to regulate individual conduct: “[U]ntil some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment . . . can be called into activity.”¹⁸ Such deductive reasoning from formal premises fully accords with the final trait of classical legal thought Kennedy identifies: legal interpretive formalism. The state action doctrine that

Amendment, but the doctrine was crafted by a Supreme Court that was grounded in and motivated by racist ideology.” *Id.* at 504.)

¹⁴ *The Civil Rights Cases*, 109 U.S. at 17.

¹⁵ *Id.*

¹⁶ See Kennedy, *supra* note 5, at 26 (discussing the “will theory,” central to classical legal thought, as an “attempt to identify the rules that should follow from consensus in favor of the goal of individual self-realization”).

¹⁷ See *United States v. Morrison*, 529 U.S. 598, 622 (2000) (“Careful adherence to the ‘state action’ requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power.” (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982)) (internal quotation marks omitted)); Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 541 (1985) (presenting the view that the state action doctrine “protects personal autonomy by creating a shield that immunizes certain conduct from any governmental review”).

¹⁸ *The Civil Rights Cases*, 109 U.S. at 13.

emerged from Justice Bradley's opinion in the *Civil Rights Cases* thus exhibits each of the three traits of classical legal thought.¹⁹

*B. "The Social" and Mid-Twentieth-Century Erosion
of the State Action Doctrine*

By the 1960s, the state action doctrine appeared to have fallen into disuse.²⁰ While refraining from overruling the *Civil Rights Cases* outright, the Court manipulated the contours of the state action doctrine defined therein.²¹ Scholars vigorously denounced the doctrine's deductive logic and its consequences.²² Such judicial manipulations and scholarly challenges reflected a more general concern with the failure of existing legal rules to address troubling instances of racial discrimination, as well as a shift away from earlier formalist reasoning toward functionalist and instrumentalist reasoning.²³ In this way, mid-twentieth-century treatment of the state action doctrine fit neatly into the period of "the social." Social legal thought emerged from critiques of classical legal thought that had argued that such thinking employed an "abuse of deduction"²⁴ in legal analysis and ignored increasing so-

¹⁹ Cf. Ira Nerken, *A New Deal for the Protection of Fourteenth Amendment Rights: Challenging the Doctrinal Bases of the Civil Rights Cases and State Action Theory*, 12 HARV. C.R.-C.L. L. REV. 297, 298 (1977) ("State action theory has tied the destiny of protection of civil rights and civil liberties to nineteenth century theories of private property and private power and their privileged position vis-à-vis the state.").

²⁰ In 1967, Professor Black noted that the last time the Court had explicitly rejected a claim under the Equal Protection Clause on the basis of the state action doctrine was in *Hodges v. United States*, 203 U.S. 1 (1906). Black, *supra* note 1, at 84-85.

²¹ See, e.g., *Reitman v. Mulkey*, 387 U.S. 369 (1967) (holding unconstitutional a facially neutral article of the California Constitution for effectively involving the state in racial discrimination); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (holding that Delaware's leasing of building space supported a finding of state action for an Equal Protection claim brought against a coffee shop owner for racial discrimination); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that judicial enforcement of racially restrictive covenants constituted state action for purposes of the Fourteenth Amendment). For a survey of cases that expanded the notion of what constitutes state action in the early to mid-twentieth century, see *Reitman*, 387 U.S. at 379-80; and Black, *supra* note 1, at 84-91. Black notes generally that "the Stone, Vinson, and Warren Courts . . . recogniz[ed], one after another, new and different forms of state involvement." *Id.* at 86.

²² See, e.g., Black, *supra* note 1; Robert L. Hale, *Rights Under the Fourteenth and Fifteenth Amendments Against Injuries Inflicted by Private Individuals*, 6 LAW. GUILD REV. 627, 627-28 (1946); Harold W. Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208, 209 (1957); J.D. Hyman, *Segregation and the Fourteenth Amendment*, 4 VAND. L. REV. 555, 555-56 (1951); John Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855, 855 (1966); William W. Van Alstyne & Kenneth L. Karst, *State Action*, 14 STAN. L. REV. 3, 3-5 (1961).

²³ See Michael J. Phillips, *The Inevitable Incoherence of Modern State Action Doctrine*, 28 ST. LOUIS U. L.J. 683, 692-94, 699-700, 734-35 (1984).

²⁴ Kennedy, *supra* note 5, at 39; see also *id.* at 37, 39 (explaining the social critique that classical thought, when confronted with gaps in the law, "abused deduction," *id.* at 37, by "mak[ing]

cial interdependence.²⁵ This new form of thinking embraced an instrumentalist view of law and “emphasized gaps, conflicts, and ambiguities in the corpus of positive law, and consequently the role of the judge, either as an abuser of deduction or as a rational lawmaker.”²⁶ The most often cited scholarly treatment of the state action doctrine in the mid-twentieth century, Professor Charles Black’s 1966 Term Foreword in the *Harvard Law Review*,²⁷ along with the case it discusses,²⁸ comprise these defining elements of social legal thought.

Black opens his critique with the assertion that “the ‘state action’ problem is the most important problem in American law.”²⁹ He grounds this assertion on two premises: (1) the task of eradicating racism is “the most important single task to which American law must address itself,”³⁰ and (2) this task requires confrontation of “the barrier of the so-called state action ‘doctrine.’”³¹ From the outset, then, Black identifies the social fact of racism and the failure of existing law, laden with the state action doctrine, to address this problem properly. He further declares that “the first item on our law’s agenda is and always ought to have been the use of every resource and technique of the law to deal with racism,”³² thus depicting the law as a means to the end of racial justice. He implicitly calls upon lawyers and judges³³ to adopt this instrumentalist approach in order to remedy the gap in positive law that allows for de facto racial discrimination,³⁴ a gap perpetuated by the state action doctrine. Thus, the foundations of Black’s argument contain the principal elements of social legal thought.

The remainder of Black’s Foreword analyzes *Reitman v. Mulkey*³⁵ from these foundations. In *Reitman*, the Court confronted the constitutionality of article I, section 26 of the California Constitution, which

decisions reached on other grounds look like the operation of deductive work premised on the coherence of the system,” *id.* at 39).

²⁵ See *id.* at 37–38. Social legal thought was premised on the idea that “the conditions of late nineteenth-century life represented a social transformation . . . summarized in the idea of interdependence,” which classical legal thought ignored, thus endorsing “particular legal rules that permitted antisocial behavior of many kinds.” *Id.* at 38.

²⁶ *Id.* at 45.

²⁷ Black, *supra* note 1; see Fred R. Shapiro, *The Most-Cited Law Review Articles*, 73 CAL. L. REV. 1540, 1550 (1985) (noting that, as of 1985, the article was twelfth among the most cited law review articles of all time).

²⁸ *Reitman v. Mulkey*, 387 U.S. 369 (1967).

²⁹ Black, *supra* note 1, at 69.

³⁰ *Id.*

³¹ *Id.* at 70.

³² *Id.* at 69–70. Black suggests that courts should read the Fourteenth Amendment (a potential “resource of the law”) as imposing a duty on states to enact antidiscrimination statutes in order to combat racial discrimination. See *id.* at 73.

³³ See *id.* at 103–04.

³⁴ *Id.* at 70.

³⁵ 387 U.S. 369 (1967).

prohibited the state from enacting laws limiting a private individual's use of discretion in the sale, lease, or rent of his real property.³⁶ Writing for the majority, Justice White noted "the necessity for a court to assess the potential impact of official action in determining whether the State has significantly involved itself with invidious discriminations."³⁷ Accordingly, the Court approached section 26 from a functionalist perspective. The California court had presented an analogy between California's constitutional prohibition on state enactment of antidiscrimination laws and a situation in which a state statute affirmatively authorizes racial discrimination; Justice White accepted this analogy on the recognition that the impact was likely the same in both cases.³⁸ In this way, the Court appeared to reject the distinction between state action and inaction underlying the deductive reasoning in the *Civil Rights Cases*. Justice White further described section 26 as effectively embedding a new, protected sphere of private discrimination in the California Constitution.³⁹ Thus, section 26 would have produced a gap in the law into which antisocial (racially discriminatory) behavior could fall — the very kind of gap social thinkers sought to eliminate. With this concern in mind, the Court held section 26 to be unconstitutional state action on the grounds that it encouraged, or involved the state in authorizing, private racial discrimination.⁴⁰

Black defends the majority opinion in *Reitman*, though he advocates a different basis for the holding.⁴¹ Though both Black and the Court reject the state action doctrine in its formalism and its potential implications for society, neither rejects the doctrine in its entirety. This, too, is consistent with social legal thought. Despite their repudiation of classical liberalism, social proponents did not aim to do away with it; indeed, ultimately, "[t]heir goal was to save liberalism from itself."⁴² Likewise, judges and scholars did not seek to do away with the state action doctrine in the mid-twentieth century, but rather to render it consistent with the demands of justice — racial justice in particular — in their interdependent political society.⁴³

³⁶ See *id.* at 371.

³⁷ *Id.* at 380.

³⁸ *Id.* at 375–76.

³⁹ See *id.* at 377.

⁴⁰ See *id.* at 381.

⁴¹ See Black, *supra* note 1, at 82 (proposing a rule that "where a racial group is in a political duel with those who would explicitly discriminate against it as a racial group, . . . the state may not place in the way of the racial minority's attaining its political goal any barriers which . . . are especially difficult of surmounting").

⁴² Kennedy, *supra* note 5, at 38.

⁴³ See Black, *supra* note 1, at 100 ("[N]o one, so far as I know, is proposing that the 'state action' requirement be dropped. . . . The point is . . . that time and thought will make it even clearer that this requirement is always satisfied in the case where substantial racial discrimination is tolerated.").

C. Contemporary Legal Thought and the Current Debate

Whereas mid-twentieth-century scholars and courts were aligned in their treatment of the state action doctrine, current views of the continued role of the doctrine in constitutional law are at fundamental odds with one another. Both sides of the debate over the state action doctrine rely on familiar arguments. Those calling for the doctrine's retirement critique it as an abuse of deduction that ignores competing rights and interests,⁴⁴ picking up the line of social critiques and revisions described above. Those defending it do so on formalist grounds and through demands for the protection of individual autonomy,⁴⁵ resurrecting the classical reasoning that originally produced the doctrine in the *Civil Rights Cases*. Kennedy accounts for the presence of such familiar arguments in contemporary legal thought, which he defines as "the unsynthesized coexistence of transformed elements of [classical legal thought] with transformed elements of the social."⁴⁶ The "key transformed element" of classical legal thought "is thinking in the mode of deduction within a system of positive law presupposed to be coherent, or 'neoformalism.'"⁴⁷ The revival of classical formalism resulted from 1960s and 1970s civil-libertarian critiques of the social's perceived denial of individual rights, its arbitrary manipulations of general standards, and its antiformalism;⁴⁸ formalism's transformation occurred through a shift in emphasis from private to public law.⁴⁹ Conversely, "[t]he key transformed element of the social is policy analysis, but based on 'conflicting considerations' (also called balancing or proportionality) . . . [, which] produces rules that are ad hoc compromises."⁵⁰ The transformation of social instrumentalism is rooted in legal realism,⁵¹ which exposed the inevitable involvement of the courts in balancing competing interests and engaging in policy analysis, thereby rejecting the premises of both classical deductive reasoning and social teleological reasoning.⁵² Overall, "[n]eoformalism is unreflective in

⁴⁴ See, e.g., West, *supra* note 2; sources cited *supra* note 7.

⁴⁵ See, e.g., *United States v. Morrison*, 529 U.S. 598, 621–27 (2000); *City of Boerne v. Flores*, 521 U.S. 507, 524–25 (1997); *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 194–96 (1989); *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 171–79 (1972).

⁴⁶ Kennedy, *supra* note 5, at 63; see also *id.* (asserting further that "[t]oday . . . positive legal regimes in every area of law are those that emerged from the confrontation at the level of legislation or case law between [classical legal thought] and the social, understood as law reform projects rather than as legal consciousnesses").

⁴⁷ *Id.*

⁴⁸ See *id.* at 61.

⁴⁹ See *id.* at 63–64.

⁵⁰ *Id.* at 63.

⁵¹ See *id.* at 67–68.

⁵² See *id.* at 60.

a way diametrically opposite to policy analysis.”⁵³ Insofar as the defenders of the state action doctrine embrace the former and the challengers embrace the latter, this opposition helps to explain the fundamental disconnect in the current debate over the state action doctrine.

In its current form, the state action doctrine exhibits the transformed element of classical legal thought — neoformalism. Writing for the majority in *United States v. Morrison*,⁵⁴ Chief Justice Rehnquist⁵⁵ reaffirmed the state action doctrine as articulated in the *Civil Rights Cases*.⁵⁶ *Morrison* addressed the constitutionality of a provision of the Violence Against Women Act that provided a federal civil remedy to victims of gender-motivated violence.⁵⁷ After holding that the provision was not authorized by the Commerce Clause,⁵⁸ the Court proceeded to consider the power afforded Congress under section 5 of the Fourteenth Amendment. Chief Justice Rehnquist first recognized the “enduring vitality of the *Civil Rights Cases*,”⁵⁹ and explicitly adopted the description of Congress’s section 5 power contained therein.⁶⁰ Examining the provision at issue, he determined that it was “directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias.”⁶¹ Therefore, despite abundant congressional findings regarding disparate treatment on the basis of gender by state officials,⁶² Chief Justice Rehnquist deemed the intended remedy “simply not ‘corrective in its character, adapted to counteract and redress the operation of such prohibited [s]tate laws or proceedings of [s]tate officers.’”⁶³ Thus, the Court invalidated an attempt by Congress to remedy violations of equal protection — otherwise a permissible exercise of its enforcement power under the Four-

⁵³ *Id.* at 65.

⁵⁴ 529 U.S. 598 (2000).

⁵⁵ Chief Justice Rehnquist was joined by Justices O’Connor, Scalia, Kennedy, and Thomas.

⁵⁶ “If there is a single person responsible for the current, confining idea of state action, it is Rehnquist.” David J. Barron, *Privatizing the Constitution: State Action and Beyond*, in *THE REHNQUIST LEGACY* 345, 346 (Craig M. Bradley ed., 2006).

⁵⁷ *See Morrison*, 529 U.S. at 605.

⁵⁸ *Id.* at 618–19.

⁵⁹ *Id.* at 624.

⁶⁰ *See id.* at 619, 624.

⁶¹ *Id.* at 626.

⁶² *See id.* at 619–20 (noting that the congressional record contained evidence that “many participants in state justice systems are perpetuating an array of erroneous stereotypes and assumptions . . . [that] often result in insufficient investigation and prosecution of gender-motivated crime, . . . and unacceptably lenient punishments,” *id.* at 620).

⁶³ *Id.* at 625 (alterations in original) (quoting *The Civil Rights Cases*, 109 U.S. 3, 18 (1883)). Like the Court in the *Civil Rights Cases*, the Court in *Morrison* also rejected the provision as “simply not corrective” in nature because it applied to all states, regardless of whether or not they were found to have violated the Equal Protection Clause. *See id.* at 626; *The Civil Rights Cases*, 109 U.S. at 14.

teenth Amendment, even under the *Civil Rights Cases*⁶⁴ — because it targeted private individuals rather than the states and state officials responsible for the violations.⁶⁵ Regardless of whether the provision furthered the ends envisioned in the Fourteenth Amendment, it failed to satisfy the formal requirement of state action. Therefore, as expected given the demands of the transformed element of classical legal thought — neoformalism — the statute failed before the Court.

In light of this and similar results, Professor Mark Tushnet criticizes the state action doctrine as “distracting us from paying attention to what truly matters.”⁶⁶ His recent calls for the abandonment of the state action doctrine,⁶⁷ which some scholars have joined⁶⁸ and to which others have responded,⁶⁹ exhibit the transformed element of social legal thought — balancing — and its realist foundations. Tushnet and Professor Gary Peller, for example, reject the logic of the public/private distinction embedded in the state action doctrine: because “[e]very exercise of ‘private’ rights in a liberal legal order depends on the potential exercise of state power to prevent other private actors from interfering with the rights holder,” no “region of social life . . . can be marked off as ‘private’ and free from governmental regulation.”⁷⁰ Tushnet further states that, absent a natural law foundation for recognition of entitlements,⁷¹ “the setting of each of the background entitlements is a result of state power that could have been exercised differently — that is, the result of policy and politics.”⁷² State inaction, then, is simply continued acceptance of historical exercises of state power — exercises that represent political choices. Once the formal distinctions between private and public actors and between state action and inaction collapse under the pressure of such realist critiques,

⁶⁴ See *The Civil Rights Cases*, 109 U.S. at 13–15.

⁶⁵ Cf. Ugarte, *supra* note 13, at 506 (“*Morrison* illustrates the continuing failure of the state action doctrine to effectuate the purpose of the Fourteenth Amendment . . .”). Justice Breyer implied that the Court’s holding in *Morrison* may actually *broaden* the state action requirement by covering not only the actors whose conduct Congress seeks to remedy (as there was sufficient evidence of discrimination on the part of state actors), but also those subject to the remedial provision itself. See *Morrison*, 529 U.S. at 665 (Breyer, J., dissenting).

⁶⁶ Tushnet, *supra* note 7, at 70.

⁶⁷ See MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS* 161–95 (2008); Peller & Tushnet, *supra* note 7; Tushnet, *supra* note 7.

⁶⁸ See, e.g., LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, *REMNANTS OF BELIEF* 49–71 (1996); Peller & Tushnet, *supra* note 7.

⁶⁹ See, e.g., Sunstein, *supra* note 7; West, *supra* note 2.

⁷⁰ Peller & Tushnet, *supra* note 7, at 789; cf. Mattias Kumm, *Who Is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law*, 7 *GERMAN L.J.* 341, 341–42 (2006) (discussing the collapse of the distinction between public and private law in the German context).

⁷¹ Professor Erwin Chemerinsky argues that even a natural law understanding of rights and entitlements fails to support the state action doctrine. See Chemerinsky, *supra* note 17, at 527–31.

⁷² TUSHNET, *supra* note 67, at 189.

Tushnet suggests, the constitutionality of government inaction regarding racial and other inequalities comes into question.⁷³ In the absence of the state action doctrine, courts may require the government to remedy de facto burdens on constitutional rights.⁷⁴ This argument is distinctly functionalist in nature. It construes constitutional rights as serving substantive interests, which, when threatened, may require action on the part of the government. For Tushnet, invocation of the current state action doctrine forecloses candid discussion of what duties might be attributed to the government, functioning as a rhetorical tool that “allows courts to pretend that they are enforcing rights rather than balancing competing constitutional interests.”⁷⁵

In a way “diametrically opposite” to Chief Justice Rehnquist’s affirmation and formalist application of the classical state action doctrine established in the *Civil Rights Cases*, Tushnet’s rejection of the state action doctrine emphasizes the presence of competing interests and affirmative rights that ought to be openly balanced. The disconnect between Chief Justice Rehnquist and Tushnet, as defender and challenger of the state action doctrine respectively, aligns with the two primary elements Kennedy identifies in contemporary legal thought. Because each side of the debate employs a different mode of reasoning — each effectively arguing in a different legal interpretive language — the possibility of consensus on the state action doctrine, such as that achieved during the periods of classical and social legal thought, appears tenuous at best.

