CONSTITUTIONAL LAW — STATE ACTION DOCTRINE — DISTRICT COURT PRESERVES CLAIM THAT UNIVERSITY IS A "COMPANY TOWN." — *Moss v. University of Notre Dame Du Lac*, No. 3:13 CV 1239, 2016 WL 5394493 (N.D. Ind. Sept. 27, 2016).

Under the state action doctrine, only government actors can be liable for violating individuals' constitutional rights.[1] In exceptional cases, private entities may also be held liable as though they were government actors.[2] The Supreme Court in *Marsh v. Alabama*[3] had found that a privately owned company town was such a private party.[4] Recently, in *Moss v. University of Notre Dame Du Lac*,[5] the United States District Court for the Northern District of Indiana denied the University of Notre Dame's motion to dismiss claims made by a former administrator that the school had infringed upon his First Amendment rights — claims applying the state action doctrine to the University by analogy to a company town. The court held that the issue requires detailed factual development and analysis.[6] In so doing, it signaled that it may broaden the relevant set of facts from those considered under prevailing interpretations of *Marsh*. This shift would better align the legal test courts apply and the rights plaintiffs seek to protect, while supplying a firmer limiting principle when defining the category of private state actors.

On two occasions at Notre Dame in 2012, members of an African American student group, Call to Action, were the victims of a racist prank: someone put fried chicken in the group's campus mailbox.[7] David Moss — Assistant Vice President of Student Affairs and a faculty supervisor and supporter of the group — spoke out against these incidents, garnering a good deal of allegedly unwelcome publicity for the University.[8] The University, he claimed, responded by denying him a promotion, which went to a less qualified candidate, and retaliated

---

[1] *See* The Civil Rights Cases, 109 U.S. 3, 11 (1883).

[2] *See* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001); *see also* G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility*, 34 HOUS. L. REV. 333, 347 (1997) (noting that a private entity will be held liable when its actions become "intertwined" with government action). Scholars have described the state action doctrine as a "conceptual disaster area," Charles L. Black, Jr., *The Supreme Court, 1966 Term — Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967), and "a shambles," Christopher D. Stone, *Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?*, 130 U. PA. L. REV. 1441, 1484 n.156 (1982).

[3] 326 U.S. 501 (1946).

[4] *Id.* at 507.

[5] No. 3:13 CV 1239, 2016 WL 5394493 (N.D. Ind. Sept. 27, 2016).

[6] *Id.* at *5.

[7] Plaintiff's Complaint at 4–5, *Moss*, 2016 WL 5394493 (No. 3:13 CV 1239).

[8] *Id.*

against him by demoting him and threatening termination.[9] Moss filed a complaint with the Equal Employment Opportunity Commission (EEOC); after losing there, he sued in federal court.[10]

Moss's complaint included two counts of violating Title VII of the Civil Rights Act of 1964 for the demotion and threats[11] and three counts covering the abridgement of First Amendment rights, as made actionable by federal statute.[12] Notre Dame moved to dismiss four of the five counts for failure to state a claim.[13] The University argued that the retaliation claim should be dismissed for not having been pled before the EEOC, that Moss's speech was work related and therefore not constitutionally protected, and that the First Amendment claims should be dismissed because the University was not a state actor.[14]

Judge Moody granted the motion to dismiss with regard to the retaliation count but denied it for the others.[15] Pressing his charge at the EEOC, Moss did not check the box for "retaliation"; charges so omitted are barred from litigation unless they could have been expected to grow from the EEOC's investigation, which Moss's could not.[16] Addressing the other counts, the court found that Moss's complaint sufficiently alleged nonwork speech.[17] The court then considered Moss's claims under the state action doctrine and 42 U.S.C. § 1983, which requires that "a plaintiff must plausibly allege . . . that a person 'acting under color of state law' deprived the plaintiff of a" constitutional right.[18] Under Supreme Court precedent, where private actors' conduct is found to be state action, it is also action under color of state law.[19] Moss argued that Notre Dame is a state actor like the company town in *Marsh,*[20] where the Supreme Court required that a corporation-owned community protect its residents' and visitors' First Amendment rights.[21]

The court rejected the University's argument that *Marsh* cannot apply to private universities. Judge Moody was unpersuaded by a case that found that a university was not made a state actor by virtue

---

9 Plaintiff's Complaint, *supra* note 7, at 4.

10 *See Moss*, 2016 WL 5394493, at *2.

