

Rethinking State Inaction: An In-Depth Look at the State Action Doctrine in State and Lower Federal Courts

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I. INTRODUCTION

Federal constitutional protections in the United States are only invoked when there is “state action,”¹ but not when the alleged constitutional violations are by private parties. When the state is not involved, and a private party is not considered a state actor, the Constitution is generally not implicated. But in the context of racial discrimination, the question remains: does state *inaction*—essentially the state permitting private racial discrimination to continue—constitute state action? Essentially, if a state chooses *not* to protect its citizens from private racial discrimination, simply allowing this private discrimination to occur, does this satisfy the state action doctrine?

The state action doctrine has been a frequent topic of conversation for decades following *Shelley v. Kraemer*.² Scholars have extensively discussed various problems with the doctrine,³ calling the distinction between public and private action “arbitrary,”⁴ and both the Supreme Court and lower federal courts have admitted the difficult nature in determining when a private party’s actions are state action.⁵ While the Supreme Court has given some guidance on determining when private action becomes state action, there is still no single specific test. Instead, because distinguishing between public and private action has proven elusive, the Supreme Court has instructed lower courts to take a case-by-case approach to the state action doctrine.⁶

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¹ Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 507 n.15 (1985).

² *Id.* at 503–06.

³ See e.g., Christian Turner, *State Action Problems*, 65 FLA. L. REV. 281, 283 (2013) (“The line of state action opinions has been criticized as incoherent, ungrounded, and insincere.”).

⁴ See Michael Deshmukh, *Is FINRA A State Actor? A Question That Exposes the Flaws of the State Action Doctrine and Suggests A Way to Redeem It*, 67 VAND. L. REV. 1173, 1182 (2014).

⁵ *Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 823 (7th Cir. 2009); Int’l Soc’y for Krishna Consciousness v. Air Canada, 727 F.2d 253, 255 (2d Cir. 1984) (admitting state action determination constitutes “one of the more slippery and troublesome areas of civil rights litigation”).

⁶ *Perkins v. Londonderry Basketball Club*, 196 F.3d 13, 18 (1st Cir. 1999) (quoting *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961)).

Even though the Constitution only protects against state action, do the state legislatures have a duty to remove structural injustice, specifically racial discrimination? Many argue the most important issue American law must address is eradicating racism,⁷ but structural injustice, specifically racism, continues to be rampant today, even espousing itself in our presidential elections. The Equal Protection Clause of the federal Constitution serves to protect individuals from unconstitutional discrimination, and most states have some form of an equal protection clause in their own state constitutions.⁸ However, Maryland and Colorado provide only for equal protection based on sex,⁹ and a few states, including both Mississippi and Delaware, do not provide an equal protection clause at all in their state constitutions.¹⁰ Regardless of the presence of an equal protection

⁷ Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69 (1967).

⁸ See N.Y. CONST. art. 1, § 11; ALASKA CONST. art. 1, § 1 ("[A]ll persons are equal and entitled to equal rights, opportunities, and protection under the law."); ARIZ. CONST. art. 2 § 13; ARK. CONST. art. 2, § 3 ("[N]or shall any citizen ever be deprived of any right, privilege or immunity; nor exempted from any burden or duty, on account of race, color or previous condition."); CAL. CONST. art. I, § 7(a) ("A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws."); CONN. CONST. art. 1, § 20; FLA. CONST. art. 1 § 2 ("No person shall be deprived of any right because of race, religion, national origin, or physical disability."); GA CONST. art. 1, § 1, ¶ II ("Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws."); HAW. CONST. art. 1, § 5; IDAHO CONST. art. I, § 1; ILL. CONST. art. 1, § 2 ("No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws."); IND. CONST. art. 1, § 23 ("The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens"); IOWA CONST. art. 1, § 1 ("All men and women are, by nature, free and equal, and have certain inalienable rights"); KAN. CONST. B. of R. § 1; KY. CONST. § 3; LA. CONST. art. 1, § 3 ("No person shall be denied the equal protection of the laws."); ME. CONST. art. 1, § 6-A ("No person shall be . . . denied the equal protection of the laws."); MASS. CONST. pt. 1, art. 1 ("Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin."); MICH. CONST. art. 1, § 2; MINN. CONST. art. 1, § 2 ("No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof."); MO. CONST. art. I, § 2 ("[A]ll persons are created equal and are entitled to equal rights and opportunity under the law; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design."); MONT. CONST. art. 2, § 4 ("No person shall be denied the equal protection of the laws"); NEB. CONST. art. I, § 1 ("No person shall . . . be denied equal protection of the laws."); NEV. CONST. art. 1, § 1; N.H. CONST. pt. 1, art. 2 ("Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin."); N.J. CONST. art. 1, ¶ 5; N.M. CONST. art. 2, § 18; N.C. CONST. art. I, § 19 ("No person shall be denied the equal protection of the laws."); N.D. CONST. art. 1, § 1; OHIO CONST. art. I, § 1; OKLA. CONST. art. 2, § 36A ("The state shall not grant preferential treatment to, or discriminate against, any individual or group . . ."); OR. CONST. art. I, § 20; PA. CONST. art. I, § 26 ("Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right."); R.I. CONST. art. 1, § 2 ("No person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied equal protection of the laws."); S.C. CONST. art. I, § 3 ("[N]or shall any person be denied the equal protection of the laws."); S.D. CONST. art. 6, § 18; TENN. CONST. art. 1, § 1; TEX. CONST. art. 1, § 3a ("Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin."); UTAH CONST. art. 1, § 1; VT. CONST. Ch. I, art. 1; VA. CONST. art. 1, § 1; WASH. CONST. art. 1, § 12; W. VA. CONST. art. 3, § 10; WIS. CONST. art. 1, § 1; WYO. CONST. art. 1, § 2.