D. *Beyond Contemporary Legal Thought? Institutional Implications of the Current Debate*

Although the competing sides of the debate over the state action doctrine align with the opposing elements that define contemporary legal thought, their arguments contain institutional implications that may represent a shift away from this latest period. The state action doctrine implicates judicial power in two ways: first, it weakens a judge’s power to extend liability to private individuals for violations of constitutional rights and to impose constitutional duties on the government;⁷⁶ second, it enhances judicial power to overturn federal legislation.⁷⁷ The shift away from contemporary legal thought is apparent

⁷³ See *id.* at 195; cf. Louis Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 481 (1962) (“The question, then, is not whether a state has ‘acted,’ but whether . . . there has been a denial for which the state should be held responsible.”).

⁷⁴ See TUSHNET, *supra* note 67, at 193.

⁷⁵ Tushnet, *supra* note 7, at 77. The absence of the state action doctrine, Tushnet suggests, would force an analysis of “what the government’s constitutional duties are.” *Id.*; see also Henkin, *supra* note 73, at 488–89, 493, 496.

⁷⁶ See, e.g., *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 202–03 (1989).

⁷⁷ See, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997).

in the ambivalence both sides display with regard to the role of the judge in state action cases. The “hero figure” in contemporary legal thought “is unmistakably the judge, who brings either policy analysis or neoformalism to bear, as best [she] can, on disputes formulated by governmental and nongovernmental organizations claiming to represent civil society.”⁷⁸ Yet both sides of the current debate contain implications that alternately support and undermine the judge’s “hero” status.⁷⁹

In his affirmation of the state action doctrine in *Morrison*, Chief Justice Rehnquist implicitly sanctioned the limits it places on judicial scrutiny of private conduct and state inaction, as well as the support it provides for judicial review of federal legislation. Regarding the latter point, Justice Breyer suggested in his dissent that the *Morrison* holding may have actually expanded judicial power to overturn federal legislation. Whereas the Court invalidated an attempt by Congress to address *private* discrimination in the *Civil Rights Cases*, it invalidated “the creation of a federal remedy to substitute for constitutionally inadequate *state* remedies” in *Morrison*,⁸⁰ thereby further restricting Congress’s enforcement power under section 5. In the context of cases involving private conduct and state inaction, however, adherence to the state action doctrine limits the scope of the Court’s constitutional review,⁸¹ here, “Rehnquist’s state action decisions do more than decline to invalidate governmental decisions not to intervene: [t]hey bar the Court from evaluating the constitutional legitimacy of such decisions.”⁸² By limiting judicial review of private action and state inaction, and by strengthening judicial review of federal legislation, Chief Justice Rehnquist’s decisions effectively reassert a constitutional baseline of negative rights and limited federal involvement in the vindication of those rights.⁸³

Conversely, in his rejection of the state action doctrine, Tushnet questions the limits it places on judicial power to pronounce constitutional duties and liabilities but appears to favor a weaker judicial role in the review of federal legislation. In the latter context, he proposes a “weak-form judicial review,” which “respects the right . . . for majorities to prevail when, acting through their representatives, they enact

⁷⁸ Kennedy, *supra* note 5, at 65.

⁷⁹ For a more comprehensive challenge to judicial supremacy, see generally Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4 (2001).

⁸⁰ *United States v. Morrison*, 529 U.S. 598, 665 (2000) (Breyer, J., dissenting) (emphasis added).

⁸¹ See, e.g., *DeShaney*, 489 U.S. at 197 (“[A] State’s failure to protect an individual against private violence simply does not constitute a violation of the [Fourteenth Amendment’s] Due Process Clause.”).

⁸² Barron, *supra* note 56, at 359.

⁸³ See Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 HOFSTRA L. REV. 1379, 1458 (2006).

statutes that are consistent with reasonable interpretations of the constitution even if those interpretations differ from those the courts offer.”⁸⁴ This form of judicial review, if applied in *Morrison*, might have required more deference to Congress’s choice of remedy in response to findings of state failures to provide equal protection to women. Combined with a stronger judicial role in the context of determining constitutional duties and liabilities, “weak-form judicial review” in the absence of the state action doctrine would enable courts and legislatures to depart from the perceived constitutional baseline and recognize affirmative constitutional rights.

Therefore, the affirmation and rejection of the state action doctrine offered by Chief Justice Rehnquist and Professor Tushnet, respectively, both support and undermine the “hero” status of the judge in opposite contexts.⁸⁵ Overall, the opposing positions reveal an ambivalence regarding judicial supremacy that represents a departure from contemporary legal thought. This departure, however, does nothing to bring the two sides of the debate to common ground — the debate fractures not only along substantive evaluations of the merit of the doctrine itself, but also along the modes of reasoning employed in such evaluations. Until some element capable of synthesizing neoformalism and functionalist policy analysis emerges, an element that fosters a shared legal interpretive language, consensus regarding the doctrine’s continued role in U.S. constitutional law will remain a thing of the past.

III. PRIVATE PARTY IMMUNITY FROM SECTION 1983 SUITS

Privatization has become an important component of many states’ plans for providing services to their citizens.¹ Just as private party state action liability under 42 U.S.C. § 1983 has a major role to play in the debate over privatization, so does private party immunity. Unlike public actors, who broadly enjoy at least qualified immunity, similarly situated private actors have been denied immunity in the only two Supreme Court cases to address the issue directly: *Wyatt v. Cole*² and *Richardson v. McKnight*.³ While these cases had narrow holdings, the standard they adopted — closely examining the history of and

⁸⁴ TUSHNET, *supra* note 67, at 264.

⁸⁵ There exists a proposed reinterpretation of the state action doctrine that would weaken the judicial role on both counts — a reinterpretation according to the principle of democratic choice. See, e.g., Huhn, *supra* note 83, at 1459 (“[T]he principle of democratic choice suggests that the state action doctrine guarantees that the American people, acting through their state and federal elected representatives, have the discretion to determine whether and to what extent individuals and private organizations have the duty to observe constitutional norms.”).

¹ See, e.g., Myriam Gilles, *Private Parties as Defendants in Civil Rights Litigation*, 26 CARDOZO L. REV. 1, 1–2 (2004).

² 504 U.S. 158 (1992).

³ 521 U.S. 399 (1997).

policy rationales for qualified immunity — appears broadly applicable. Lower courts have attempted to apply this standard, but they have been confused by *Richardson*'s use of precedent and the complex mix of factors in its analysis and have reached divergent conclusions about various categories of private actors. It is time for the Court to reconsider the *Richardson* standard and either clarify its own logic or adopt a new standard.

A. *Qualified Immunity for Private Actors*

While § 1983 “on its face admits of no immunities,”⁴ the Supreme Court has afforded government officials qualified or absolute immunity if there was a “tradition of immunity . . . so firmly rooted in the common law and . . . supported by such strong policy reasons” that Congress would not have silently abolished it upon § 1983’s adoption in 1871.⁵ Originally, the Court required subjective, good faith belief that one’s conduct was lawful and that the conduct was objectively reasonable before granting qualified immunity.⁶ Yet even sham suits require a jury trial to determine intent, risking “distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.”⁷ In *Harlow v. Fitzgerald*,⁸ these three policy rationales (particularly the first) prompted the Court to remove the subjective inquiry⁹ and establish the modern test: immunity is granted unless the official “violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known.”¹⁰ The standard provides an “immunity from suit,”¹¹ preventing discovery until the court finds that a clearly established right was violated.¹²

⁴ *Wyatt*, 504 U.S. at 163 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976)) (internal quotation mark omitted).

⁵ *Id.* at 164 (quoting *Owen v. City of Independence*, 445 U.S. 622, 637 (1980)) (internal quotation mark omitted); *see id.* at 163–64.

⁶ Sheldon Nahmod, *The Emerging Section 1983 Private Party Defense*, 26 CARDOZO L. REV. 81, 90 & n.41 (2004). This test assured that government actors held liable would both have had sufficient notice of the constitutional norm and be at fault. *Id.*

⁷ *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982).

⁸ 457 U.S. 800.

⁹ *See id.* at 814–18; Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 236–37 (2006); Nahmod, *supra* note 6, at 91 (“[T]he interest of a plaintiff . . . is sacrificed for the greater good of the community . . .”).

¹⁰ *Harlow*, 457 U.S. at 818 (citing *Procunier v. Navarette*, 434 U.S. 555, 565 (1978); *Wood v. Strickland*, 420 U.S. 308, 322 (1975)).

¹¹ *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

¹² *See id.*; *Harlow*, 457 U.S. at 818–19; Steven W. Miller, Note, *Rethinking Prisoner Litigation: Shifting from Qualified Immunity to a Good Faith Defense in § 1983 Prisoner Lawsuits*, 84 NOTRE DAME L. REV. 929, 938–39, 952 (2009).

Although private actors could be state actors under § 1983 even prior to *Harlow*, the Court reserved the question of private qualified immunity until *Wyatt*.¹³ While the Court could have granted similarly situated actors the same immunities out of fairness to defendants or in support of privatization,¹⁴ the *Wyatt* Court instead adopted what it saw as the established standard: immunity is granted if (1) a tradition of immunity exists, and (2) the purposes of immunity (that is, *Harlow*'s three policy rationales) support granting it.¹⁵ The issue and holding were narrowly confined to a private party conspiring with state officials in invoking an unconstitutional state replevin, garnishment, or attachment statute.¹⁶ Though a good faith defense was available at common law, the Court refused to transmute this defense into qualified immunity because *Harlow*'s policy rationales were inapposite; the defendant held no public office and was not principally concerned with the public good, so a trial would not impair the public interest or distract an official from his duties.¹⁷

In *Richardson*, the Court reviewed immunity where private actors were serving a largely public function — an inmate had sued a guard at a privately managed correctional center under § 1983 for placing restraints tightly enough to injure.¹⁸ Though *Wyatt*'s holding did not control, the Court did apply its framework of examining the history and policy rationales of immunity.¹⁹ The Court found no “firmly rooted” tradition of immunity for private prison guards; on the contrary, previous cases had held private prison guards liable for mistreating inmates.²⁰ In contrast, the opinion noted that doctors and lawyers acting “at the behest of the sovereign” historically had immunity.²¹

In examining immunity's purposes, the Court rejected a functional approach — where performing a governmental function confers immunity — stating that function has mattered for determining only

¹³ See *Wyatt v. Cole*, 504 U.S. 158, 160–61 (1992); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 942 n.23 (1982).

¹⁴ See, e.g., *Richardson v. McKnight*, 521 U.S. 399, 422 (1997) (Scalia, J., dissenting).

¹⁵ See *id.* at 403–04 (majority opinion) (citing *Wyatt*, 504 U.S. at 164, 167).

¹⁶ *Wyatt*, 504 U.S. at 168–69.

¹⁷ *Id.* at 165–68.

¹⁸ *Richardson*, 521 U.S. at 401–02.

¹⁹ See *id.* at 409–12. Because *Richardson* served a traditionally public function, *Harlow*'s policy rationales were relevant, and so the Court did not rely on *Wyatt*'s lack-of-public-interest logic. See *id.*

²⁰ *Id.* at 404 (internal quotation marks omitted); see *id.* at 404–06. However, the Court relied on only post-1871 authorities. See *id.* at 404–07. The majority disagreed with the dissent's assertion that an 1861 case refuted the majority's finding, stating that the case at most established immunity for negligence, not for the intentional harm alleged in *Richardson*. Compare *id.* at 406 (citing *Williams v. Adams*, 85 Mass. (3 Allen) 171 (1861)), with *id.* at 415 & n.1 (Scalia, J., dissenting) (citing *Williams*, 85 Mass. (3 Allen) 171).

²¹ *Id.* at 407 (majority opinion) (citing *Tower v. Glover*, 467 U.S. 914, 921 (1984)).

which type of immunity (qualified or absolute) applies, not whether it should be granted to a private actor.²² Because government and private industry can perform similar functions, a functional “approach bristles with difficulty.”²³ Instead, the Court used *Wyatt*’s policy rationales: “[P]rotecting ‘government’s ability to perform its traditional functions’ by providing immunity where ‘necessary to preserve’ the ability of government officials ‘to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering public service.’”²⁴ In particular, the Court focused on whether liability would cause “unwarranted timidity,”²⁵ deterrence from service, and distraction from duties. The Court found the first two rationales inapposite, arguing that “ordinary marketplace pressures” would alleviate these problems by replacing timid firms and by offering employees insurance, extra pay, or benefits to offset the risk of suit.²⁶ Public officials face indirect electoral pressures and ossified civil services systems, so they are more sensitive to liability dampening vigorous performance and are less able to punish infractions.²⁷ Finally, while not disputing that immunity would help prevent distraction, the Court found that because some of the most important discretionary tasks were reserved for state officials, the threat caused by distraction was not too severe.²⁸ The Court concluded that none of the factors warranted granting qualified immunity to private prison guards.²⁹

However, the Court provided several caveats. Most importantly, the Court narrowed its holding to the context in which a “private firm, systematically organized to assume a major lengthy administrative task . . . with limited direct supervision by the government, undertakes that task for profit and potentially in competition with other firms.”³⁰ Its holding did *not* apply to “a private individual briefly associated with a government body, serving as an adjunct to government in an essential government activity, or acting under close official supervision.”³¹

²² *Id.* at 408–09.

²³ *Id.* at 409.

²⁴ *Id.* at 408 (quoting *Wyatt v. Cole*, 504 U.S. 158, 167 (1992)).

²⁵ *Id.*

²⁶ *Id.* at 409; *see id.* at 409–10.

²⁷ *Id.* at 410–11.

²⁸ *Id.* at 411–12.

²⁹ *Id.* at 412. Importantly, the Court did not say that private actors were more likely to violate constitutional rights “because they work for a profit motive.” *Id.* at 421 (Scalia, J., dissenting). In fact, Tennessee’s prisons improved with privatization. *See* Alyssa van Duizend, *Should Qualified Immunity Be Privatized?: The Effect of Richardson v. McKnight on Prison Privatization and the Applicability of Qualified Immunity Under 42 U.S.C. § 1983*, 30 CONN. L. REV. 1481, 1506–09 (1998).

³⁰ *Richardson*, 521 U.S. at 413.

³¹ *Id.*

B. Problems with the Standard

The Court's narrow holdings in *Wyatt* and *Richardson* — the only two opinions to address private qualified immunity squarely — leave the applicability of the history and policy standard uncertain.³² The *Richardson* opinion, upon which lower courts principally rely, fails to address complex issues of precedent and to clarify its own logic in applying the standard. Lower courts have unsurprisingly reached contradictory results in trying to apply *Richardson*.

Richardson's treatment of history is unclear. Originally, true "immunity" was absolute and only granted to those who had it at common law, while "qualified immunity" was a preservation of the common law good faith defense.³³ The good faith defense was transmuted into modern "qualified immunity" by *Harlow* on policy grounds. Yet by then the Court had abandoned any pretense of historical inquiry, largely because it had trouble interpreting the common law for many officials.³⁴ Instead, it first used a functional approach, comparing an official's functions to those performed by an official with common law immunity. It later began granting immunity based solely on policy justifications to all officials performing executive or discretionary functions, even in the face of contradictory common law.³⁵ This later approach belies *Richardson's* point that function was never determinative in granting qualified immunity. The historical standard is either conjunctive, with policy bootstrapping a good faith defense into an immunity, or else a requirement of no strongly contrary common law. *Richardson* further obfuscated the standard by introducing, without defining, the phrase "behest of the sovereign."³⁶

The policy determination is also confusing. Prior to *Richardson*, the policy rationales were mostly used as broad justifications for granting public officials immunity.³⁷ They were used as a *test* only to

³² Although *Tower v. Glover*, 467 U.S. 914 (1984), technically addressed private immunity, it did not clearly announce that it was doing so; *Wyatt* did clearly announce that it was addressing private immunity and did not cite *Tower* in the relevant discussion.

³³ See, e.g., *Pierson v. Ray*, 386 U.S. 547 (1967) (granting judges absolute immunity and police officers a good faith defense); Oliver Barber, Recent Decision, *Richardson v. McKnight*, 117 *S. Ct. 2100* (1997), 71 *TEMP. L. REV.* 417, 424–26 (1998).

³⁴ See, e.g., *Anderson v. Creighton*, 483 U.S. 635, 644–45 (1987); *Wood v. Strickland*, 420 U.S. 308, 315–20 (1975).

³⁵ See, e.g., *Richardson*, 521 U.S. at 414–18 (Scalia, J., dissenting); *Anderson*, 483 U.S. at 644–45 ("[W]e have never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law." *Id.* at 645.); Barber, *supra* note 33, at 426–30; Daniel J. Juceam, Recent Development, *Privatizing Section 1083 Immunity: The Prison Guard's Dilemma After Richardson v. McKnight*, 21 *HARV. J.L. & PUB. POL'Y* 251, 259–60 (1997).

³⁶ *Richardson*, 521 U.S. at 407. The Court cited *Tower* for this phrase; yet *Tower* had denied private immunity and never used that phrase. See *Tower*, 467 U.S. 914.

³⁷ See *Harlow v. Fitzgerald*, 457 U.S. 800, 813–19 (1982).

choose between qualified and absolute immunity, a distinction already clear because of functional comparisons to established categories.³⁸ *Richardson*, by contrast, uses the rationales as a multifactor test with caveats for granting immunity itself, yet provides no guidance on balancing the factors or on which ones are dispositive. The Court did not explain who has the burden to prove the factors' existence or to what extent they must be shown. For instance, courts could assume "market pressures" always operate; proving factors like market competition or the degree of supervision could be highly fact-intensive. Further, *Richardson* never explained whether policy and history form a conjunctive or disjunctive test, instead leaving their roles uncertain.

C. *The Responses of Lower Courts*

Lower courts have varied widely in applying *Richardson*, with the majority of cases denying qualified immunity. Seven circuits have used *Richardson* as a test, refusing to grant private actors qualified immunity in many circumstances.³⁹ While only one circuit has explicitly granted private actors qualified immunity under *Richardson*, others have arguably done so implicitly,⁴⁰ so immunity is not always categorically precluded.⁴¹ One circuit has held that qualified immunity applied in every case it has considered, though it has not relied on *Wyatt* or *Richardson*.⁴² The remaining four circuits have no holding applying *Richardson*.⁴³ Much litigation continues at the district court level without circuitwide resolution.

The discussion below focuses on three types of private actors: medical personnel, lawyers, and private individuals acting pursuant to government orders. All three types of actors could be distinguishable from private prison guards because they might be supervised or not

³⁸ See, e.g., *Forrester v. White*, 484 U.S. 219, 229–30 (1988); *Malley v. Briggs*, 475 U.S. 335, 342–44 (1986).