11 *Id.* at *1; *see* 42 U.S.C. §§ 2000e–2000e-17 (2012).

12 *Moss*, 2016 WL 5394493, at *1 & n.2 (citing 42 U.S.C. §§ 1981, 1983). The University asserted that the § 1981 claims, which relied on that statute's prohibition of racial discrimination, should be dismissed for having been improperly pled, but the court rejected this argument. *Id.* at *6.

13 *Id.* at *1.

14 *Id.*

15 *Id.* at *6.

16 *Id.* at *2–3.

17 *Id.* at *5.

18 *Id.* at *3 (quoting Wilson v. Warren County., 830 F.3d 464, 468 (7th Cir. 2016)).

19 Lugar v. Edmondson Oil Co., 457 U.S. 922, 935 (1982).

20 *Moss*, 2016 WL 5394493, at *4; *see* Marsh v. Alabama, 326 U.S. 501 (1946).

21 *Marsh*, 326 U.S. at 509.

of educating people.[22] That case was off point because Moss's claim relied on Notre Dame's status as a place, not an educational institution.[23] He lent more credence to *Browns v. Mitchell*,[24] in which the Tenth Circuit Court of Appeals found *Marsh* inapplicable in the context of employee dismissals.[25] But the court looked to Seventh Circuit precedent from *Illinois Migrant Council v. Campbell Soup Co.*,[26] which overturned a dismissal of "company town" claims where the plaintiffs had "alleged sufficient facts upon which it could be concluded" that a corporate hamlet qualified as a state actor under *Marsh*.[27] Along the same lines, Judge Moody held that the case for Notre Dame as a company town, while "fall[ing] far on the spectrum from 'likely,'" was not "so speculative and unsupported by law that [the claims] should be dismissed."[28] This holding was premised on allegations of fact that "Notre Dame's campus is . . . open to the public and . . . similar to a traditional town, containing public roads, stores, restaurants, a post office, [and] a police department,"[29] as well as a fire department, a health center, the state's second-largest tourist attraction, "and more."[30]

Moss's complaint and response to the motion to dismiss contained even more detailed allegations: Notre Dame is cut through by streets that connect to nearby municipalities, has two federal reserve depository libraries that are required to remain open and accessible to the public, houses 6000 resident students for most of the year, promulgates and enforces a code of governance for employees and students, maintains a campus open to all except for a limitation on automobile access, employs police with arrest powers on and off campus,[31] and hosts

---

[22] *See Moss*, 2016 WL 5394493, at *4 (discussing Grossner v. Trs. of Columbia Univ., 287 F. Supp. 535, 549 (S.D.N.Y. 1968)).

[23] *Id.*

[24] 409 F.2d 593 (10th Cir. 1969).

[25] *See id.* at 596 (holding that *Marsh* was "concerned only with the delineation of public places for purposes of First Amendment activities" and was "not concerned with state action in the internal affairs of these enterprises"); *see also* Blackburn v. Fisk Univ., 443 F.2d 121, 124 (6th Cir. 1971) ("Fisk University is not a public facility of the nature that would transform . . . the internal affairs of the University into 'State action.'").

[26] 519 F.2d 391 (7th Cir. 1975).

[27] *Id.* at 395; *see Moss*, 2016 WL 5394493, at *5 (quoting Ill. Migrant Council v. Campbell Soup Co., 574 F.2d 374, 376 (7th Cir. 1978) ("Determining the threshold of components necessary to constitute a company town under *Marsh* requires a detailed factual analysis.")). The court also adverted to another recent case involving similar issues in the same court. *Id.* at *5 (citing Torres v. Univ. of Notre Dame Du Lac, No. 3:11 CV 209, 2012 WL 12292946 (N.D. Ind. Mar. 23, 2012) (denying motion to dismiss and referring to "the fact sensitive nature of the issue," *id.* at *9)).