³⁹ See, e.g., *Harrison v. Ash*, 539 F.3d 510 (6th Cir. 2008); *Rosewood Servs., Inc. v. Sunflower Diversified Servs., Inc.*, 413 F.3d 1163 (10th Cir. 2005); *Toussie v. Powell*, 323 F.3d 178 (2d Cir. 2003); *Jensen v. Lane County*, 222 F.3d 570 (9th Cir. 2000); *Hinson v. Edmond*, 192 F.3d 1342 (11th Cir. 1999), *amended by* 205 F.3d 1264 (11th Cir. 2000); *Malinowski v. DeLuca*, 177 F.3d 623 (7th Cir. 1999); *Weiler v. Purkett*, 137 F.3d 1047 (8th Cir. 1998).

⁴⁰ For a discussion of Sixth Circuit cases granting immunity, see *infra* pp. 1273, 1275. For implicit grants of immunity, see *infra* pp. 1274, 1277.

⁴¹ The Ninth Circuit does appear to have a line of cases denying qualified immunity to all private actors. See *infra* notes 103–04 and accompanying text; see also *Franklin v. Fox*, 312 F.3d 423, 444 (9th Cir. 2002) (“[P]rivate persons are not entitled to qualified immunity under § 1983.”).

⁴² See *Burke v. Town of Walpole*, 405 F.3d 66 (1st Cir. 2005); *Camilo-Robles v. Hoyos*, 151 F.3d 1 (1st Cir. 1998).

⁴³ The Third, Fourth, Fifth, and D.C. Circuits have no reported opinions applying *Richardson*, though some of their district courts have applied it.

motivated purely by profit.⁴⁴ In addition, medical personnel and lawyers could be distinguishable from prison guards based on *Richardson's* assertion that these actors historically enjoyed some immunity.⁴⁵

1. *Medical Personnel.* — Courts have taken different stances toward private medical providers, disagreeing over whether governmental supervision is dispositive, whether the common law tradition of immunity is sufficient, and what other factors to consider. In *Jensen v. Lane County*,⁴⁶ the Ninth Circuit held that qualified immunity was “categorically” unavailable to private health contractors.⁴⁷ Dr. Robbins, a private psychiatrist working for the county, committed Jensen to a state psychiatric hospital, allegedly denying him due process.⁴⁸ The court first assessed history. Although Dr. Robbins quoted *Richardson's* suggestion of immunity for doctors, the court found an insufficient historical basis for granting immunity due to “[t]he paucity of federal case law” and because Oregon’s statutory immunity for commitments did not suggest a firmly rooted tradition.⁴⁹

Jensen next applied *Richardson's* policy analysis, noting that the “market forces arguments are equally applicable” to private physicians; physicians face replacement, and the “potential for insurance, indemnification agreements, and higher pay all may operate” to encourage them to work with the government and perform their duties vigorously.⁵⁰ The court placed the burden on Dr. Robbins to demonstrate these factors’ absence.⁵¹ He suggested applying *Bartell v. Lohiser*,⁵² in which private social workers were granted qualified immunity.⁵³ The court distinguished that case: unlike the social workers, who performed a “discrete public service task . . . under close supervision of government officials . . . , did not conduct any policy-making or administrative functions, and operated as a not-for-profit entity,” the psychiatrists in *Jensen* conducted some discretionary decisionmaking and

⁴⁴ Doctors, lawyers, and those assisting officials or asserting their legal rights may often act out of a sense of a higher duty rather than for mere profit.

⁴⁵ See *Richardson v. McKnight*, 521 U.S. 399, 407 (1997).

⁴⁶ 222 F.3d 570 (9th Cir. 2000).

⁴⁷ *Id.* at 576; see *id.* at 576–80.

⁴⁸ See *id.* at 573.

⁴⁹ *Id.* at 576 n.2; see *id.* at 576–77. The court did find possible common law *absolute* immunity for an emergency commitment order but dismissed this immunity as inapposite because it was based on a physician’s functional status as a witness rather than as a doctor. See *id.* at 575, 577 & n.3 (citing *Dunbar v. Greenlaw*, 128 A.2d 218, 221, 224 (Me. 1956)). The factual basis for this distinction is somewhat unclear; in at least one case in which a physician was granted qualified immunity for an emergency commitment order, the physician followed a procedure very similar to that followed by Dr. Robbins in *Jensen*. Compare *Dunbar*, 128 A.2d at 220–22, 224, with *Jensen*, 222 F.3d at 573.

⁵⁰ *Jensen*, 222 F.3d at 578.

⁵¹ See *id.* at 578–79.

⁵² 12 F. Supp. 2d 640 (E.D. Mich. 1998), *aff’d*, 215 F.3d 550 (6th Cir. 2000).

⁵³ *Jensen*, 222 F.3d at 579.

policymaking.⁵⁴ The court concluded that “[a]lthough no one of these responsibilities is necessary or sufficient,” the combination revealed a “complex administrative task.”⁵⁵ Thus, *Jensen* suggested that governmental supervision is not by itself determinative.⁵⁶

*Chauncey v. Evans*⁵⁷ reached the opposite legal conclusion on roughly equivalent facts. There, medical contractors allegedly showed deliberate indifference to a prisoner.⁵⁸ The court found that just as state physicians assume an obligation to the state’s mission, so do private prison physicians; the coercive setting creates unique problems and makes the work a “joint effort” requiring “close cooperation and coordination” between prison officials and private physicians.⁵⁹ The opinion did not discuss history or policy; it distinguished *Richardson* solely on governmental supervision, making that issue determinative.⁶⁰ *Chauncey* also challenged *Wyatt*’s notion that private actors are not concerned with the public good.

Other circuit cases have attempted to apply *Richardson*’s standard to medical contractors as a multifactor test, ultimately denying immunity. *Harrison v. Ash*,⁶¹ *Cook v. Martin*,⁶² and *Hinson v. Edmond*⁶³ each found that while state actor physicians may have had common law immunity for negligence, they had none for intentional harm (including deliberate indifference); these courts made similar policy determinations to those made in *Jensen*.⁶⁴ *Harrison*, though, noted the presence of insurance,⁶⁵ and *Hinson* noted that the previous company had recently been replaced.⁶⁶ *Cook* and another case found that being under the supervision of another company, and thus being two steps

⁵⁴ *Id.* (citing *Bartell*, 12 F. Supp. 2d at 643, 646).

⁵⁵ *Id.*

⁵⁶ *Jensen* appears to have misinterpreted its own facts as showing no close supervision: Dr. Robbins was engaged in a “deeply intertwined process . . . [where] County employees initiate[d] the evaluation process, there [was] significant consultation with and among . . . both [private] psychiatrists and county crisis workers[,] . . . [and] the state ha[d] . . . deeply insinuated itself into the process . . .” *Id.* at 575.

⁵⁷ No. 2:01-CV-0445, 2003 WL 21730580 (N.D. Tex. Feb. 11, 2003).

⁵⁸ *See id.* at *1.

⁵⁹ *Id.* at *2 (quoting *West v. Atkins*, 487 U.S. 42, 51 (1988)) (internal quotation marks omitted).

⁶⁰ *See id.* Other courts have also suggested that supervision is determinative. One court found that a lack of information about supervision precluded a judgment on qualified immunity. *See Pearson v. City of Philadelphia*, No. CIV. A. 97-1298, 1998 WL 721076, at *3 n.3 (E.D. Pa. Oct. 15, 1998).

⁶¹ 539 F.3d 510 (6th Cir. 2008).

⁶² 148 F. App’x 327 (6th Cir. 2005).

⁶³ 192 F.3d 1342 (11th Cir. 1999).

⁶⁴ *See Harrison*, 539 F.3d at 522–25; *Cook*, 148 F. App’x at 339–42; *Hinson*, 192 F.3d at 1345–47.

⁶⁵ *See Harrison*, 539 F.3d at 524.

⁶⁶ *See Hinson*, 192 F.3d at 1346. This fact suggested a robust market. *See id.*

removed from public supervision, militated strongly against immunity.⁶⁷ Other cases also have treated *Richardson* as a test, requiring that its factors be shown (though to varying levels of specificity).⁶⁸

Other opinions have determined immunity without careful application of *Richardson*. In *Lee v. Wyatt*,⁶⁹ relying on *Richardson*'s recognition of some common law immunity, a district court granted a private prison physician qualified immunity without any other discussion of history or policy.⁷⁰ However, the court appears to have also relied on contrary pre-*Richardson* precedent, construing it too broadly in stating that "a private individual who performs a government function pursuant to a state order or request is entitled to qualified immunity if a state official would have been entitled to such immunity."⁷¹ Some cases have done the opposite, using *Richardson* without analysis to conclude that "private individuals who contract with the state to provide prison services do not appear entitled to qualified immunity."⁷² The First Circuit's only post-*Richardson* private qualified immunity cases granted immunity to forensic odontologists and psychiatrists, relying on precedent unrelated to *Richardson*.⁷³ Finally, in at least two cases, courts presumed that medical personnel were public employees because evidence to the contrary was not raised in a timely manner.⁷⁴

2. *Lawyers*. — Cases involving private lawyers working for the government have similarly reached contradictory categorical conclusions, largely because of confusion over the phrase "behest of the sovereign." In *Cullinan v. Abramson*,⁷⁵ the Sixth Circuit granted a city's outside counsel qualified immunity based on that phrase. The court noted that, because the attorneys were acting as agents of the state, the rationales for qualified immunity applied as much to them as to the city's "sometime law director"; there was "no good reason" to hold in-house counsel eligible and outside counsel ineligible.⁷⁶ The court pro-

⁶⁷ See *Cook*, 148 F. App'x at 341; *Parreant v. Schotzko*, No. 00-2014 JRT/JGL, 2001 WL 1640137, at *5 (D. Minn. Sept. 30, 2001).

⁶⁸ See, e.g., *Payton v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 184 F.3d 623, 631 (7th Cir. 1999); *McDuffie v. Hopper*, 982 F. Supp. 817, 823-24 (M.D. Ala. 1997).

⁶⁹ No. CIV-07-773-W, 2009 WL 1741387 (W.D. Okla. Jan. 20, 2009).

⁷⁰ See *id.* at *26.

⁷¹ *Id.* (quoting *Eagon ex rel. Eagon v. City of Elk City*, 72 F.3d 1480, 1489 (10th Cir. 1996)) (internal quotation mark omitted).

⁷² *Wolfe v. Horn*, 130 F. Supp. 2d 648, 656 (E.D. Pa. 2001); see also *Gray v. Metro. Gov't of Nashville & Davidson County*, No. 3:04-0425, 2005 WL 2334119, at *5 (M.D. Tenn. Sept. 22, 2005).

⁷³ See *Burke v. Town of Walpole*, 405 F.3d 66, 89-92 (1st Cir. 2005); *Camilo-Robles v. Hoyos*, 151 F.3d 1, 10-12 (1st Cir. 1998).

⁷⁴ See *Sain v. Wood*, 512 F.3d 886, 893 (7th Cir. 2008); *Gill v. Mathai*, 2006 WL 2796155, at *3 (E.D. Mich. Sept. 27, 2006).

⁷⁵ 128 F.3d 301 (6th Cir. 1997).

⁷⁶ *Id.* at 310.

vided no other supporting authorities and did not analyze policy, essentially holding that state-retained lawyers always get qualified immunity. The fairness argument, though, ignores the purpose of qualified immunity — “to protect the public at large, not to benefit its agents.”⁷⁷ Subsequently, the same circuit held in *Cooper v. Parrish*⁷⁸ that a private attorney assisting prosecutors was *not* protected. Though he had been sworn in as a special assistant district attorney, the court found that he was not a public official at the state’s behest because he did not obtain his position pursuant to statutory authority and was not paid by the state.⁷⁹ The court did not explain why a lawyer must work pursuant to a contract, rather than pursuant to a request for aid (as was arguably the case in *Cooper*), in order to receive immunity. Further, it is not clear why he was not a nonmarket “private individual briefly associated with a government body . . . acting under close official supervision”⁸⁰ and thus within a *Richardson* caveat. The court’s sole policy argument⁸¹ was not part of *Richardson*.

In *Cottingham v. Policy Studies, Inc.*,⁸² a court granted absolute prosecutorial immunity to a private attorney collecting alimony for the state because she had acted at the “behest of the sovereign.”⁸³ Because there was a valid contract, the court stated that *Cullinan* was analogous and *Cooper* inapposite;⁸⁴ it considered no other history or policy arguments, creating a presumption of immunity for government contract lawyers. However, in *Gonzalez v. Spencer*,⁸⁵ the Ninth Circuit denied qualified immunity to a county-retained lawyer because she had “pointed to ‘no special reasons . . . favoring . . . immunity,’” citing *Richardson* but ignoring the Court’s acknowledgment of historical immunity.⁸⁶ Another court denied immunity based on conclusory readings of *Wyatt*, *Cooper*, and pre-*Richardson* precedent as denying immunity for government-retained lawyers, stating that *Cullinan* applies rarely (but not specifying when).⁸⁷ Ironically, after criticizing *Cullinan* as lacking reasoned analysis, the court in *Venable v. Keever*⁸⁸ did not engage with *Richardson*’s factors; it simply asserted that *Rich-*

⁷⁷ *Wyatt v. Cole*, 504 U.S. 158, 168 (1992).

⁷⁸ 203 F.3d 937 (6th Cir. 2000).

⁷⁹ *Id.* at 952.

⁸⁰ *Richardson v. McKnight*, 521 U.S. 399, 413 (1997).

⁸¹ The attorney performed no unique government function, so no public interest would be impaired by denying him immunity. See *Cooper*, 203 F.3d at 952–53.

⁸² No. 3:07-0580, 2008 WL 768854 (M.D. Tenn. Mar. 21, 2008).

⁸³ *Id.* at *2 (quoting *Richardson*, 521 U.S. at 407) (internal quotation mark omitted).

⁸⁴ *Id.* at *3–4.

⁸⁵ 336 F.3d 832 (9th Cir. 2003).

⁸⁶ *Id.* at 835 (quoting *Richardson*, 521 U.S. at 412).

⁸⁷ See *Romero v. Yellowstone County Sheriff Office*, No. CV 06 104 BLG RFC, 2007 WL 1140659, at *4–5 (D. Mont. Apr. 16, 2007).

⁸⁸ 61 F. Supp. 2d 552 (N.D. Tex. 1999).

ardson's common law point did not address for-profit private individuals and found *Harlow*'s rationales inapposite because the actors were not public employees performing a unique governmental or discretionary function.⁸⁹ More importantly, in glossing over distinguishing features, it concluded that "[i]f the attorney defendants are granted qualified immunity, it would apply . . . to virtually every . . . agent who works on behalf of the government, and that is not [its] purpose."⁹⁰ Therefore, the case became a categorical denial of qualified immunity to government-retained lawyers. The only court to look for *Richardson* factors, including autonomy, potential competition, and compensation, found that "[e]ven assuming a tradition of immunity," there was too little information at the time to reach summary judgment.⁹¹

3. *Private Individuals Acting Pursuant to Government Orders.* — Categorical inconsistencies also exist when a private individual works with law enforcement pursuant to a request, warrant, or order — cases that may fall within *Richardson*'s caveats. These cases reveal the indeterminacy of common law immunity, confusion over the test, and differences in burdens. *Mejia v. City of New York*,⁹² which analyzed whether a private company that allegedly assisted a false arrest could be entitled to qualified immunity, is the only opinion examining in detail common law immunity for citizens aiding law enforcement. The court noted that the common law history was unclear.⁹³ In examining policy, the court conflated distraction and timidity but still gave a full treatment to *Richardson*'s factors; it found that civil liability would distract and deter citizens from promptly rendering aid, thereby hindering law enforcement.⁹⁴ Likewise, the court distinguished *Richardson* by that case's caveats: the actor was not compensated, its involvement with the government was brief, its actions were directed by law enforcement, and it did not carry insurance.⁹⁵ Further, after noting that *Richardson* did not address whether its standard was conjunctive or disjunctive, the *Mejia* court found that Supreme Court precedent recognized immunity even where common law support was equivocal, and concluded that policy was dispositive here.⁹⁶

A highly analogous situation occurred where two Wal-Mart employees assisted a police sting operation, and the court recited *Richard-*

⁸⁹ *Id.* at 561–62.

⁹⁰ *Id.* at 562.

⁹¹ *B.F.G. v. Blackmon*, No. 08 C 1565, 2008 WL 4155263, at *4 (N.D. Ill. Sept. 8, 2008).

⁹² 119 F. Supp. 2d 232 (E.D.N.Y. 2000).

⁹³ *Id.* at 262–64. An equal number of jurisdictions had granted and denied immunity. *Id.*

⁹⁴ *Id.* at 264–66.

⁹⁵ *Id.* at 265–66.

⁹⁶ *Id.* at 268.

son caveats like close supervision.⁹⁷ Yet the court denied qualified immunity because it placed the burden of proof on the defendants, and they had failed to provide historical or policy justifications.⁹⁸ Given that the *Mejia* court provided both of these justifications *itself*,⁹⁹ these cases show that different burdens produce inconsistent outcomes.

Courts have sometimes granted qualified immunity to private actors assisting law enforcement or following a court order. In *Gardner v. McGroarty*,¹⁰⁰ a district court granted an electric company immunity for termination of power pursuant to a city official's emergency request. The court found that this case fell within *Richardson's* caveats because the company "serv[ed] as an adjunct to the local government in an essential government activity, and act[ed] under close governmental supervision" in exercising police powers.¹⁰¹ Similarly, private nurses were effectively given immunity for giving a police blood test, despite their similarities to prison medical providers, based on pre-*Richardson* precedents providing immunity for assisting police and the unfairness of preventing nurses from relying on police representations of probable cause when other officers could.¹⁰² By contrast, in *Clement v. City of Glendale*,¹⁰³ the Ninth Circuit refused to grant qualified immunity to a towing company, despite the courts' finding of close supervision, stating simply that qualified immunity was "generally not available to private defendants."¹⁰⁴ In *Malinowski v. DeLuca*,¹⁰⁵ private building inspectors employed by the state, following a special inspection warrant and accompanied by police, were not given qualified immunity because they failed to meet the burden of demonstrating historical immunity and performed their duties with little supervision.¹⁰⁶

D. Conclusion

Contradictory immunity standards have costs. Patchwork liability across jurisdictions raises privatization costs as firms adapt to each jurisdiction's rules, requiring differences in benefits and personnel practices even within a state. Federal laws should not create such prob-

⁹⁷ See *Willits v. Wal-Mart Stores Inc.*, No. IP99-0276-C-M/S, 2001 WL 1028778, at *1-5 (S.D. Ind. July 30, 2001).

⁹⁸ See *id.* at *10.

⁹⁹ See *Mejia*, 119 F. Supp. 2d at 261 & n.31; *id.* at 261-68.

¹⁰⁰ No. Civ.A. 3:CV-99-1634, 2002 WL 32107213 (M.D. Pa. Mar. 26, 2002).

¹⁰¹ *Id.* at *8.

¹⁰² See *Marshall v. Columbia Lea Reg'l Hosp.*, 345 F.3d 1157, 1179-81 (10th Cir. 2003).

¹⁰³ 518 F.3d 1090 (9th Cir. 2008).

¹⁰⁴ See *id.* at 1096; see also *Tarantino v. Syputa*, 270 F. App'x 675 (9th Cir. 2008) (following *Clement*). The *Clement* court did allow the company to assert a good faith defense. *Clement*, 518 F.3d at 1097.

¹⁰⁵ 177 F.3d 623 (7th Cir. 1999).

¹⁰⁶ *Id.* at 627.

lems, especially since Congress is empowered to solve them.¹⁰⁷ The inconsistency of outcomes in federal court makes this litigation unfair to both defendants and plaintiffs, as constitutional liability and redress will depend not only on who the parties are, but also on where they are. In addition, the deluge of more than one hundred cases so far over whether qualified immunity applies is an added cost, not considered by *Richardson*, that has been and will continue to be passed on to society.¹⁰⁸ Costly litigation is sure to continue absent intervention.

These problems could be largely addressed if the Court clarified its immunity standard by explaining “behest of the sovereign,” how the factors relate and which are dispositive, and who bears the burden of proof. Alternatively, the Court could reform the standard by granting immunity to all state actors or to those who are determined to be based on certain state action tests (that is, a case-by-case functional standard). While the latter approach is less consistent than the former, it would reduce the inquiry to a single point and would be no more inconsistent than the current standard.¹⁰⁹ The Court has had opportunities to review the issue, but it has not done so.¹¹⁰ Congress could of course modify § 1983 liability. Although state legislatures have delineated state tort immunity,¹¹¹ the vitality of privatization counsels for federal reform. Otherwise, the aggregate costs of inconsistency will continue to rise, and state privatization will continue to be burdened needlessly. A clear, logically coherent standard is something upon which all states and their citizens can and should insist.

IV. THE STATE ACTION DOCTRINE AND THE ESTABLISHMENT CLAUSE

In 1999, the Supreme Court upheld a state program that provided educational materials to religious schools in *Mitchell v. Helms*¹ and struck down a school policy that allowed for public prayer before

¹⁰⁷ Cf. Stephen F. Williams, *Preemption: First Principles*, 103 NW. U. L. REV. 323, 327–28 (2009) (arguing that federal preemption law has a role in reducing the balkanization of standards).

¹⁰⁸ These costs, like those caused by a lack of private immunity, are passed on through the increase in prices firms must charge the public and through the distraction to officials of the litigation process. Cf. *Richardson v. McKnight*, 521 U.S. 399, 421–22 (Scalia, J., dissenting).

¹⁰⁹ The public function and pervasive entwinement tests are somewhat similar to *Richardson*’s standard, while other grounds for finding state action show a lesser association, falling within its caveats. See *SWORD AND SHIELD* 25–28 (Mary Massaron Ross & Edwin P. Voss, Jr. eds., 2006).

¹¹⁰ See *Parrish v. Cooper*, 531 U.S. 877 (2000) (mem.); *Cullinan v. Abramson*, 523 U.S. 1094 (1998) (mem.).

¹¹¹ See, e.g., N.M. STAT. ANN. § 31-16-10 (LexisNexis 2000); W. VA. CODE ANN. § 29-21-20 (LexisNexis 2008); see also *Marshall v. Columbia Lea Reg’l Hosp.*, 345 F.3d 1157, 1181 (10th Cir. 2003) (compiling statutes).

¹ 530 U.S. 793 (2000).

football games in *Santa Fe Independent School District v. Doe*.² Professor Michael McConnell suggests that the seemingly opposing holdings in these two cases represented a convergence in Establishment Clause jurisprudence.³ He argues that, in both of these Establishment Clause cases, the critical inquiry was whether the religious speech was state action.⁴ Moreover, McConnell asserts that this “specialized application of the state action doctrine” provides “a useful way to address issues under the Religion Clauses.”⁵

The three recent federal appellate court cases discussed below — *Cooper v. United States Postal Service*,⁶ *Americans United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*,⁷ and *Community House, Inc. v. City of Boise*⁸ — illustrate how the question of state action has been addressed in the Establishment Clause context and how state action can be a crucial and often determinative factor in complex Establishment Clause analyses. As such, the state action doctrine provides a useful lens for deciding such cases. But so long as lower courts are bound by the Supreme Court’s approach to the Establishment Clause in *Lemon v. Kurtzman*,⁹ these questions will remain muddled, even when courts recognize the importance of a state action inquiry. Of course, the state action doctrine does not answer all Establishment Clause questions — in particular, it does not help identify whether an activity is religious in nature. This Part argues, however, that when the sectarian nature of constitutionally questioned activity is determined, the state action doctrine furnishes courts with a clearer and more coherent legal framework for evaluating Establishment Clause cases than does automatic application of the *Lemon* test. Section A provides a theoretical justification for the application of the state action doctrine to Establishment Clause jurisprudence, and the following sections examine *Cooper*, *Americans United*, and *Community House* — three cases that demonstrate why and how the state action doctrine should be applied.

A. State Action: A Cleaner Inquiry

The question of state action should weigh heavily in modern freedom of religion cases because the doctrine supports the principles es-

² 530 U.S. 290 (2000).

³ See Michael W. McConnell, *State Action and the Supreme Court’s Emerging Consensus on the Line Between Establishment and Private Religious Expression*, 28 PEPP. L. REV. 681 (2001).

⁴ *Id.* at 681–82.

⁵ *Id.* at 682.

⁶ 577 F.3d 479 (2d Cir. 2009).

⁷ 509 F.3d 406 (8th Cir. 2007).

⁸ 490 F.3d 1041 (9th Cir. 2007).

⁹ 403 U.S. 602 (1971).

poused by the Constitution's two Religion Clauses.¹⁰ Religious activity by private parties is protected by the Free Exercise Clause,¹¹ while the same activity or promotion of that activity by the government is forbidden by the Establishment Clause¹² — therefore, the question of state action is determinative. Moreover, if the state action doctrine is more directly applied to Establishment Clause cases, it will improve the doctrinal coherence of cases applying § 1983.¹³ Under the current regime, the Establishment Clause occupies a place that is inconsistent with those of other constitutional rights regarding violations “under color of State law”:¹⁴ courts apply the state action doctrine to, for example, violations of equal protection or free speech rights, but they neglect to do so with respect to Establishment Clause violations.¹⁵ More explicit and concerted applications of the state action doctrine to the Establishment Clause will help ameliorate this incoherence.

Despite the clear importance of answering the question of state action in Establishment Clause cases, most courts mechanically apply the *Lemon* test,¹⁶ which requires government actions to have a secular purpose, not to have the primary effect of either advancing or inhibiting religion, and not to entangle the government excessively with religion.¹⁷ These three prongs, however, can sometimes consist of superfluous inquiries or indirect state action analyses, as shown below. These analyses are especially inefficient when an entity is engaging in clearly sectarian behavior, and thus the fundamental question before the court is whether such activity is attributable to the state. Consequently, instead of the full *Lemon* test, the application of the state action doctrine, in conjunction with a test to determine whether an action was religious in nature, would more clearly signal to other courts, governments, and private actors the line between constitutionally protected and constitutionally forbidden activity. This doctrinal move

¹⁰ See McConnell, *supra* note 3, at 682.

¹¹ U.S. CONST. amend. I.

¹² *Id.*

¹³ 42 U.S.C. § 1983 (2006).

¹⁴ *Id.* § 1981(c).

¹⁵ See Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 1, 63–64 (2005); cf. Daniel P. Hart, Note, *God's Work, Caesar's Wallet: Solving the Constitutional Conundrum of Government Aid to Faith-Based Charities*, 37 GA. L. REV. 1089, 1119–20 (2003) (advocating for the state action doctrine to be applied to *Lemon*'s government indoctrination test, thus implying that courts do not yet apply the state action doctrine to Establishment Clause inquiries).

¹⁶ The test was modified in *Agostini v. Felton*, 521 U.S. 203 (1997).

¹⁷ *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

would be particularly helpful in light of the Court's own frustration with the vagaries of the *Lemon* test.¹⁸

Analysis under the state action doctrine could easily replace the second and third prongs of the *Lemon* test. The second prong of the *Lemon* test asks whether the questioned action has the primary effect of advancing or inhibiting religion.¹⁹ Generally, an action violates this prong if it (1) results in governmental indoctrination or (2) defines its recipients by reference to religion.²⁰ The question of governmental indoctrination hinges on whether such behavior is “governmental” — a question of state action; the concern of “indoctrination” is better addressed separately. Similarly, as a plurality of the Supreme Court stated in *Mitchell*, whether the government action defines its recipients by reference to religion is ultimately a question of state action:

In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion. . . .

As a way of assuring neutrality, we have repeatedly considered whether any governmental aid that goes to a religious institution does so “only as a result of the genuinely independent and private choices of individuals.”²¹

The state action doctrine can also replace the third prong of the *Lemon* test, which prohibits excessive entanglement of government with religion.²² This prong is functionally similar to the state action test that considers an entity to be a state actor if it is partnered with the government in a joint enterprise²³ or if a public official, acting in his official capacity, takes a substantial part in the governance of that entity.²⁴ The extensive monitoring by the government of the religious conduct of private actors that generally leads to violations of the excessive entanglement test²⁵ would also transform that private actor in-

¹⁸ See, e.g., *Tangipahoa Parish Bd. of Educ. v. Freiler*, 530 U.S. 1251, 1253 (2000) (Scalia, J., dissenting from denial of certiorari) (“Like a majority of the Members of this Court, I have previously expressed my disapproval of the *Lemon* test. I would grant certiorari in this case if only to take the opportunity to inter the *Lemon* test once for all.” (citations omitted) (collecting cases)); *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (describing the application of the *Lemon* test as a “sisyphean task of trying to patch together [a] ‘blurred, indistinct, and variable barrier’” (quoting *Lemon*, 403 U.S. at 614)).

¹⁹ *Lemon*, 403 U.S. at 612.

²⁰ *Agostini*, 521 U.S. at 223, 231–32, 234.

²¹ *Mitchell v. Helms*, 530 U.S. 793, 809–10 (2000) (plurality opinion) (quoting *Agostini*, 521 U.S. at 226).

²² *Lemon*, 403 U.S. at 613.

²³ See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961).

²⁴ See *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 299–302 (2001).

²⁵ See *Lemon*, 403 U.S. at 619–20; see also *Agostini*, 521 U.S. at 221–22.

to a state actor.²⁶ Indeed, the Court analogized the excessive entanglement prong to state action inquiries when it first created this test.²⁷ As such, the *Lemon* test circuitously asks the same question of sectarian behavior as the state action doctrine does and would lead to the same result.

In contrast, the first prong of the *Lemon* test, which asks whether the government's action had a secular purpose,²⁸ cannot be replaced by the state action doctrine since it is, in essence, asking a question that goes to the substance of the Establishment Clause — whether the activity in question established or endorsed a religion. Thus, an Establishment Clause analysis that incorporated the state action doctrine would also need to keep some form of the first prong of the *Lemon* test. However, this prong, as currently interpreted by the courts, likely sets too low a bar: as long as the state was not *entirely* motivated by religion, an action satisfies this first prong.²⁹ A better Establishment Clause test would combine the state action doctrine with a more rigorous version of the first *Lemon* prong — for example, courts could ask whether the specific action, once determined to be state action, was motivated *primarily* by a sectarian purpose. Thus, the state action inquiry would ask, “Who are the state actors, and which of their actions are attributable to the government?” Then the substantive Establishment Clause test would follow by asking, “Do those actions violate the Establishment Clause because they are primarily motivated by religious purposes?” In cases where the questioned action is clearly sectarian, the answer should be obvious once the court has found state action. Where the state action is not clearly sectarian, the Court would need to form a new standard for what is sufficiently religiously motivated. This new inquiry would address the question directly, rather than blending it confusingly with questions of governmental involvement as the *Lemon* test does.

²⁶ See *Wickersham v. City of Columbia*, 481 F.3d 591, 597 (8th Cir. 2007) (“In certain circumstances the government may become so entangled in private conduct that ‘the deed of an ostensibly private organization or individual is to be treated . . . as if a State had caused it to be performed.’” (alteration in original) (quoting *Brentwood*, 531 U.S. at 295)).

²⁷ See *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 675 (1970) (“The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees ‘on the public payroll.’ There is no genuine nexus between tax exemption and establishment of religion.”).

²⁸ *Lemon*, 403 U.S. at 612.

²⁹ See *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985); *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984); see also *Bowen v. Kendrick*, 487 U.S. 589, 603 (1988); *Edwards v. Aguillard*, 482 U.S. 578, 613 (1987) (Scalia, J., dissenting) (noting the infrequency with which the Court has invalidated statutes because they lacked a secular purpose).

Admittedly, the state action doctrine has “not been a model of consistency.”³⁰ Many commentators have criticized the doctrine’s usefulness in general,³¹ disagreed on the number of tests the Court has applied,³² and questioned the clarity and application of those tests.³³ Even so, the Court has not expressed nearly as much disapproval of the state action doctrine as it has of the *Lemon* test. Justice Scalia noted in 2005 that “a majority of the Justices on the current Court . . . have, in separate opinions, repudiated the brain-spun ‘*Lemon* test.’”³⁴ Since applying the state action doctrine to Establishment Clause cases likely would not be as harrowing to courts as the much-maligned *Lemon* test (which already incorporates its own convoluted state attribution inquiry), such an application would provide the aforementioned benefits of coherence with other § 1983 suits, elimination of redundancy, and a clearer delineation of the line between the Establishment and Free Exercise Clauses.

Professors Ira Lupu and Robert Tuttle have argued, however, that the Establishment Clause requires “more robust”³⁵ standards and “a more searching inquiry”³⁶ than that provided by the state action doctrine. They contend that since the Establishment Clause is “a structural limitation on government”³⁷ instead of a privately enforceable right, the state has a “duty not to use religion as an instrument,”³⁸ and thus “official awareness of [religious] grantees’ foreseeable use of reli-

³⁰ *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 632 (1991) (O’Connor, J., dissenting).

³¹ See, e.g., Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: “State Action,” Equal Protection, and California’s Proposition 13*, 81 HARV. L. REV. 69, 95 (1967); Henry J. Friendly, *The Public-Private Penumbra—Fourteen Years Later*, 130 U. PA. L. REV. 1289, 1290–91 (1982); Alan R. Madry, *State Action and the Due Process of Self-Help*; Flagg Bros. *Redux*, 62 U. PITT. L. REV. 1, 2 (2000); Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 GEO. L.J. 779, 789 (2004).

³² See, e.g., Martin A. Schwartz & Erwin Chemerinsky, *Dialogue on State Action*, 16 Touro L. REV. 775, 798 (2000).

³³ See, e.g., *id.* at 780, 806 (criticizing the lack of clarity and unworkability of the public function and entanglement tests); Maura L. Demouy, Recent Decisions, *Exploring the Boundaries of Section 1983 and Title VII*, 54 MD. L. REV. 942, 946–47 (1995) (criticizing the lack of clarity in the Court’s public function test).

³⁴ *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 890 (2005) (Scalia, J., dissenting). While two of those Justices — Chief Justice Rehnquist and Justice O’Connor — are no longer on the Court, it seems doubtful that their replacements — Chief Justice Roberts and Justice Alito — would favor the *Lemon* test. See Erwin Chemerinsky, *The Future of Constitutional Law*, 34 CAP. U. L. REV. 647, 665 (2006); see also Sarah M. Isgur, Note, “Play in the Joints”: *The Struggle To Define Permissive Accommodation Under the First Amendment*, 31 HARV. J.L. & PUB. POL’Y 371, 378 & n.41 (2008). In contrast, the Justices have not expressed a similar desire to scrap the state action doctrine. See, e.g., *Castle Rock v. Gonzales*, 545 U.S. 748 (2005); *United States v. Morrison*, 529 U.S. 598 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997).

³⁵ Lupu & Tuttle, *supra* note 15, at 63.

³⁶ *Id.* at 65.

³⁷ *Id.* at 64–65.

³⁸ *Id.* at 65.

gious means . . . should lead to an attribution of governmental responsibility.³⁹ But it is precisely *because* the Establishment Clause is a structural limitation on government and not private actors that the state action question is important. The First Amendment prohibits religious behavior by the state but protects that same behavior when performed by private entities;⁴⁰ the crucial dividing line between the two is state action. Moreover, there is little reason to think that current state action doctrine is too lax of a standard to protect Establishment Clause rights. Indeed, a very expansive and strict Establishment Clause interpretation runs the risk of mandating governmental hostility towards religion and violating the Free Exercise Clause. The government cannot fund or encourage unconstitutional means and ends in *any* context, not just that of religion. For example, the government generally cannot use racially discriminatory means to further an otherwise legitimate purpose;⁴¹ nor can it use religious indoctrination as a means.⁴² However, questioned behavior always requires a nexus with the state for it to be considered unconstitutional.⁴³ For instance, governments are generally not held responsible when a government-funded private actor fires an employee for exercising a constitutionally protected right, whether that right is freedom of speech⁴⁴ or freedom of religion.⁴⁵

The three following cases show how the question of state action can be crucial when the Religion Clauses are at issue. They also illustrate how the state action doctrine can provide a more compendious and consistent basis for deciding cases under the Establishment Clause than the *Lemon* test.

B. *Cooper v. U.S. Postal Service*

In *Cooper*, a Connecticut taxpayer sued the U.S. Postal Service (USPS) for violating his Establishment Clause rights through the ac-

³⁹ *Id.*

⁴⁰ See McConnell, *supra* note 3, at 682 (“Precisely the same conduct — leading prayers, for example — is constitutionally *valued* and *protected* if engaged in by private parties, though unconstitutional if done by the government. . . . The evil against which the Establishment Clause is directed is not religion, but government control over religion.”).

⁴¹ See, e.g., *Palmore v. Sidoti*, 466 U.S. 429, 432–34 (1984); *McLaughlin v. Florida*, 379 U.S. 184, 193–96 (1964).

⁴² See *Agostini v. Felton*, 521 U.S. 203, 223 (1997).

⁴³ See *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974).

⁴⁴ See *Rendell-Baker v. Kohn*, 457 U.S. 830, 832, 834, 836–37 (1982) (finding no state action when a private school, which received ninety to ninety-nine percent of its funds from the government, fired a teacher after she had a public disagreement with the director).