[28] *Moss*, 2016 WL 5394493, at *5.

[29] *Id.* at *4.

[30] *Id.* at *1.

[31] Plaintiff's Response in Opposition to Defendants' Motion to Dismiss at 14, *Moss*, 2016 WL 5394493 (No. 3:13-CV-1239); *see About NDSP*, UNIV. NOTRE DAME (2016), http://ndsp.nd.edu/about-ndsp [https://perma.cc/JK3R-RZ2G]; *see also* IND. CODE § 21-17-5-4 (2016) (giving college police "[t]he same . . . powers" as other police).

football games during which 85,000 visitors freely wander the campus.[32] And Judge Moody, seemingly from his own research, found it "interesting that Notre Dame's website lists its address as 'University of Notre Dame[,] Notre Dame, Indiana 46556.'"[33]

Judge Moody's inclusion of a broad array of company-town indicators may offer a corrective to courts' narrow reading of *Marsh*. In applying *Marsh* beyond traditional company towns, courts have latched onto that case's discussion of the municipal services provided by the corporate owner of the town,[34] creating a "public function test" of state action.[35] A broader — and true-to-*Marsh* — approach looks also to the rest of *Marsh*'s discussion of the town; such an analysis does not consist merely of a high-level tallying of municipal services but also includes a holistic appraisal of the way a place looks and functions from the point of view of its inhabitants and visitors.[36] The court's analysis provides a full accounting of *Marsh*, links more logically with the full panoply of constitutional rights, and supplies a firmer limiting principle for qualifying (or not) alleged state actors.

The Court in *Marsh* took a rather broad view of the characteristics that were relevant to state actor status, noting a number of specific features without defining any individual aspects as key. *Marsh* dealt with the company town of Chickasaw, Alabama, and the right of a Jehovah's Witness to pass out religious flyers against company policy.[37] Chickasaw "ha[d] all the characteristics of any other American town"[38] and could not be distinguished from its noncompany surroundings, with residents and visitors alike using the business district for their regular shopping.[39] The Court held that in such a place, no less than in a typical municipality, members of the public had an interest in free speech and access to information so that they could make the informed decisions required of citizens in a democracy.[40] The

---

[32] Plaintiff's Complaint, *supra* note 7, at 3.

[33] *Moss*, 2016 WL 5394493, at *4 n.4 (quoting *About ND*, UNIV. OF NOTRE DAME, https://www.nd.edu/about/contact [https://perma.cc/BBU7-VNT8]). Nevertheless, Judge Moody disclaimed that this fact was relevant to his decision. *Id.*

[34] *See* Marsh v. Alabama, 326 U.S. 501, 502 (1946) (describing the town's sewage system and police).

[35] *See, e.g.*, Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 302 (2001) (citing Rendell-Baker v. Kohn, 457 U.S. 830 (1982)).

[36] *Cf.* JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 13–14 (1992) (positing that it is more accurate to assess a city from the perspective of the individual than from that of the top-down planner, and that "[t]he look of things and the way they work are inextricably bound together, and in no place more so than cities," *id.* at 14).

[37] *Marsh*, 326 U.S. at 502–03.

[38] *Id.* at 502. Specifically, the Court noted that the town contained "residential buildings, streets, a system of sewers, a sewage disposal plant," *id.*, businesses open to the public, police, and a post office, *id.* at 502–03.

[39] *Id.* at 503.

[40] *Id.* at 508.