⁴⁵ See *Lown v. Salvation Army, Inc.*, 393 F. Supp. 2d 223, 241–44 (S.D.N.Y. 2005) (ruling that the firing of an employee by a religious charitable organization funded primarily by government contracts was not state action).

tions of a Contract Postal Unit (CPU).⁴⁶ Specifically, Cooper complained about religious displays and materials placed in the area in which a church-affiliated organization operated the CPU.⁴⁷ The Second Circuit held that the displays violated the Establishment Clause and remanded to the district court to issue an injunction ordering that the displays be taken down.⁴⁸

The Second Circuit set out first to determine if Sincerely Yours, Inc. (SYI), the nonprofit incorporated by the church to run the CPU, was a state actor.⁴⁹ The court applied the public function test⁵⁰ to SYI's operation of the CPU⁵¹ and determined that SYI was a state actor because SYI performed many of the functions normally exclusively done by the USPS, such as selling postage, accepting mail, and processing it for delivery.⁵² Congress, the court explained, established the USPS through its enumerated constitutional power, giving it a monopoly over many of the postal services performed by SYI, thus making such services traditional "exclusive, or near exclusive, function[s] of the State."⁵³ The court made a point to explain that SYI's nature as a state actor extended only so far as "those areas of its facility where the public function takes place, namely the postal counter, the postal boxes, and the shelving unit that stores and displays postal materials," but not to any other property SYI owned or activities in which it engaged.⁵⁴ The court concluded its analysis by applying the *Lemon* test to SYI's religious displays, holding that the displays clearly had no secular purpose and thus violated the Establishment Clause "spectacularly."⁵⁵

The Second Circuit in *Cooper* appropriately made full use of the state action doctrine to find a violation of the Establishment Clause. In this case, the court recognized the preeminent importance of distinguishing between private action, which would have been protected by

⁴⁶ 577 F.3d 479, 484 (2d Cir. 2009). CPUs are "postal facilities operated by private parties on private property pursuant to revenue-sharing contracts," which the USPS uses at locations in which building a traditional post office is not "geographically or economically feasible." *Id.* at 485.

⁴⁷ *Id.* at 487–88.

⁴⁸ *Id.* at 484, 495–97.

⁴⁹ *Id.* at 491–92.

⁵⁰ See *Blum v. Yaretsky*, 457 U.S. 991, 1005 (1982) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974)), quoted in *Cooper*, 577 F.3d at 492.

⁵¹ *Cooper*, 577 F.3d at 492.

⁵² *Id.* at 492–93.

⁵³ *Id.* at 493 (quoting *Horvath v. Westport Library Ass'n*, 362 F.3d 147, 151 (2d Cir. 2004)).

⁵⁴ *Id.*

⁵⁵ *Id.* at 495; see *id.* at 494–95. The court additionally held that SYI's disclaimer on the postal counter, which stated, "The United States Postal Service does not endorse the religious viewpoint expressed in the materials posted at this Contract Postal Unit," *id.* at 495, did not cure the Establishment Clause violation. *Id.* at 496.

the First Amendment, and state action, which was prohibited. It is within the church's free exercise right to make private decisions to evangelize and spread spiritual teachings, but when it chose to perform the state functions of the postal service, it surrendered that right within the performance of those services. Once the court concluded that SYI was a state actor, the ruling that their displays violated the Establishment Clause was so obvious that the court lamented being required by Supreme Court precedent to invoke the "difficult to apply and not . . . particularly useful [*Lemon*] test."⁵⁶

C. *Americans United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*

From 1999 to 2007, the Iowa Department of Corrections (IDOC) allowed InnerChange Ministries (and its affiliate Prison Fellowship Ministries) to operate a residential rehabilitation program in Unit E of their medium security prison in Newton, Iowa.⁵⁷ The ultimate goal of InnerChange was to reduce recidivism rates and encourage participants to become responsible, "contributing members of society."⁵⁸ InnerChange described itself as "a Christian program, with a heavy emphasis on Christ and the Bible."⁵⁹ It had control of the prisoners who were enrolled in the program, with the power to treat, incarcerate, and discipline inmates.⁶⁰ While no one from InnerChange or the IDOC threatened punishment, promised a reduced sentence, or otherwise pressured inmates to participate, and no religious affiliation was required to participate,⁶¹ there were substantial benefits for participating. Prisoners enrolled in the program had greater privacy, were allowed more visits from family members, had greater access to computers, and were housed in Unit E, which was used in previous years as the "honor unit."⁶² The IDOC funded about a third of InnerChange's operating costs, but those funds went only to aspects of the program that were designated as nonreligious.⁶³

Americans United for Separation of Church and State, an advocacy group, sued the State of Iowa, InnerChange, and Prison Fellowship for violation of the Establishment Clause and prevailed in the district

⁵⁶ *Id.* at 494.

⁵⁷ *Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 413–14 (8th Cir. 2007).

⁵⁸ *Id.* at 413.

⁵⁹ *Ams. United*, 509 F.3d at 414.

⁶⁰ *Id.* at 423.

⁶¹ *Id.* at 414.

⁶² *Id.* at 424 (internal quotation marks omitted).

⁶³ *Id.* at 418. The plaintiff advocacy group alleged that the lines between the religious and nonreligious aspects of the program were indistinct and that some funding went to sectarian uses. *Id.*

court.⁶⁴ InnerChange appealed to the Eighth Circuit. The court first determined that InnerChange and Prison Fellowship were state actors, noting the “close nexus”⁶⁵ between the state of Iowa and InnerChange, which had 24-hour authority over *state* prisoners, and citing precedent in cases also involving private correctional providers who were found liable under § 1983.⁶⁶ The court then spent a third of the opinion applying the *Lemon* test (as modified by *Agostini v. Felton*⁶⁷), finding that the government aid to InnerChange violated the second prong of the test — that is, that the aid resulted in government religious indoctrination and defined recipients by reference to religion — and thus violated the Establishment Clause.⁶⁸ In addition, because InnerChange was the only special rehabilitation program offered by the IDOC, the court held that there was no true private choice, as the Establishment Clause necessitated.⁶⁹

The Eighth Circuit ruled correctly in *Americans United*, but it failed to recognize the importance of its determination that InnerChange was a state actor and thus obfuscated a straightforward Establishment Clause analysis by delving into complex questions of government aid to religious organizations under the *Lemon* test. The court correctly addressed the state action question first, but once it determined that InnerChange was a state actor, all it needed to find a violation of the Establishment Clause was the obvious fact that InnerChange, in its provision of services, promoted sectarian religious beliefs. The inquiry should have ended there. Instead, after addressing the state action question, the court turned to the *Lemon* test and addressed the very same issues again. For example, in applying *Lemon*’s second prong, the Court examined whether InnerChange’s indoctrination could “reasonably be attributed to Iowa’s funding”⁷⁰ — an inquiry that seems redundant if InnerChange was already deemed to be a state actor. Similarly, the court’s analysis of true private choice under *Zelman v. Simmons-Harris*⁷¹ could have been incorporated into the state actor question, because without the private choice, the government encouraged participation in InnerChange, thus satisfying the

⁶⁴ *Id.* at 413.

⁶⁵ *Id.* at 422.

⁶⁶ *Id.* at 422–23 (citing *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 71 n.5 (2001); *Smith v. Cochran*, 399 F.3d 1205, 1215–16 (10th Cir. 2003); *Street v. Corr. Corp. of Am.*, 102 F.3d 810, 814 (6th Cir. 1996)).

⁶⁷ 521 U.S. 203 (1997).

⁶⁸ *Ams. United*, 509 F.3d at 424–25. The court did not find, however, that the program created excessive entanglement because “there was no pervasive monitoring by the DOC.” *Id.* at 425.

⁶⁹ *Id.* at 425–26 (citing *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002)).

⁷⁰ *Id.* at 425.

⁷¹ 536 U.S. 639; *id.* at 652.

state action requirement.⁷² The Eighth Circuit's analysis shows that, ultimately, inquiries under the state action doctrine and the *Lemon* test are very similar in cases where religious action is apparent; as such, to increase the clarity of the opinion and eliminate redundancy, the court could have eschewed a full *Lemon* analysis.

D. Community House, Inc. v. City of Boise

Beginning in 1994, the City of Boise worked with Community House, Inc. (CHI) to build a homeless shelter.⁷³ The city owned the building; CHI ran the shelter, called Community House. After a 2004 dispute, the city took over operation of the shelter and requested bids to take control of it.⁷⁴ Ultimately, the Boise Rescue Mission (BRM), a Christian nonprofit organization that had served the Boise homeless population for almost fifty years, won the bid, and the City leased Community House to them.⁷⁵ BRM aimed to “help people at their physical and spiritual points of need’ by providing” material assistance and “Christian teaching.”⁷⁶ In furtherance of these goals, BRM decided to confine Community House to adult males and move the women and children to another shelter owned by BRM.⁷⁷

Before the transition to BRM's running of Community House, CHI sought an injunction to prevent the removal of women and children and the leasing to BRM, citing violations of the Fair Housing Act and the Establishment Clause.⁷⁸ After the district court granted a limited preliminary injunction, the Ninth Circuit reviewed the case on appeal.⁷⁹ The court addressed the Establishment Clause claim by applying the *Lemon* test, but it quickly dismissed any notion that the secular purpose prong was violated since the City clearly had a secular purpose in leasing Community House to BRM: providing shelter to the homeless.⁸⁰ However, the Ninth Circuit found that the lease had the effect of advancing religion because it resulted in government religious indoctrination, concluding that BRM's Christian teaching constituted

⁷² See McConnell, *supra* note 3, at 690–91 (explaining the connection between the Establishment Clause private choice inquiry and the state action inquiry); cf. *Reitman v. Mulkey*, 387 U.S. 369, 381 (1967) (finding state action where a local law “significantly encourage[d]” private discrimination); *Lombard v. Louisiana*, 373 U.S. 267, 273–74 (1963) (finding state action where local officials encouraged restaurants to discriminate based on race).

⁷³ *Cnty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1046 (9th Cir. 2007).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* (internal quotation marks omitted).

⁷⁷ *Id.*

⁷⁸ *Id.* at 1046–47.

⁷⁹ *Id.*

⁸⁰ *Id.* at 1054–56.

indoctrination and its actions were attributable to the government.⁸¹ In other words, while not explicitly invoking the state action doctrine, the court found a violation of the Establishment Clause implicitly because BRM was a state actor. The court reasoned that leasing the \$2.5 million building to BRM for \$1 likely constituted direct aid to religious indoctrination and thus raised “serious questions regarding an Establishment Clause violation,”⁸² warranting a preliminary injunction prohibiting all religious activities in Community House.⁸³ Judge Callahan concurred and dissented, disagreeing with the court’s determination that BRM’s indoctrination was attributable to the government.⁸⁴ Judge Callahan argued that whether *any* direct aid flowed from the City to BRM merely through a lease was factually indeterminate and that any such aid was de minimis with no actual diversion to religious indoctrination.⁸⁵

While the Ninth Circuit correctly recognized that the question of state action was the determinative factor in this case, the court erred by incorrectly designating BRM as a state actor in its conducting of chapel services. It made this mistake by attempting to answer the question of state action using indeterminate *Lemon* test precedent. Instead of relying on the state action doctrine, both the majority and Judge Callahan tried to sift through a Supreme Court ruling, *Mitchell*, which lacked a majority opinion.⁸⁶ The court should have focused on whether the chapel services could reasonably have been attributed to the government, rather than examining whether aid was diverted to chapel services because they took place within the leased building.

Furthermore, the court should have applied the state action doctrine and found that BRM was not a state actor for purposes of its chapel services since (1) the lease was assigned to BRM after a neutral bidding process,⁸⁷ (2) the lease created no excessive entanglement between the state and BRM,⁸⁸ (3) the city did not require or encourage the religious conduct or teaching,⁸⁹ (4) the individuals chose to live in the shelter themselves and the chapel services were not mandatory,⁹⁰

⁸¹ *Id.* at 1056–59. In addition, the court found that the third prong of the *Lemon* test was not violated because the lease did not create excessive entanglement with religion. *Id.* at 1056.

⁸² *Id.* at 1059.

⁸³ *Id.* at 1057–60.

⁸⁴ *Id.* at 1060 (Callahan, J., concurring and dissenting).

⁸⁵ *Id.* at 1063–66.

⁸⁶ *See id.*; *id.* at 1057–59 (majority opinion).

⁸⁷ *Id.* at 1057. The lack of neutrality can show the presence of state action. *See Mitchell v. Helms*, 530 U.S. 793, 794 (2000).

⁸⁸ The court agreed with this assessment. *Cnty. House*, 490 F.3d at 1056.

⁸⁹ *See Reitman v. Mulkey*, 387 U.S. 369, 381 (1967).

⁹⁰ *See Cnty. House*, 490 F.3d at 1066 (Callahan, J., concurring and dissenting). Other shelters were available in the Boise area. *See Appellees’ Response to Appellants’ Opening Brief* at 8, *Cnty. House*, 490 F.3d 1041 (No. 05-36195).

(5) running a homeless shelter is not traditionally an exclusive or near-exclusive function of the state,⁹¹ and (6) there was no significant nexus between BRM's chapel services and the local government.⁹² This last factor is a threshold requirement for finding state action. The lease was, at best, a very weak nexus between the challenged conduct — BRM's chapel services — and the local government. Even though the lease was a but-for cause of BRM's chapel services, it does not follow that the requisite nexus existed to transform those services into state action, for the same reason that a city's extension of sewage or fire-fighting services to a church does not transform a church service into state action. Moreover, state action cases have held that government contracts, and even very substantial government funding (much less a publicly subsidized lease), are not alone enough to transform a private entity into a state actor where there is little direct connection between that funding and the prohibited activity.⁹³ Thus, ruling that BRM's chapel services constituted state action was unwarranted — a result of the court's application of *Lemon* instead of the state action doctrine.

E. Conclusion

As these cases demonstrate, the question of state action is vitally important in contemporary Establishment Clause jurisprudence. The state action doctrine is more useful than the *Lemon* test because it more clearly and coherently decides cases involving sectarian behavior, while holding true to the public/private distinction that is enshrined in the Constitution's two Religion Clauses.⁹⁴ Thus, by applying the state action doctrine, courts have the opportunity to lift the Establishment Clause out of its current jurisprudential mire and clarify the boundaries of the first liberty in the Bill of Rights.

⁹¹ See *Horvath v. Westport Library Ass'n*, 362 F.3d 147, 151–52 (2d Cir. 2004).

⁹² See *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974) (requiring such a nexus for a finding of state action).

⁹³ See, e.g., *Rendell-Baker v. Kohn*, 457 U.S. 830, 840–41 (finding that over ninety percent funding by the government to a school did not itself transform the school into a state actor).

⁹⁴ Indeed, some circuit court judges have recently begun to recognize the importance of the state action question when addressing Establishment Clause cases. See, e.g., *Winn v. Ariz. Christian Sch. Tuition Org.*, 586 F.3d 649, 658–65 (9th Cir. 2009) (O'Scannlain, J., dissenting from denial of rehearing en banc) (criticizing the majority for failing to take notice of an absence of state action in the case); *Cooper v. U.S. Postal Service*, 577 F.3d 479, 491–93 (2d Cir. 2009).

V. SPECIALTY LICENSE PLATES AND THE FIRST AMENDMENT

The Commonwealth of Virginia issues to a certain group of its residents license plates that depict the Confederate flag.¹ At first glance, the use of this symbol does not present a state action problem: whether the action can be attributed to Virginia is immaterial because the existing case law suggests that there is no constitutional provision barring a state from displaying the Confederate flag.² But although Virginia's action does not implicate a response from the judiciary, it raises the specter of endorsement of the flag by the Virginian government and is thus of great consequence to society as a whole. The flag evokes a range of strong emotions in Virginians and other Americans,³ and the question whether the Virginian government has endorsed any or all of its myriad connotations is a serious one for citizens of the Commonwealth who may wish by their votes and other political activity to support or protest such an endorsement; it will be of equal concern to those who encounter Virginian automobiles carrying the plates and whose perceptions of the Commonwealth will be influenced by them. Many observers will attribute the presence of the Confederate flag — on state-issued, state-owned identification plates embossed with the name of "VIRGINIA" — to the Commonwealth's endorsement of the symbol and some portion of the cultural associations it carries.⁴ The reality, however, is that Virginia originally refused to allow the relevant group, the Sons of Confederate Veterans, to have the flag on their specialty license plate; the State only issued the plates after a federal court held that the State's viewpoint discrimination in the specialty license plate context violated the First Amendment.⁵

¹ See Commonwealth of Va. Dep't of Motor Vehicles, Special Plates: Plate Information, Sons of Confederate Veterans, <http://www.dmv.virginia.gov/exec/vehicle/splates/info.asp?idnm=SCVMC> (last visited Jan. 31, 2010).

² See, e.g., *NAACP v. Hunt*, 891 F.2d 1555, 1562–66 (11th Cir. 1990) (holding that the Confederate flag flying at Alabama's state capitol was the product of state action but did not constitute a violation of the Equal Protection Clause, the Thirteenth Amendment, the Establishment Clause, or the Free Speech Clause).

³ See *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles (SCV II)*, 305 F.3d 241, 248 (4th Cir. 2002) (Niemeyer, J., dissenting from the denial of rehearing en banc) ("The Confederate Flag, while appreciated by an organization commemorating the bravery of Civil War veterans as a symbol of honor, is at the same time a racially hostile symbol to a large segment of Virginia's citizens insofar as the Civil War included a fight to preserve slavery.").

⁴ *Id.* at 252 (Gregory, J., dissenting from the denial of rehearing en banc) ("[T]he display of the Confederate flag *will* be attributed to Virginia. . . . [T]he ban on the Confederate flag is designed to serve the substantial government interest of disassociating the Commonwealth from the Confederate flag.").

⁵ See *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles (SCV I)*, 288 F.3d 610, 614 (4th Cir. 2002). A district court reached the same holding in an earlier case involving Maryland's refusal to issue Confederate flag plates; Maryland, unlike Virginia, did not

The law of specialty license plates⁶ is a central battleground in the still-unfolding jurisprudence of government speech. Undoubtedly, license plates implicate the expressive rights of the drivers who display them, but because their messages are so readily attributed to the issuing governments, they also implicate a government speech interest in avoiding inaccurate assumptions of state endorsement. Accordingly, specialty license plates constitute a hybrid speech category — a classification as yet unrecognized by the Supreme Court — in which both private and government speech interests are weighty enough to demand simultaneous recognition by courts.⁷ In this hybrid category, both the government and the private speaker should have a right to veto expression that would be attributed to them by reasonable observers,⁸ as the test for government speech recently suggested by Justice Souter implies.

A. *The Government Speech Doctrine*

The government speech doctrine is a curiosity in the state action jurisprudence. Briefly stated, the doctrine declares that where the government communicates its own message, it is free to emphasize its own position and may discriminate against competing viewpoints with

appeal the decision. *See Sons of Confederate Veterans, Inc. v. Glendening*, 954 F. Supp. 1099 (D. Md. 1997).

⁶ “Specialty” license plates, which carry a symbol, image, or motto other than the issuing state’s default, are distinct from “vanity” license plates, which allow the driver to choose the specific series of characters that will appear on her plate. Vanity plates will not be discussed here, although they certainly raise a similar set of First Amendment issues as specialty plates. *Compare Perry v. McDonald*, 280 F.3d 159 (2d Cir. 2001) (holding that vanity license plates are non-public fora and that the state’s refusal to issue a “SHTHPNS” vanity plate was a reasonable and viewpoint-neutral restriction since it reacted not to the applicant’s personal philosophy that “Shit Happens,” *id.* at 163, but only to the offensive terms in which she couched it), *with Lewis v. Wilson*, 253 F.3d 1077 (8th Cir. 2001) (holding that, without regard to forum analysis, the state’s refusal to issue an “ARYAN-1” vanity plate arose from an overbroad regulation and violated the First Amendment).