Court balanced the public interest against property owners' rights,[41] though it did not specify what rights were at issue, and it stated that those rights become more limited the more the "owner, for his advantage," invites the public onto the property.[42]

Though later cases applying *Marsh* to entities other than traditional company towns — such as shopping malls — have dealt more fully with the owners' interests,[43] they have often narrowed *Marsh* to a "public function" test of state actor status,[44] focused on the provision of "municipal" services.[45] As the Court later described it, "[*Marsh*] simply held that where private interests were substituting for and performing the customary functions of government, First Amendment freedoms could not be denied . . . ."[46] On this reading, Notre Dame is a good candidate for state actor status. Yet this reading misinterprets *Marsh*'s "public functions." The Court in *Marsh* was concerned with "the functioning of the community"[47]: the people's use of a public sphere. But the public function test narrowly confines the inquiry to the most private businesslike aspect of government: service provision.

Excavating the full *Marsh* opinion provides a test truer to the Court's original concerns. The *Marsh* test asks if the privately owned place is visually and experientially indistinguishable from a typical municipality and its public sphere.[48] Such a test requires a showing of how people see and use the space. Do they do their shopping at Notre Dame's businesses? Are they engaged in community life? Is the campus visually distinguishable from a municipal town? Not only does this test hew to the *Marsh* line,[49] but it also solves two doctrinal deficiencies of the public function test.

---

[41] *Id.* at 509.

[42] *Id.* at 506.

[43] *See, e.g.*, Lloyd Corp. v. Tanner, 407 U.S. 551, 569–70 (1972).

[44] *See, e.g.*, Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974). Initially, the Court embraced the broad view, applying *Marsh*'s holistic analysis to a mall's function, appearance, and look, though reading *Marsh* as only about the town's business block. Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 316–18 (1968), *overruled by* Hudgens v. NLRB, 424 U.S. 507, 518 (1976). Justice Black, the author of the *Marsh* opinion, dissented in *Logan Valley*, arguing that *Marsh* applied only where "the area [has] all the attributes of a town and [is] exactly like any other town." *Id.* at 331 (Black, J., dissenting).

[45] *See* Evans v. Newton, 382 U.S. 296, 302 (1966). This narrowing has also been noted in academic literature. *See, e.g.*, William A. Diamond, *State Action in the Public Function Doctrine: Are There Really Public Functions?*, 13 U. RICH. L. REV. 579, 581 (1979).

[46] *Lloyd Corp.*, 407 U.S. at 562.

[47] *Marsh*, 326 U.S. at 507.

[48] *Id.* at 502–03, 507–08.

[49] It also seems that this test, which raises a higher bar to state actor status, is unlikely ever to be in conflict with the public function precedents. The public function test has almost always been found to rule entities out of state actor status; in those few cases of ruling entities in as state actors, other principles, such as effective state delegation, seem to operate at least as powerfully. *See Evans*, 382 U.S. at 301; *see also* Terry v. Adams, 345 U.S. 461, 469 (1953) (finding a Fifteenth

First, there is no clear connection between, say, sewer service and First Amendment rights. One possibility is that public functions are a proxy for the nonexistence of alternative forums for information exchange.[50] But whether that rationale has survived later precedent ought to be in real doubt,[51] and it would seem to fall flat as it moves beyond the First Amendment — information-exchange forums are irrelevant in the Second, Fourth, and Fifth Amendment realms.[52] Another possibility is that by availing itself of the commercial benefits of providing a service typically offered by the government, a private entity also takes upon itself governmental responsibilities. But the Supreme Court has limited this rationale to functions that are "traditionally the *exclusive* prerogative of the State";[53] moreover, in an age of privatization,[54] one might wonder how much longer this frame of reference can maintain its shape.[55] Whichever it is, rather than relying

---

Amendment violation where a state allowed the "duplication of its election processes" by a private entity in order to disenfranchise African Americans).

[50] *See Lloyd Corp.*, 407 U.S. at 562 ("[A]s title to the entire town was held privately, there were no publicly owned streets, sidewalks, or parks where such rights could be exercised."); Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 322–25 (1968) (holding lack of alternative forum weighs in favor of finding state action and noting that suburbanization validates that finding), *overruled by* Hudgens v. NLRB, 424 U.S. 507, 518 (1976); Petersen v. Talisman Sugar Corp., 478 F.2d 73, 83 (5th Cir. 1973) ("Having located the *functional* equivalent of a thousand-resident municipality in the midst of its property, the company must accommodate its property rights to the extent necessary to allow the free flow of ideas and information . . . ." (emphasis added)).