⁷ Although *Sons of Confederate Veterans v. Commissioner of the Virginia Department of Motor Vehicles*, 288 F.3d 610, held that specialty license plates constituted private speech, two Fourth Circuit judges recognized that government interests were implicated alongside the private. *See SCV II*, 305 F.3d at 245 (Luttig, J., respecting the denial of rehearing en banc); *id.* at 252 (Gregory, J., dissenting from the denial of rehearing en banc). Scholars have also written on the free speech issue presented by specialty plates. *See, e.g.,* Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 690–91 (2008); Leslie Gielow Jacobs, *Free Speech and the Limits of Legislative Discretion: The Example of Specialty License Plates*, 53 FLA. L. REV. 419 (2001); Helen Norton, *Not for Attribution: Government’s Interest in Protecting the Integrity of Its Own Expression*, 37 U.C. DAVIS L. REV. 1317 (2004); Stephanie S. Bell, Note, *The First Amendment and Specialty License Plates: The “Choose Life” Controversy*, 73 MO. L. REV. 1279 (2008).

⁸ *See SCV II*, 305 F.3d at 245 (Luttig, J., respecting the denial of rehearing en banc) (“[T]he particular speech at issue in this case is neither exclusively that of the private individual nor exclusively that of the government, but, rather, hybrid speech of both.”).

impunity; the forum analysis performed in private speech cases does not apply.⁹ Thus, whereas plaintiffs asserting an infringement of their constitutional rights must typically demonstrate that a state actor was responsible for that infringement, government speech most often is a defense raised by the state when it is accused of a Free Speech Clause violation.¹⁰ Expansion of the government speech doctrine therefore threatens to erode constitutional protections by allowing the government to discriminate based on viewpoint in an increasingly wide range of circumstances. While this threat is a serious one, it is also clear that the government must be allowed to speak, and to discriminate freely in that speech, in order to govern at all.¹¹ The analysis of the government speech doctrine in two recent Supreme Court cases, *Johanns v. Livestock Marketing Association*¹² and *Pleasant Grove City v. Summum*,¹³ may inform a new analysis applicable to hybrid categories such as specialty license plates.

In *Johanns*, the Court considered a challenge by a group of cattle ranchers to a beef promotion campaign run by the federal government.¹⁴ The campaign was funded by an assessment on all sales and importations of cattle and beef products.¹⁵ The plaintiffs asserted that the assessment constituted a compelled subsidy of speech,¹⁶ but the Court held that the assessment was constitutional because the campaign was government speech.¹⁷ In so holding, the Court noted that the ability of the government to tax citizens and put the money to uses to which the citizens may object is fundamental to a working democracy.¹⁸

⁹ See *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1131 (2009) (citing, *inter alia*, *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005)).

¹⁰ However, “government speech must comport with the Establishment Clause.” *Id.* at 1132.

¹¹ See, e.g., *Keller v. State Bar of Cal.*, 496 U.S. 1, 12–13 (1990) (“If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.”).

¹² 544 U.S. 550.

¹³ 129 S. Ct. 1125.

¹⁴ 544 U.S. at 555. The campaign’s slogan was “Beef. It’s What’s for Dinner.” *Id.* at 554 (internal quotation marks omitted).

¹⁵ *Id.* at 554.

¹⁶ *Id.* at 556. While presumably sympathetic to the promotion of beef-eating, the ranchers protested the campaign’s lack of quality differentiation among different sources and types of meat, “not[ing] that the advertising promotes beef as a generic commodity, which . . . impedes [the ranchers’] efforts to promote the superiority of, *inter alia*, American beef, grain-fed beef, or certified Angus or Hereford beef.” *Id.*

¹⁷ *Id.* at 566–67.

¹⁸ See *id.* at 559 (quoting *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000)).

Justice Souter dissented.¹⁹ Although he recognized the necessity of government speech, including speech paid for through the taxation of those who might disagree with it,²⁰ he also felt that the primary restraint on government power — the democratic process²¹ — was ill served in the case at bar because it was far from clear to observers that the government was behind the campaign. He argued that “[u]nless the putative government speech appears to be coming from the government, its governmental origin cannot possibly justify the burden on the First Amendment interests of the dissenters targeted to pay for it.”²² Because the public was likely to understand the campaign as private speech from “America’s Beef Producers,” and unlikely to attribute it to the federal government, no democratic corrective would be forthcoming even if a great many disfavored the campaign.²³

In *Summum*, a religious group mounted a free speech challenge against a Utah city.²⁴ The city maintained in a public park a number of monuments donated to it by private groups, including a stone Ten Commandments sculpture, but refused to accept the proposed Summum monument, which enumerated the Summum religion’s Seven Aphorisms.²⁵ The Tenth Circuit held that this rejection, in the absence of a compelling state interest, constituted impermissible viewpoint discrimination.²⁶ The Supreme Court, however, reversed, reasoning that although a park is indeed a traditional public forum for most purposes, the permanent monuments within it are government speech, making the government’s viewpoint discrimination wholly permissible.²⁷

Justice Souter concurred only in the judgment.²⁸ Drawing on the attribution-based reasoning of his *Johanns* dissent, he asserted that the best test for identifying government speech is “to ask whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige.”²⁹ He noted that this test “is of a piece with the one for spotting forbidden governmental endorsement of religion in

¹⁹ *Id.* at 570 (Souter, J., dissenting). Justice Souter was joined by Justices Stevens and Kennedy.

²⁰ *Id.* at 574.

²¹ *Id.* at 575 (“Democracy . . . ensures that government is not untouchable when its speech rubs against the First Amendment interests of those who object to supporting it; if enough voters disagree with what government says, the next election will cancel the message.”).

²² *Id.* at 578–79; see also Corbin, *supra* note 7, at 666.

²³ *Johanns*, 544 U.S. at 577 (Souter, J., dissenting) (internal quotation mark omitted).

²⁴ *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1130 (2009).

²⁵ *Id.* at 1129–30.

²⁶ *Summum v. Pleasant Grove City*, 483 F.3d 1044 (10th Cir. 2007).

²⁷ *Summum*, 129 S. Ct. at 1129.

²⁸ *Id.* at 1141 (Souter, J., concurring in the judgment).

²⁹ *Id.* at 1142.

the Establishment Clause cases.”³⁰ Applying this observer test, Justice Souter concluded that in *Sumnum*, unlike in *Johanns*,³¹ a reasonable observer would understand the speech at issue to be government expression.³² He accordingly joined the Court’s holding that the government speech doctrine allowed the city to exercise viewpoint discrimination in accepting and rejecting monuments for its park.³³

While the general implications of a finding of government speech are clear, the framework to be applied in determining whether expression is government speech or private speech remains undefined.³⁴ Although it has not been adopted by a majority of the Court and indeed militates against the Court’s holding in *Johanns*,³⁵ Justice Souter’s observer test provides the most promising doctrinal framework around which to build a coherent jurisprudence of government speech. Constituting, as it does, a variation on the standard “reasonable person” test, it should be relatively easy for the lower courts to administer. Because the analysis turns on a single question, Justice Souter’s test provides a clearer and more direct approach to finding government speech than do the multifactor tests suggested by some lower courts and scholars.³⁶ Justice Souter’s proposed doctrine is also useful simply because the majority has never announced any clear test that can be applied to all government speech issues. Moreover, the Seventh Circuit recently “distilled” the Fourth Circuit’s four-factor government speech test³⁷ into a streamlined inquiry virtually identical to Justice Souter’s observer

³⁰ *Id.* (citing *County of Allegheny v. ACLU*, 492 U.S. 573, 630, 635–36 (1989) (O’Connor, J., concurring in part and concurring in the judgment)).

³¹ *See id.* at 1141 (citing *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 577 (2005)).

³² *Id.* at 1142.

³³ *Id.*

³⁴ *See SCV I*, 288 F.3d 610, 618 (4th Cir. 2002) (“No clear standard has yet been enunciated in our circuit or by the Supreme Court for determining when the government is ‘speaking’ and thus able to draw viewpoint-based distinctions, and when it is regulating private speech and thus unable to do so.”); *see also* *Ariz. Life Coal. Inc. v. Stanton*, 515 F.3d 956, 963 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 56 (2008) (“There is some question as to what standard we should apply in differentiating between private and government speech.”).

³⁵ Justice Souter’s position in *Johanns* would not preclude a government advertisement campaign funded by targeted industry assessments. It would merely require that the government “show its hand” in such cases by making it clear that the campaign was of governmental origin. *See Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 571–72 (2005) (Souter, J., dissenting).

³⁶ The Fourth Circuit’s four-factor test considers “(1) the central ‘purpose’ of the program in which the speech in question occurs; (2) the degree of ‘editorial control’ exercised by the government or private entities . . . ; (3) the identity of the ‘literal speaker’; and (4) whether the government or the private entity bears the ‘ultimate responsibility’ for the content of the speech.” *SCV I*, 288 F.3d at 618 (citing *Wells v. City & County of Denver*, 257 F.3d 1132, 1141 (10th Cir. 2001); *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085 (8th Cir. 2000)). For an overlapping five-factor test, see *Corbin*, *supra* note 7, at 627. A similar three-factor test is suggested in Andy G. Olree, *Identifying Government Speech*, 42 CONN. L. REV. 365 (2009).

³⁷ *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 863 (7th Cir. 2008), *cert. denied*, 130 S. Ct. 59 (2009).

test.³⁸ More recently, the Eighth Circuit, adopting the Seventh Circuit test in a case decided soon after the *Summum* decision came down, drew attention to this test's resemblance to the observer test from Justice Souter's *Summum* opinion;³⁹ by contrast, the Eighth Circuit found no clear test or standard to draw from the majority opinion in *Summum*. That lower courts already apply Justice Souter's test counsels all the more in favor of its broad adoption.

B. *The Specialty License Plate Cases*

The spate of specialty license plate cases that have been decided by the federal courts of appeals over the past decade provide a fertile ground for application of Justice Souter's observer test. A circuit split has emerged on the issue, with the courts taking three distinct approaches by variously classifying specialty plates as private speech, a mix of private and government speech, or pure government speech. Applied to that context, the observer test helps to clear up a doctrinal muddle and craft for the government speech doctrine a workable test that keeps it tethered to its democratic justifications.

As discussed above, the Fourth Circuit determined that the Confederate flag plate at issue in *Sons of Confederate Veterans, Inc. v. Commissioner of the Virginia Department of Motor Vehicles*⁴⁰ (*SCV*) was private speech and thus required Virginia to permit it.⁴¹ But in a later case, *Planned Parenthood of South Carolina Inc. v. Rose*,⁴² the same court held that a challenged "Choose Life" plate,⁴³ which originated in the state legislature, was a hybrid of government speech and private speech.⁴⁴ Because it felt that the private speech element substantially predominated, the panel held that typical prohibitions on viewpoint discrimination applied and that the State's issuance of a "Choose Life" plate when no plate with the opposite viewpoint was available violated

³⁸ The Seventh Circuit asked: "Under all the circumstances, would a reasonable person consider the speaker to be the government or a private party?" *Id.*

³⁹ See *Roach v. Stouffer*, 560 F.3d 860, 867 (8th Cir. 2009).

⁴⁰ 288 F.3d 610 (4th Cir. 2002).

⁴¹ See *id.* at 622, 626.

⁴² 361 F.3d 786 (4th Cir. 2004).

⁴³ For a discussion of the "Choose Life" position, see Judge Manion's thoughtful concurrence in *Choose Life Ill.*, 547 F.3d at 867–69 (Manion, J., concurring).

⁴⁴ See *Rose*, 361 F.3d at 794. The legislature's particularly substantial role in creating the plate at issue in *Rose*, *id.* at 793, does not appear to be legally significant in light of *Summum*, which acknowledged that creation by private actors followed by government acceptance is a common and valid means by which the government speaks. See *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1133 (2009). Thus, that the Ten Commandments monument at issue in *Summum* was held to be government speech suggests that the plate design in *SCV*, which also was privately created but was subject to acceptance or rejection by the government, also constitutes government speech to the same extent as the government-designed plate challenged in *Rose*.

the First Amendment.⁴⁵ Thus, despite its different reasoning, *Rose* mirrored *SCV* in its result: the court enjoined the State's viewpoint discrimination.

More recently, the Seventh, Eighth, and Ninth Circuits have followed *SCV* and declared specialty plates to be private speech, thus barring viewpoint discrimination in this context. In *Arizona Life Coalition Inc. v. Stanton*,⁴⁶ the Ninth Circuit held unconstitutional Arizona's denial of a pro-life group's application for a "Choose Life" specialty plate.⁴⁷ The Seventh Circuit, in *Choose Life Illinois, Inc. v. White*,⁴⁸ faced an identical situation in Illinois. Although the Seventh Circuit agreed with the Ninth Circuit that license plates constitute a private speech forum in which viewpoint discrimination is unconstitutional, it determined that the State's rejection of a "Choose Life" design was not viewpoint discriminatory because Illinois had never issued plates with any bearing on the abortion issue.⁴⁹ Accordingly, the panel upheld the rejection as a reasonable content-based distinction, permissible in a nonpublic forum.⁵⁰

In *Roach v. Stouffer*,⁵¹ the Eighth Circuit addressed the rejection of a "Choose Life" specialty plate by the State of Missouri. The Eighth Circuit adhered to an earlier opinion on vanity plates, which likened license plates to bumper stickers in terms of their private expressive nature.⁵² Responding to the State's assertion of a government speech interest, the court applied a reasonable observer standard and concluded that "a reasonable and fully informed observer would consider the speaker to be the organization that sponsors and the vehicle owner who displays the specialty license plate."⁵³ As its bumper sticker analogy suggests, the *Roach* court found no government interest.⁵⁴ *Roach* is the only license plate case that has been decided in the courts of appeals in the wake of the Supreme Court's decision in *Summum*,⁵⁵ however, *Summum* received only passing mention from the panel.⁵⁶

⁴⁵ See *Rose*, 361 F.3d at 795.

⁴⁶ 515 F.3d 956 (9th Cir. 2008), cert. denied, 129 S. Ct. 56 (2008).

⁴⁷ *Id.* at 960, 973.

⁴⁸ 547 F.3d 853 (7th Cir. 2008), cert. denied, 130 S. Ct. 59 (2009).

⁴⁹ *Id.* at 865.

⁵⁰ *Id.*

⁵¹ 560 F.3d 860 (8th Cir. 2009).

⁵² *Id.* at 864 (quoting *Lewis v. Wilson*, 253 F.3d 1077, 1079 (8th Cir. 2001)).

⁵³ *Id.* at 867.

⁵⁴ See *id.* at 868.

⁵⁵ A Westlaw search on January 31, 2010, of the Court of Appeals database for "license plate"/s 'first amendment'" after February 25, 2009, yielded only two results: *Roach* and *Max v. Republican Comm. of Lancaster County*, 587 F.3d 198 (3d Cir. 2009), which merely discussed old license plate cases.

⁵⁶ See *Roach*, 560 F.3d at 864, 867–68. This scant treatment is perhaps unsurprising, as *Roach* was decided only a month after *Summum*.

In contrast to its sister circuits, the Sixth Circuit, in *ACLU of Tennessee v. Bredesen*,⁵⁷ held that a challenged license plate — again, one bearing the motto “Choose Life” — constituted only government speech.⁵⁸ Thus, the Sixth Circuit allowed Tennessee to refuse to represent a competing viewpoint on specialty plates.⁵⁹

C. *The Hybrid Category*

No court thus far has arrived at a doctrinally coherent classification of specialty license plates that adequately serves the purposes of the First Amendment and democratic accountability. The Fourth Circuit in *Rose* reasonably held license plates to constitute hybrid speech despite the absence of Supreme Court recognition of such a category, while in *Bredesen* the Sixth Circuit convincingly identified a government interest in regulating state-issued license plates by viewpoint. In fact, it is likely that reasonable observers would conclude that specialty plates involve substantial expression on the part of the government and the private speaker, meaning that they implicate to a legally significant extent the expressive interests of both the driver who bears them and the state that issues them: they constitute a hybrid category. The free speech doctrine thus far established by the Supreme Court does not provide a suitable framework for such a category. Nonetheless, one may be extrapolated from the Court’s speech jurisprudence and the purposes of expressive activity in our society. An application of Justice Souter’s observer test to the doctrinal problem presented by license plates shows the efficacy of that test at reaching coherent and practicable solutions.

In the specialty license plate context, Justice Souter’s test strongly supports a finding of government speech. For a number of reasons, observers reasonably assume that states approve and endorse the messages on their license plates.⁶⁰ First, license plates are produced and owned in perpetuity by the state,⁶¹ and their *raison d’être* is to enable the state to identify and track motor vehicles. Second, license plates tend to carry phrases and images that refer to the state of issue, so that more than just the state’s name associates the typical plate with its state of origin. Plates by default often bear the state motto, leading people to expect a message approved, endorsed, and even created by the state; furthermore, an increasing number of states now issue plates

⁵⁷ 441 F.3d 370 (6th Cir. 2006).

⁵⁸ *Id.* at 375.

⁵⁹ *Id.* at 371–72.

⁶⁰ See, e.g., *SCV II*, 305 F.3d 241, 252 (4th Cir. 2002) (Gregory, J., dissenting from the denial of rehearing en banc).

⁶¹ *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 866 (7th Cir. 2008), *cert. denied*, 130 S. Ct. 59 (2009).

that carry the internet address for the state's official website,⁶² making the plates a type of mobile tourism advertisement. Even the *Choose Life Illinois* court, which asserted that "the messages on specialty license plates are not government speech," conceded that "they *are* reasonably viewed as having the State's stamp of approval."⁶³ And though many states have been highly permissive in producing plates carrying a wide range of messages from different groups,⁶⁴ this permissiveness does not negate the fact that state-issued license plates are state expression or make it reasonable that states should be forced to issue plates carrying messages they do not support.⁶⁵ Indeed, although some states, like Virginia, have been forced to issue specialty plates against their will, there have as yet been very few plates issued that clearly contravene the policy of the issuing government. And courts have upheld restrictions against profanity on vanity license plates.⁶⁶ Thus, Americans have not learned by experience that the state has no power to discriminate on the basis of viewpoint in regulating license plate expression, in contrast to such contexts as bumper stickers or private speech in parks. Indeed, the uncontroversial range of expression that characterizes the vast majority of plates issued up to this point contrasts sharply with the wide range of expression, much of it highly controversial and potentially offensive, that reasonable observers expect from other media. A reasonable observer test thus must acknowledge a substantial government interest in expression on specialty license plates.

At the same time, it is clear that drivers have a substantial expressive interest in their license plates where those plates are used for expression and not merely identification.⁶⁷ As the *Choose Life Illinois* court noted, the Supreme Court's last foray into license plate law, the 1977 case *Wooley v. Maynard*,⁶⁸ forecloses a holding that license plates are pure government speech.⁶⁹ In *Wooley*, the Court was presented

⁶² See, e.g., Pa. Dep't of Transp., The Standard Pennsylvania License Plate, http://www.dot3.state.pa.us/license_plates/plate-pa-large.shtml (last visited Jan. 31, 2010).

⁶³ *Choose Life Ill.*, 547 F.3d at 866.

⁶⁴ See, e.g., *Bredesen*, 441 F.3d at 376 ("Tennessee produces over one hundred specialty plates in support of diverse groups, ideologies, activities, and colleges . . .").

⁶⁵ Cf. *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 569–70 (1995) ("[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech. Nor . . . does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication.").

⁶⁶ See, e.g., *Perry v. McDonald*, 280 F.3d 159 (2d Cir. 2001).

⁶⁷ It is evident, for example, that a plate carrying only the state name and state-assigned license number would implicate no expressive interest.

⁶⁸ 430 U.S. 705 (1977).

⁶⁹ See *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 866 (7th Cir. 2008), *cert. denied*, 130 S. Ct. 59 (2009).

with a challenge to a New Hampshire law barring resident motorists from obstructing the state's motto, "Live Free or Die," which was embossed on all New Hampshire plates.⁷⁰ The Court held that the State could not force motorists to become "mobile billboards" for its philosophy and declared that the law was unconstitutional compelled speech.⁷¹ Because a constitutional protection of drivers against compelled speech inheres in license plates under *Wooley*, the *Bredesen* court's failure to recognize a private speech interest in expressive license plates alongside the government's interest is untenable. Furthermore, as a practical matter, drivers today have substantial creative control over their plates: they may choose from a wide range of specialty plates, and in most states can petition for the creation of new specialty plates. Thus, for many Americans, specialty plates play a role in the public expression of identity.

But although there is a definite private speech right in specialty plates, it does not follow that the driver's right against compelled speech as recognized in *Wooley* should also imply a right against viewpoint discrimination; the former is a more central element of freedom of speech and can rationally exist even with the latter element peeled away. The problem is that the Court's private speech and government speech categories cannot at present accommodate this intuitive result: under current doctrine, expression is either private speech and therefore subject to forum analysis (and, in turn, to various levels of prohibitions on content and viewpoint discrimination), or else it is government speech, with no limitations at all.⁷² But just as forum analysis recognizes that speech should be unrestrained in some fora though in others it can be subjected to reasonable content restrictions while viewpoint discrimination remains verboten, it is rational to posit that a more substantial expressive interest on the part of the government would give rise to an even more attenuated category of private speech interest than the nonpublic forum. In such a category, viewpoint discrimination would be acceptable but the restriction on compelled speech — perhaps the core free speech right — would remain in force. This, then, is the case with the proposed hybrid category: because both the private speaker and the government have a substantial interest in controlling the content of expression that will likely be attributed to both of them by reasonable observers, neither party's interest in affirmative expression suffices to overcome the other's interest in avoiding

⁷⁰ *Wooley*, 430 U.S. at 706–07. Notably, Justice Souter was at that time the Attorney General of New Hampshire and therefore supported the State.

⁷¹ See *id.* at 713, 715, 717. Thus, the State was precluded from prosecuting Maynard for taping over the motto on his plates.

⁷² See *SCV II*, 305 F.3d 241, 244–45 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc).

compelled speech. In effect this analysis gives both state and driver a veto over the expression on a plate to be affixed to a given vehicle.

Allowing the government to discriminate regarding the viewpoints of the license plates it issues is ideal because such discrimination serves the purposes of expression in a free and democratic society and the resulting speech remains clearly attributable to the government and therefore susceptible to democratic control. First, “there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs”;⁷³ this freedom is vital to a functioning democracy because citizens must be informed of the state’s proposed practices and policies and free to debate their merits in order to participate rationally in the political process. The doctrine here proposed for the hybrid category would effectuate this end both by allowing citizens to discern the government’s preferences from the range of specialty plates available and by protecting the government from potential misattribution to it of expression it does not in fact endorse; voters will then be able to take democratic action against results they dislike. Second, free expression promotes the “marketplace of ideas.”⁷⁴ The marketplace of ideas is well served when participants know the sources of the ideas they encounter, because knowing who is promoting an idea may help one to analyze it.⁷⁵ The converse applies equally: the reasonable observer test will prevent private speakers from warping the marketplace of ideas by giving the appearance of government endorsement to their private agendas. Just as applying the reasonable observer test in *Johanns* would have precluded the government’s “cloaked advocacy,”⁷⁶ applying it to the specialty plate context would prevent groups like the Sons of Confederate Veterans from taking on an unwarranted semblance of state support. Third, speech serves an individual interest in self-fulfillment through personal expression and exposure to the expression of others.⁷⁷ Under

⁷³ *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

⁷⁴ *See Abrams v. United States*, 250 U.S. 616, 630 (Holmes, J., dissenting) (“[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market That at any rate is the theory of our Constitution.”); *see also* JOHN STUART MILL, *On Liberty*, in *ON LIBERTY AND OTHER ESSAYS* 5, 59 (John Gray ed., Oxford University Press 1998) (1859) (“[E]ven if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds.”).

⁷⁵ *See, e.g., Corbin, supra* note 7, at 668–69.

⁷⁶ *Planned Parenthood of S.C. Inc. v. Rose*, 361 F.3d 786, 795 (4th Cir. 2004).

⁷⁷ *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (“Those who won our independence believed that the final end of the state was to make men free to develop their faculties They valued liberty both as an end and as a means.”).

the doctrine suggested for the hybrid category, license plates may be used for the highest expressive value congruent with their status as speech attributable to both driver and state.

The hybrid category is also judicially administrable. It is triggered by a reasonable observer test already familiar to courts from the Establishment Clause's endorsement test jurisprudence.⁷⁸ And the hybrid category standard would be far easier to apply than the nonpublic forum standard: the latter category requires a conceptual distinction between content discrimination and viewpoint discrimination, and that line can be exceptionally difficult to draw.⁷⁹ Because First Amendment decisions can easily be influenced by the judge's views on the speech's value where the doctrine is blurry, procedural clarity in free speech jurisprudence carries substantive benefits.

Furthermore, the proposed doctrine would not have a negative impact on freedom of speech generally. The continued availability of bumper stickers would allow drivers to continue using their cars as vehicles for their own personal expression. Finally, the hybrid category would avoid the threat to free and open discourse that would accompany a significant expansion of government speech. Under *Johanns*, the government can already use the beef industry's money to run a campaign the industry opposes; it hardly seems more worrisome if it can use drivers' money to collaborate in expression they *do* support.

Thus, difficulties of accurate attribution in the government speech context create a type of state action problem wherein the government may speak without appearing to and thereby evade democratic consequences (as in *Johanns*) or else may have expression it does not support incorrectly attributed to it (the probable consequence of *SCV*); both these eventualities should be avoided because both distort the political process and the marketplace of ideas. These problems can be solved by a test that takes into account who appears to be speaking in any given case, and a doctrine that accommodates the reality that, in some cases, such a test will recognize substantial speech interests for both private entities and the government. Justice Souter's reasonable observer test and the hybrid category doctrine proposed above have the potential to fill these roles. Their application to the license plate context shows that specialty plates should be viewed not primarily as an area of government regulation of private speech, but rather as a medium in which the government and the relevant private parties are jointly speaking.

⁷⁸ For a recent case finding an Establishment Clause violation after the South Carolina legislature created a license plate featuring a cross superimposed on stained glass and the phrase "I Believe," see *Summers v. Adams*, No. 3:08-2265-CMC, 2009 WL 3785691 (D.S.C. Dec. 14, 2009).

⁷⁹ Compare *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828-37 (1995), *with id.* at 892-99 (Souter, J., dissenting).

VI. PUBLIC SPACE, PRIVATE DEED:
THE STATE ACTION DOCTRINE AND FREEDOM
OF SPEECH ON PRIVATE PROPERTY

One of the hallmarks of free speech jurisprudence is that public expression is most carefully guarded within locations traditionally understood as public, even if they are not publicly owned. As the Supreme Court observed in *Hague v. Committee for Industrial Organization*,¹ “[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”² Applying constitutional protections to privately owned locations seems odd in light of the state action doctrine, which requires a threshold showing of state involvement for most constitutional claims.³ Although the Court treats some private entities as state actors,⁴ doing so in the free speech context creates tension between the autonomy and property rights of owners and the expressive rights of others.

Perhaps free public expression and the state action doctrine have existed in relative harmony, as *Hague* suggests, because spaces traditionally understood to be public have historically been publicly owned. This correlation, however, is weakening. The traditional public square is disappearing, and as new fora for public expression arise, their connection to state actors is often less clear. The modern shopping mall is one such area that defies easy classification: as a place of free public access it resembles the traditional public forum, yet its ownership is distinctly private.⁵ Because of these dual public and private characteristics, it is not necessarily surprising that courts have disagreed on the application of federal and state free speech protections to private shopping centers.⁶ The shopping mall cases show that the judicial

¹ 307 U.S. 496 (1939).

² *Id.* at 515.

³ See *United States v. Morrison*, 529 U.S. 598, 621–24 (2000) (affirming the holding of *The Civil Rights Cases*, 109 U.S. 3, 11 (1883)).

⁴ The Court has created two exceptions to the state action doctrine. The entanglement exception applies “when the government affirmatively authorizes, encourages, or facilitates unconstitutional action.” Martin A. Schwartz & Erwin Chemerinsky, *Dialogue on State Action*, 16 *TOURO L. REV.* 775, 780 (2000). Private conduct that serves a public function is also state action: “[T]he public function exception applies only if the private entity is performing a task that has been traditionally exclusively done by the government.” *Id.* at 788.

⁵ See, e.g., *N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp.*, 650 A.2d 757, 767–68 (N.J. 1994) (collecting sources positing that shopping malls are the functional equivalent of downtown business districts).

⁶ Compare, e.g., *Hudgens v. NLRB*, 424 U.S. 507 (1976) (holding First Amendment expression rights inapplicable in a private shopping center), with *Fashion Valley Mall, LLC v. NLRB*, 172 P.3d 742 (Cal. 2007) (holding that, under the state constitution, a mall owner could not restrict picketing).

balance between the values of autonomy and free speech reflects different conceptions of what makes a mall “public” — public ownership or public use — and thus also affects what definition of state action courts choose to use. As public gathering places and government-owned locations continue to diverge, the state action doctrine will have to account for the values animating both ideas of public to protect free speech without sacrificing other constitutional values.

This Part is divided into four sections. Section A provides a brief history of the jurisprudence of free speech on private property, specifically the different ways the Supreme Court and California state courts have treated free speech rights in private shopping centers. Section B argues that variations between the federal and state constitutions do not fully account for these differences; rather, the inconsistent outcomes highlight different views of the values that the state action requirement is meant to protect. Section C examines the implications of these different conceptions of state action, highlighting the value clash that results from diverging modern senses of “public” space. Section D concludes the Part, noting that the courts’ developing approach to free speech on private property will require a theory of the state action doctrine that accounts for the increasingly malleable nature of public and private property.

A. *An Uneasy Stasis: The State of the Law*

The extent of free speech protections⁷ on private property and the role of the state action doctrine in this inquiry remained unsettled for three decades.⁸ This period opened with the 1946 decision of *Marsh v. Alabama*,⁹ in which the Supreme Court ruled that a privately owned town could not restrict expressive rights because the town was the functional equivalent of a municipality.¹⁰ Shopping malls entered the debate twenty years later in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*¹¹ when the Court affirmed the right to picket in a private shopping center, equating it to a business district.¹² In *Lloyd Corp. v. Tanner*,¹³ however, the Court narrowed this holding by ruling that the Constitution does not protect expressive activity in a mall unless it is directly related to the mall’s purpose and

⁷ U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”).

⁸ For an analysis of this federal constitutional history, see, for example, *Fashion Valley*, 172 P.3d at 746–50.

⁹ 326 U.S. 501 (1946).

¹⁰ *Id.* at 507–10.

¹¹ 391 U.S. 308 (1968).

¹² *Id.* at 318–19.

¹³ 407 U.S. 551 (1972).

the speaker has no other means of communication.¹⁴ In 1976, the Court fully reversed *Logan Valley*'s expansive First Amendment holding in *Hudgens v. NLRB*.¹⁵ The Court held, consistent with *Lloyd*, that a threshold showing of state action is necessary to sustain a free speech challenge because the First Amendment is a check "on state action, not on action by the owner of private property used nondiscriminatorily for private purposes only."¹⁶ Speech restrictions by private owners are not state action and do not violate the First Amendment.¹⁷

During this time period, California courts wrestled with similar free speech issues. The California Supreme Court upheld First Amendment speech protections in private shopping malls based on the "public character of the shopping center"¹⁸ — four years before the U.S. Supreme Court decided this question in *Logan Valley*. Prior to *Hudgens*, California courts built on the Supreme Court's analysis in *Logan Valley* to uphold a right to expressive activity unrelated to the character of a specific shopping center.¹⁹ When the Supreme Court narrowed the scope of these rights, California was forced to rule that the First Amendment did not require mall owners to accommodate private speech.²⁰ In the 1979 decision of *Robins v. PruneYard Shopping Center*,²¹ however, the California Supreme Court relied on its own constitution to support more expansive free speech rights.²² The California Constitution — unlike the federal "Congress shall make no law"²³ formulation — states that "[e]very person may freely speak, write and publish his or her sentiments on all subjects."²⁴ Unlike *Hudgens*, *PruneYard* did not ground its interpretation in the state action doctrine.²⁵ The U.S. Supreme Court upheld *PruneYard* against a federal constitutional challenge, holding that mall owners do not have a constitutional right to suppress expressive activity on their property when the activi-

¹⁴ *Id.* at 568–70.

¹⁵ 424 U.S. 507 (1976).

¹⁶ *Id.* at 519 (quoting *Lloyd*, 407 U.S. at 567).

¹⁷ *Id.* at 519–21.

¹⁸ *Schwartz-Torrance Inv. Corp. v. Bakery & Confectionery Workers' Union, Local No. 31*, 394 P.2d 921, 924 (Cal. 1964).

¹⁹ See *Diamond v. Bland*, 477 P.2d 733 (Cal. 1970) (*Diamond I*).

²⁰ *Diamond v. Bland*, 521 P.2d 460, 461 (Cal. 1974) (*Diamond II*) (holding, in response to the Supreme Court's ruling in *Lloyd*, that a private mall could restrict expressive activity unrelated to the business of the shopping center).

²¹ 592 P.2d 341 (Cal. 1979).

²² *Id.* at 347 (citing CAL. CONST. art. I, § 2(a)).

²³ U.S. CONST. amend. I.

²⁴ CAL. CONST. art. I, § 2(a).

²⁵ See Alan E. Brownstein & Stephen M. Hankins, *Pruning Pruneyard: Limiting Free Speech Rights Under State Constitutions on the Property of Private Medical Clinics Providing Abortion Services*, 24 U.C. DAVIS L. REV. 1073, 1090 (1991).

ty is protected by state law.²⁶ This decision established that states have latitude to protect speech on private property without violating other constitutional provisions, including those protecting property rights.

In recent years, California has refined its doctrine of free speech on private property. In *Golden Gateway Center v. Golden Gateway Tenants Ass'n*,²⁷ the California Supreme Court reaffirmed *PruneYard's* vitality in the shopping mall context.²⁸ Significantly, it also decided a question that had been left unanswered since *PruneYard*: does California law require state action for free speech violations? *Golden Gateway* held that there is a state action requirement in the California free speech provision, but that this requirement is met when private property is “freely and openly accessible to the public.”²⁹ This public use test is very different from the Supreme Court’s government actor state action test in *Hudgens*.³⁰ Interestingly, *Golden Gateway* both cited differences between the state and federal constitutions to account for this divergence³¹ and emphasized that its interpretation was consistent with the state action requirement as understood more broadly in federal constitutional history.³² In 2007, the California Supreme Court revisited the shopping mall question in *Fashion Valley Mall, LLC v. NLRB*,³³ holding that a shopping center’s permit requirement for expressive activity was an impermissible restriction on citizens’ right to boycott in front of a store within the mall.³⁴ Again, the court mentioned that California and federal free speech protections are not coextensive,³⁵ yet also emphasized the Supreme Court’s strict scrutiny test and view that boycotts lie at the core of the federal free speech right.³⁶

Few states have followed California in accepting the Supreme Court’s invitation to adopt state free speech protections more expansive than those guaranteed by the First Amendment. Despite speech

²⁶ *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980). The Court disagreed on the extent of this ruling’s application. Compare *id.* at 95–96 (White, J., concurring) (arguing that states may not require malls to subsidize expressive groups implicitly), and *id.* at 96 (Powell, J., concurring) (arguing that the holding does not apply to stand-alone stores), with *id.* at 90–91 (Marshall, J., concurring) (arguing that there was state action in this case, which could implicate federal constitutional concerns).

²⁷ 29 P.3d 797 (Cal. 2001).

²⁸ *Id.* at 809–10.

²⁹ *Id.* at 810.

³⁰ *Hudgens v. NLRB*, 424 U.S. 507, 519–20 (1976).

³¹ *Golden Gateway*, 29 P.3d at 801.

³² *Id.* at 808 (explaining the necessity of the state action doctrine in American law). For a more detailed discussion of the similarity between the California and U.S. Supreme Courts’ interpretations of state action, see *infra* p. 1310.

³³ 172 P.3d 742 (Cal. 2007).

³⁴ *Id.* at 754.

³⁵ *Id.* at 749.

³⁶ *Id.* at 754.

provisions nearly identical to California's, seventeen state high courts — “the overwhelming majority of the state supreme courts to address the question” — have echoed the Supreme Court's conception by holding that state action is necessary to sustain even free speech challenges under state constitutions.³⁷ Two states have recognized a limited expressive right in private malls to collect signatures for electoral petitions, but based their rulings on rights relating to free elections, not on speech rights alone.³⁸ Although Colorado recognizes malls as a forum for public speech,³⁹ it also permits owners to restrict expressive activity to specified locations within the mall.⁴⁰ New Jersey is the only state to reach results similar to California's: although it uses a balancing test to protect the rights of owners and speakers,⁴¹ it has upheld speech protections outside the mall context in private universities, residential communities, and hallways in residential buildings.⁴²

Many of these state court interpretational battles were fought in the decade and a half following *PruneYard*, yet the law of free speech on private property continues to develop in many states today. Since 2000, the highest courts of four states have handed down decisions aligned with the Supreme Court's view that the state action requirement is not met in the shopping mall context.⁴³ Colorado's limitation on its earlier, more speech-protective stance occurred in 2001.⁴⁴ As recently as 2007, New Jersey's supreme court used its balancing approach in the context of a free speech challenge to rule in favor of a private homeowners' association, but emphasized that under different facts the association's actions might have constituted a state constitutional free speech violation.⁴⁵ These cases suggest that the doctrine is still being shaped at the state level as courts continue to face difficult factual applications of their theories of state action.

³⁷ See Gregory C. Sisk, *Uprooting the PruneYard*, 38 RUTGERS L.J. 1145, 1151 (2007).