[51] *See Hudgens*, 424 U.S. at 517–18. *Hudgens*, like *Lloyd Corp.* and *Logan Valley*, involved plaintiffs suing to vindicate their putative right to protest at privately owned shopping malls. The plaintiffs in *Logan Valley* won because the Court found they had no other forum in which to reach their intended audience. 391 U.S. at 322–25. *Lloyd Corp.* went the other way on the grounds that a mall owner does not lose her property rights when she opens the mall to the public. 407 U.S. at 569–70. *Hudgens* outright overruled *Logan Valley*, stating, "[T]he fact is that the reasoning of the Court's opinion in *Lloyd Corp.* cannot be squared with the reasoning of the Court's opinion in *Logan Valley*." *Hudgens*, 424 U.S. at 518.

[52] For a case involving Fourth Amendment claims, see *United States v. Francoeur*, 547 F.2d 891 (5th Cir. 1977). If Notre Dame qualifies as a company town, there could be potential Second and Fifth Amendment concerns; Notre Dame maintains a firearms ban, *Firearms and Other Weapons*, UNIV. NOTRE DAME, http://hr.nd.edu/nd-faculty-staff/forms-policies/firearms-and-other-weapons (last updated Jan. 3, 2016) [https://perma.cc/9DUW-VQLB], and an extensive disciplinary process, UNIV. OF NOTRE DAME, AN INTRODUCTION TO THE UNIVERSITY CONDUCT PROCESS (Dec. 15, 2015), http://communitystandards.nd.edu/assets/184596/csc_2015_12_15_ppt.pdf [https://perma.cc/YRW3-4RJD].

[53] Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982) (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 353 (1974)).

[54] *See* Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1229 (2003).

[55] In any event, this frame is too small, leaving out the history of private provision of what are now "customary functions of government," *Lloyd Corp.*, 407 U.S. at 562. *See, e.g.*, *New York City Transit — History and Chronology*, METRO. TRANSP. AUTH., http://web.mta.info/nyct/facts/ffhist.htm [https://perma.cc/973W-V7LD] ("Private companies originally managed rapid transit routes and surface lines [in New York City].").

on a nebulous link between municipal services and constitutional rights, it is more straightforward to ask, following *Marsh*, whether a place looks like and is experienced as somewhere that a resident or visitor would objectively expect to enter with constitutional rights intact.[56] Reasonable residents are unlikely to assess their constitutional rights by asking, "Who is treating my wastewater?" Instead, they are likely to proceed by reference to places they know as constitutionally robust, taking account of the look and feel of the place.

Second, the public function test provides an inadequate limiting principle, which may be especially important where the property owner has sincere constitutional concerns of its own — for instance, a Catholic university's religious objections to protecting speech in tension with its beliefs.[57] One possibility is that state actor status might be limited by "the use to which the property is put by the owner."[58] Yet this limiting principle seems hardly a principle at all; after all, the *Marsh* town's owner thought it was inviting the public for "designated purposes"[59] when it excluded solicitation from those purposes.[60] And the company also might rationally say that any seemingly public uses were allowed in pursuit of private gain. Moreover, this lack of limits has the potential to sweep into company-town status places readily recognized as nonmunicipal. Disney World — a tourist attraction with few full-time residents[61] and a giant fairytale castle — might well have been found to be a state actor had the plaintiffs in one case made a proper showing of its public functions.[62] And what about private

---

[56] *Cf.* Ron Levi, *Gated Communities in Law's Gaze: Material Forms and the Production of a Social Body in Legal Adjudication*, 34 LAW & SOC. INQUIRY 635, 636 (2009) (arguing that "we must . . . attend to the specificity of spatial forms" in examining the public/private dividing line).

[57] It bears mention that the Constitution also protects property rights per se, not only where those rights protect other rights like religious liberty. *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

[58] Petersen v. Talisman Sugar Corp., 478 F.2d 73, 82 (5th Cir. 1973) (listing a possible factor to consider when balancing competing rights under the state action doctrine); *see also Lloyd Corp.*, 407 U.S. at 569 ("[P]roperty [does not] lose its private character merely because the public is generally invited to use it for designated purposes.").

[59] *Lloyd Corp.*, 407 U.S. 551 at 569.

[60] Marsh v. Alabama, 326 U.S. 501, 503 (1946).

[61] *See* Joshua Shenk, *Hidden Kingdom: Disney's Political Blueprint*, AM. PROSPECT (Spring 1995), http://prospect.org/article/hidden-kingdom-disneys-political-blueprint [https://perma.cc/XCD3-FXR3].

[62] *See* United States v. Francoeur, 547 F.2d 891, 894 (5th Cir., 1977). In *Francoeur*, the court rejected imposing state actor status on Disney World in part because "there [was] no showing that [Disney World] has all of the facilities" of a town. *Id.* But the idea is not so far-fetched as it may seem. *See* Jason Garcia, *Disney's Reedy Creek Government Has Rare Board Vacancy, but Don't Bother Running*, ORLANDO SENTINEL (May 9, 2011), http://articles.orlandosentinel.com/2011-05-09/business/os-disney-reedy-creek-election-20110509_1_disney-awards-reedy-creek-improvement-district-tom-moses/2 [https://perma.cc/M3R7-SNKC] (describing the Reedy Creek Improvement District, which governs the area including Disney World and which is controlled by

schools?[63] On the other hand, while Notre Dame provides a number of municipal services, which would indicate state action under the public function test, Judge Moody evinced substantial skepticism about Notre Dame as a state actor in the form of a company town.

Notre Dame provides sewer, water, and power utilities;[64] it has parks.[65] Visitors can stay at Notre Dame's hotel, enjoy its museum and performing arts center, and catch up on local happenings in the newspaper.[66] These facts reflect much of the substance of municipal life, and they, along with evidence that would show how people interact with the space, may or may not add up to a company town. Judge Moody's opinion seems to operate on this holistic, experience-oriented view.[67] As *Moss* and similar cases move forward, courts would do well to expand beyond a "company town" inquiry focused solely on service provision. In order to do so, they can go back to the origins of this branch of the state action doctrine to find that appearance and experience matter.

Disney, as having "the ability to write building codes, sell tax-free bonds, produce electricity, [and] condemn property," and noting the District's fire department).

[63] *See* Evans v. Newton, 382 U.S. 296, 321–22 (1966) (Harlan, J., dissenting) (expressing concern that the public function test could be used to compel private religious schools to adopt nondiscriminatory admissions policies). A private elementary or high school might well be serving a public function, but such a school is unlikely to constitute a *Marsh*-like town.

[64] *See* UNIV. OF NOTRE DAME, NOTRE DAME UTILITIES DEPARTMENT, http://utilities.nd.edu/assets/12786/7635_utilitiesbrochure_09.pdf [https://perma.cc/4LR2-KKVF].

[65] Margaret Fosmoe, *Public Welcome at New Notre Dame Playground*, S. BEND TRIB. (Sept. 4, 2012), http://articles.southbendtribune.com/2012-09-04/news/33589065_1_playground-irish-green-campus [https://perma.cc/L7NM-6P6M].

[66] *Visitors*, UNIV. NOTRE DAME, https://www.nd.edu/visitors [https://perma.cc/4F9N-U9VG].

[67] Judge Moody's reliance on *Campbell* is telling. In that case, the Seventh Circuit found that an ostensible company town, though it provided water, sewer, and garbage services, nonetheless lacked the requisite breadth of characteristics required to establish state actor status under *Marsh*. Ill. Migrant Council v. Campbell Soup Co., 574 F.2d 374, 377–78 (7th Cir. 1978).