³⁸ *Batchelder v. Allied Stores Int'l, Inc.*, 445 N.E.2d 590, 595 (Mass. 1983); *Alderwood Assocs. v. Wash. Envtl. Council*, 635 P.2d 108, 116–17 (Wash. 1981) (plurality opinion).

³⁹ *Bock v. Westminster Mall Co.*, 819 P.2d 55 (Colo. 1991).

⁴⁰ *Robertson v. Westminster Mall Co.*, 43 P.3d 622, 626 (Colo. App. 2001).

⁴¹ *N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp.*, 650 A.2d 757 (N.J. 1994).

⁴² See Gregory C. Sisk, *Returning to the PruneYard: The Unconstitutionality of State-Sanctioned Trespass in the Name of Speech*, 32 HARV. J.L. & PUB. POL'Y 389, 391 (2009).

⁴³ *State v. Viglielmo*, 95 P.3d 952, 966–97 (Haw. 2004); *City of W. Des Moines v. Engler*, 641 N.W.2d 803, 806 (Iowa 2002); *Dossett v. First State Bank*, 627 N.W.2d 131, 138–39 (Neb. 2001); *S.O.C., Inc. v. Mirage Casino-Hotel*, 23 P.3d 243, 250–51 (Nev. 2001).

⁴⁴ *Robertson*, 43 P.3d at 622.

⁴⁵ See *Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n*, 929 A.2d 1060, 1072–74 (N.J. 2007).

*B. The Two Publics: The Values
Underlying State Action*

California's interpretation of the state action doctrine in shopping malls is an unconventional counterpoint to the views of the Supreme Court and the majority of state courts that have addressed the issue. These different definitions of state action reflect separate emphases on what it means to protect speech on public property and a divergence in what values — autonomy and property rights or broad expression rights — a correct application of the state action doctrine should primarily protect. Although California's conclusions are anomalous, its legal rationales are part of the larger national dialogue about free expression and state action in public spaces.

One way to understand the difference between Supreme Court and California precedent is that the decisions simply resulted from different sources of authority, as California chose to expand the scope of free speech protections under its own constitution further than the federal Constitution requires.⁴⁶ Yet the differences between California's free speech provision and the First Amendment⁴⁷ do not fully account for opposing outcomes in the shopping mall cases.⁴⁸ Thirty-four state constitutions have free speech provisions virtually identical to California's, and these constitutions were either written in similar historical periods and shared similar contextual influences, or were patterned after one of those earlier constitutions.⁴⁹ Nevertheless, the majority of these states to address free speech on private property have rejected California's interpretation.⁵⁰ The New York Constitution, for example, shares almost identical language with the California Constitution,⁵¹ and even the California Supreme Court has acknowledged that the states' constitutions are so similar that New York's constitutional

⁴⁶ See, e.g., *Fashion Valley Mall, LLC v. NLRB*, 172 P.3d 742, 749 (Cal. 2007).

⁴⁷ Compare U.S. CONST. amend. I, with CAL. CONST. art. I, § 2(a).

⁴⁸ See, e.g., *Southcenter Joint Venture v. Nat'l Democratic Policy Comm.*, 780 P.2d 1282, 1287–88 (Wash. 1989) (“It is a 2-foot leap across a 10-foot ditch . . . to seize upon the absence of a reference to the State as the actor limited by the state free speech provision and conclude therefrom that the framers of our state constitution intended to create a bold new right that conflicts with the fundamental premise on which the entire construction is based.”); Stanley H. Friedelbaum, *Private Property, Public Property: Shopping Centers and Expressive Freedom in the States*, 62 ALB. L. REV. 1229, 1261 (1999) (“Little can be gained by contrasting the claimed non-specificity of the First Amendment’s wording with the greater protection said to be found in state expressive freedom guarantees.”).

⁴⁹ See Sisk, *supra* note 37, at 1163–65.

⁵⁰ See *id.* at 1151; see also Friedelbaum, *supra* note 48, at 1239–40.

⁵¹ See N.Y. CONST. art. I, § 8 (“Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.”).

history is relevant for interpreting the California free speech clause.⁵² Nevertheless, New York critiqued California's interpretation as "hardly persuasive authority"⁵³ and stated that adopting a similar approach would lead to "broad and mischievous consequences."⁵⁴ While the fact that courts have interpreted similar provisions so differently is not necessarily dispositive, it does suggest that California's constitutional language does not, in itself, end the inquiry⁵⁵ and — when combined with the factors below — that California is at least partially engaging with a national dialogue on free speech protections.

The California Supreme Court's reliance on First Amendment caselaw in even its most recent decisions further indicates the continuing influence of federal jurisprudence. First, *Fashion Valley* did not occur within a vacuum. As explained above, the first California cases to address free speech on private property applied the First Amendment, not the California Constitution.⁵⁶ While the majority in the 2007 *Fashion Valley* decision cited the California Constitution, it framed the case as an application of its earlier decision in *PruneYard*, which it explicitly acknowledged to be an extension of this early, First Amendment-based jurisprudence.⁵⁷ Given the continued vitality of these cases, it is evident that California's free speech doctrine borrows heavily from federal constitutional interpretation.⁵⁸ Another, similar indication that current California jurisprudence should be understood in relation to federal First Amendment jurisprudence is that the California Supreme Court has justified its decisions by referencing concepts at the heart of the First Amendment. The court freely borrows language from the Supreme Court's seminal free speech cases, likening the mall in *Fashion Valley*, for example, to the "sidewalks of the central business district which, have immemorially been held in trust for the use of the public."⁵⁹ The court's argument is that shopping malls

⁵² See *Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n*, 29 P.3d 797, 804 (Cal. 2001) (noting that the framers of California's constitution "adopted New York's free speech clause virtually unchanged and with no debate").

⁵³ *SHAD Alliance v. Smith Haven Mall*, 488 N.E.2d 1211, 1215 n.5 (N.Y. 1985).

⁵⁴ *Id.* at 1217.

⁵⁵ See Todd F. Simon, *Independent but Inadequate: State Constitutions and Protection of Freedom of Expression*, 33 U. KAN. L. REV. 305, 318 (1985) ("The notion that free expression can, and potentially does, mean something slightly different in each state even when provisions read identically is not fully supportable.").

⁵⁶ See *Schwartz-Torrance Inv. Corp. v. Bakery & Confectionery Workers' Union, Local No. 31*, 394 P.2d 921, 923–24 (Cal. 1964) (justifying speech protections on private property under the U.S. Constitution).

⁵⁷ See *Fashion Valley Mall, LLC v. NLRB*, 172 P.3d 742, 746–50 (Cal. 2007).

⁵⁸ See *Brownstein & Hankins*, *supra* note 25, at 1079 ("[T]he conceptual constitutional roots of the California Supreme Court's decision in *Pruneyard* are grounded in the 1968 first amendment case of [*Logan Valley*].").

⁵⁹ *Fashion Valley*, 172 P.3d at 745 (quoting *Hague v. Ctr. for Indus. Org.*, 307 U.S. 496, 515 (1939)) (internal quotation mark omitted).

have become the new public fora as the concept is understood in First Amendment jurisprudence, not that California's constitution defines new types of public space. Even critics of California's approach implicitly recognize that the state's precedent is inextricably connected with federal constitutional interpretation when they note concern for the implications that California's approach might have for federal free speech applications.⁶⁰

California's recent return to an explicit state action doctrine is a final indication of the overlap between the constitutions. *Golden Gateway* clarified that the California Constitution does require state action, yet by using public accessibility instead of government actors to define state action, the court justified more expansive speech protections than exist in federal law.⁶¹ Despite these differences, several aspects of *Golden Gateway* suggest that California intended to reinsert its jurisprudence into the national debate. Instead of relying on its own constitution alone, the court emphasized its desire to bring its case law back into consonance with other state courts⁶² and explained that even *PruneYard* need not be considered an aberration from national jurisprudence because it relied heavily on Supreme Court state action decisions.⁶³ Most important, *Golden Gateway* returned to an explicit state action doctrine because the "careful differentiation between government and private conduct has been a hallmark of American constitutional theory" that preserves goals like personal autonomy⁶⁴ that are common justifications for the federal conception of state action.⁶⁵

This Part is not arguing that *PruneYard*, *Golden Gateway*, and *Fashion Valley* are only or primarily First Amendment cases, but that there is substantial overlap between state and federal doctrine in this area. When combined with the disagreement over outcomes, this overlap helps illustrate the problem of defining public space in today's world. The Supreme Court's line between government-owned and privately owned property reflects an idea of "public" as belonging to the state. The California Supreme Court is more willing to engage with how a space is used, not just who owns it, when deciding if it is "public." These two visions of "public" are not accidental. After all,

⁶⁰ See, e.g., 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, 1568 (1998) ("[T]he construction of [*PruneYard*] leaves a troubling legacy, exacerbating the Court's neglect of the private autonomy implications in the state action cases."); Sisk, *supra* note 42, at 396–97.

⁶¹ *Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n*, 29 P.3d 797, 810 (Cal. 2001).

⁶² *Id.* at 808.

⁶³ *Id.* at 806–07.

⁶⁴ *Id.* at 808.

⁶⁵ See, e.g., Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 536 (1985); Eule & Varat, *supra* note 60, at 1547; Mark D. Rosen, *Was Shelley v. Kraemer Incorrectly Decided? Some New Answers*, 95 CAL. L. REV. 451, 473 (2007).

Marsh's functional equivalency test⁶⁶ for determining state action still has salience, and the Court's rejection of this test in *Hudgens* reflected a conscious value choice.⁶⁷ Courts make these competing values clear through their divergent conceptions — and applications — of state action. The Supreme Court's view in *Hudgens* requiring a state actor in the more traditional sense reflects values like personal autonomy⁶⁸ and property owners' privacy and ownership interests.⁶⁹ California's broader definition of state action reflects an emphasis on protecting the rights of individual speakers against powerful private actors.⁷⁰ In many ways, shopping centers have replaced the town square,⁷¹ and California's jurisprudence demonstrates that these societal changes are straining the state action doctrine's ability to address how far constitutional protections should extend when government ownership and public usage become less synonymous.

C. Implications

Regardless whether the Supreme Court's or California's definition of state action better balances the competing values of autonomy, property, and expression in our constitutional system, future cases must account for this value clash that the changing definition of "public" space brings into focus. How courts define the parameters of state action reflects which values they weigh most heavily, and in a world

⁶⁶ See *Marsh v. Alabama*, 326 U.S. 501 (1946) (holding that a company-owned town must uphold constitutional rights because it performed the functions of any other town).

⁶⁷ Applying the *Marsh* test to shopping malls would "wholly disregard[] the constitutional basis on which private ownership of property rests in this country." *Hudgens v. NLRB*, 424 U.S. 507, 517 (1976) (quoting *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 332–33 (1968) (Black, J., dissenting)).

⁶⁸ See Chemerinsky, *supra* note 65, at 536; Eule & Varat, *supra* note 60, at 1547; Rosen, *supra* note 65, at 473.

⁶⁹ See, e.g., *Fashion Valley Mall, LLC v. NLRB*, 172 P.3d 742, 759 (Cal. 2007) (Chin, J., dissenting); William J. Emanuel, *Union Trespassers Roam the Corridors of California Hospitals: Is a Return to the Rule of Law Possible?*, 30 WHITTIER L. REV. 723 (2009); Sisk, *supra* note 37, at 1160–63.

⁷⁰ See, e.g., Paul Schiff Berman, *Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to "Private" Regulation*, 71 U. COLO. L. REV. 1263, 1303–04 (2000) (arguing that broad state action doctrines reflect fear of powerful private actors infringing on protected liberties); Chemerinsky, *supra* note 65, at 507, 519–34 (arguing that constitutional protections are social morals even private actors should not violate without compelling justification).

⁷¹ See, e.g., *N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp.*, 650 A.2d 757, 767–68 (N.J. 1994) (stating that retail experts and legal commentators agree that malls are becoming the functional equivalent of downtown business districts); Mark C. Alexander, *Attention, Shoppers: The First Amendment in the Modern Shopping Mall*, 41 ARIZ. L. REV. 1, 2–7 (1999) (characterizing the modern mall as essentially the new downtown); Friedelbaum, *supra* note 48, at 1243 (arguing that societal trends are changing the nature of previously private business ventures). *But see* Sisk, *supra* note 37, at 1189–92 (arguing that shopping centers are distinct from downtown areas).

where public title and public use overlap with less frequency — the internet is perhaps the most striking example of this change⁷² — the conflicts between these values will likely only become more explicit.

California's emphasis on the values of free expression in publicly accessible locations, for example, can limit ownership rights and personal autonomy.⁷³ Justice Chin's dissent in *Fashion Valley* is not anti-speech,⁷⁴ but argues that applying a public use idea of state action to privately owned locations turns a victory for free speech into a simultaneous defeat for private property rights.⁷⁵ These rights, too, are protected by constitutional provisions: even the majority in *Fashion Valley*, recognizing the danger of diluting property rights, allowed mall owners to enforce some "reasonable regulations" of expressive activity.⁷⁶ Another implication of California's state action framework is that it pits the speech rights of patrons and owners against each other in a way that the Supreme Court's definition does not. This tension occurs in at least two ways. First, forcing mall owners to allow speech on their property — especially controversial speech — can interfere with the owners' own expressive marketing activity, which is essential to the mall's commercial purpose.⁷⁷ In some cases, the California approach "obliges the commercial landowner to serve as the host for his own roasting."⁷⁸ Second, by turning shopping mall owners into unwilling hosts for speech that they may disagree with or find offensive, this model compels owners to promote beliefs they do not share, albeit indirectly.⁷⁹ Supreme Court decisions subsequent to *PruneYard* may mitigate this danger: in at least some circumstances states cannot require private parties to provide fora for speech with which they disagree.⁸⁰

⁷² See, e.g., Margaret Jane Radin & R. Polk Wagner, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 CHI.-KENT L. REV. 1295, 1306–07 (1998) (arguing that cyberlaw is uncertain because the internet "collapses our traditional notions of location . . . for sovereignty and regimes of law," *id.* at 1306).

⁷³ See, e.g., Sisk, *supra* note 37, at 1160–63 (arguing that defining private property as a new type of public forum undermines the Lockean idea of the state's role in protecting private property rights).

⁷⁴ The dissent, for example, emphasizes that "free speech rights and private property rights can and should coexist" and notes several alternative ways to protect the expressive speech at issue in this case. *Fashion Valley Mall, LLC v. NLRB*, 172 P.3d 742, 760 (Cal. 2007) (Chin, J., dissenting).

⁷⁵ See *id.* at 759.

⁷⁶ See *id.* at 754 (majority opinion).

⁷⁷ See Sisk, *supra* note 42, at 396.

⁷⁸ *Id.*

⁷⁹ *Id.* at 394–98; see also *supra* Part V, pp. 1291–1302.

⁸⁰ See, e.g., *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995). The Court distinguished *PruneYard* because the parade organizers in *Hurley* specifically objected to the speech's content and because third parties were more likely to attribute the speech to the parade organizers. *Id.* at 579–80. This analysis suggests that private owners might be able to defeat state free speech protections by claiming a First Amendment right against compelled

It is not obvious, however, that the Supreme Court's view is the best way to balance these competing interests. As shopping centers continue to adopt more characteristics of the town square, a theory that cannot protect rights in these locations is problematic in light of our nation's history of protecting free discourse in the spaces where such speech actually occurs.⁸¹ The more accessible owners make their property, the more public it becomes; California's approach is appealing because it recognizes that even private property can assume public characteristics.⁸² Even conceding the difficulty of balancing the rights of owners and speakers, the bright-line rule of government ownership can become a simplistic and "absurd basis for choosing between the two liberties,"⁸³ because conditioning free speech protections on the identity of the property owner provides an artificially clear line that can minimize the merits of competing rights claims.⁸⁴

The difficulty of this balancing, combined with continued disagreements as state courts interpret near-identical free speech provisions, further suggests that the debate is unlikely to end soon. Even recent Supreme Court precedent arguably marks a shift from the strict *Hudgens* state action requirement. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*⁸⁵ denied certain private institutions the right to exclude expressive activity with which they do not agree.⁸⁶ This decision concerned the rights of law schools to exclude military recruiters, not the rights of shopping mall owners to exclude picketers; nevertheless, by limiting the right to exclude speakers from a nongovernment institution, the decision could be a step back from *Hudgens*'s strong personal autonomy focus.⁸⁷ The continuing debate is further evidence that in an era in which public use and private ownership collide increasingly often, a court's theory of state action on private property can have serious implications.

D. Conclusion

As the doctrine of the state action requirement in privately owned space continues to develop, courts must wrestle with the changing realities of what defines "public" space. One approach is the Supreme Court's refusal to extend speech rights into private shopping malls by

support for content that they find objectionable. For a further discussion of this issue, see Sisk, *supra* note 42, at 394–95.

⁸¹ See, e.g., *Hague v. Ctr. for Indus. Org.*, 307 U.S. 496, 515 (1939).

⁸² See *Fashion Valley Mall, LLC v. NLRB*, 172 P.3d 742, 746–48 (Cal. 2007).

⁸³ Chemerinsky, *supra* note 65, at 537.

⁸⁴ See *id.*

⁸⁵ 547 U.S. 47 (2006).

⁸⁶ *Id.* at 56.

⁸⁷ See Sisk, *supra* note 42, at 398 (arguing that *Rumsfeld* weakened the Court's protections against "coerced access to private property for expressive purposes").

setting government ownership as the standard for state action. California's alternate approach to state action makes a location's openness to the public sufficient to sustain a state constitutional challenge. As each embodies different aspects of what it means to protect speech in "public" spaces, a theory of state action that reconciles the increasing privatization of public fora with the rights of property owners cannot ignore the arguments from either side — especially as California's jurisprudence partially draws from federal constitutional norms.

Of course, a state action theory need not result in an all-or-nothing victory for one side. Supporters of the Supreme Court's interpretation could argue that *Marsh*, the functional equivalency case underlying the shopping mall decisions, provides precedent for requiring private owners to respect speech rights when locations become so public that they are essentially identical to government-owned space.⁸⁸ Broadening *Marsh*'s scope could help account for factors on both sides of the debate by considering private title and public usage in state action analysis,⁸⁹ a "rough-edged, but richly colored" test somewhere between *Hudgens*'s formalism and California's expansive view.⁹⁰ Even proponents of the California view might agree with this approach by looking to California's own precedent acknowledging the need for careful balancing and factual distinctions to ensure adequate protections for property rights.⁹¹ Yet wherever the lines are drawn, future courts' choices will contain implicit definitions of public space that will color their attempts to balance rights of both speakers and owners in a world where distinctions between public and private continue to collapse.

⁸⁸ See *Marsh v. Alabama*, 326 U.S. 501, 506–09 (1946).

⁸⁹ See Eule & Varat, *supra* note 60, at 1559–60.

⁹⁰ See *id.*

⁹¹ See Emanuel, *supra* note 69, at 744–57 (cataloging California appellate court, federal district court, and Ninth Circuit court opinions limiting the basic *PruneYard* rule based on specific factual circumstances).