⁹ MD CONST. DECL. OF RIGHTS, art. 5; C.R.S.A. CONST. art. 2, § 29.

¹⁰ See DEL. CONST., art. 1, § 1; MS CONST. art. 3, § 5; see also S.B. 190, 148th Gen. Assemb. (Del. June 14, 2016); John W. Winkle, *THE MISSISSIPPI STATE CONSTITUTION: A REFERENCE GUIDE* 18

clause in a state constitution, the Fourteenth Amendment provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”¹¹

But if the Constitution only applies to state action, then the focus must be on whether the state permitting private racial discrimination to continue, even if the state did not create it, constitutes “state action” for constitutional purposes. Commentators have asked the very valid question: “why [are] infringements of the most basic values—speech, privacy, and equality— . . . tolerated just because the violator is a private entity rather than the government[?]”¹² The answer given in this Article is emphatically “it should not be tolerated,” because the state action doctrine is satisfied when the state fails to act to prevent private racial discrimination.

This Article will perform two functions: first, it will provide a comprehensive and in-depth analysis of the lower federal courts’ and state courts’ decisions on the state action doctrine and the conclusions derived from this; second, the argument proposed here is the states have a duty under the Equal Protection clause to ameliorate private racial discrimination. The state action doctrine compels this, as state inaction in the context of racial discrimination, even by private actors, constitutes state action; therefore, constitutional rights of the individual come into play.

Part I begins by providing a background to the policies of the state action doctrine and its importance in enforcing constitutional rights. Part II will then look at how federal courts under the federal Constitution determine whether a private party is a state actor. In Part III, this Article will look to two specific areas of federal state action cases, namely in private police officers and private prison employees. Part IV will provide the landscape of state cases and their application of the state action doctrine under both the federal and the state constitutions. Part V will analyze the conclusions drawn from this broad compilation of state action cases, leading to the analysis of the policies behind the state action doctrine in Part VI. Part VII and Part VIII will discuss the thesis of this Article: that the state has a duty to ameliorate private racial discrimination based on the idea that state inaction under the Equal Protection Clause constitutes state action.

II. POLICIES BEHIND THE STATE ACTION DOCTRINE

Before understanding the tests for the state action doctrine, the underlying rationale must be clearly defined, if possible. Several policies behind limiting constitutional protections to only state action have been generally accepted, and the most frequently asserted policy is that this

(Greenwood Press 1993) (noting the constitutional commission called for equal protection and civil rights clauses in the Mississippi Constitution).

¹¹ U.S. CONST. amend. XIV, § 1.

¹² Chemerinsky, *supra* note 1, at 505.

limitation protects individual liberty by allowing private choice.¹³ Generally, the state action question appears when a moving party asserts a constitutional right, but the opposing party asserts a different constitutional value, resisting the application of the state action doctrine.¹⁴ If the opposing party is defined as a state actor, the moving party's constitutional right applies, generally infringing on the opposing party's constitutional value. This situation frequently occurs in relation to free speech on private property.¹⁵

Underlying the state action doctrine, particularly in the context of the Fourteenth Amendment, is this conflict between liberty and equality. The Supreme Court in *Lugar* put forth the idea that the adherence to the state action requirement preserves individual freedom by restricting federal law and judicial authority.¹⁶ This philosophy of individual liberty is based on the idea that individuals would be denied freedom—such as the freedom of association—if forced to conform to constitutional requirements.¹⁷ Liberty presupposes the freedom of association and to use and enjoy his property and even “to be irrational, arbitrary, capricious, even unjust in his personal relations” without governmental interference.¹⁸ This policy prevents the Constitution from superseding individual liberty and the freedom to make certain choices.¹⁹ Justice Harlan believed liberty would be overridden in the pursuit of equality if the Constitution was applied to both governmental and private action.²⁰ So to protect individual liberty and freedom of choice, some argue private action should be exempt from the confines of constitutional equality, giving the state action doctrine a *Lochnerian* sense: as long as the actions are private in nature, it does not violate the Constitution.²¹

A second policy commonly said to support the state action doctrine is maintaining the separation of powers between the legislature and the courts, as the Constitution gave the Federal Government strictly limited powers, and

¹³ *Breese v. Smith*, 501 P.2d 159, 168 (Alaska 1972) (“No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”).

¹⁴ See Michael L. Wells, *Race-Conscious Student Assignment Plans After Parents Involved: Bringing State Action Principles to Bear on the De Jure/de Facto Distinction*, 112 PENN. ST. L. REV. 1023, 1042 (2008).

¹⁵ See, e.g., *Robins v. Pruneyard Shopping Ctr.*, 23 Cal. 3d 899 (1979), *aff'd*, 447 U.S. 74 (1980).

¹⁶ *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 936-37 (1982).

¹⁷ Scott J. Nordstrand, *Private Rights Versus Public Power: The Role of State Action in Alaska Constitutional Jurisprudence*, 7 ALASKA L. REV. 299, 322 (1990) (quoting *Southcenter v. Nat'l Democratic Policy Comm.*, 113 Wash. 2d 413, 430 (1989)).

¹⁸ *Peterson v. City of Greenville*, 373 U.S. 244, 250 (1963) (Harlan, J., concurring).

¹⁹ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1691 (2nd ed. 1988) (“[B]y exempting private action from the reach of the Constitution's prohibitions, it stops the Constitution short of preempting individual liberty—of denying to individuals the freedom to make certain choices. . . . [s]uch freedom is basic under any conception of liberty, but it would be lost if individuals had to conform their conduct to the Constitution's demands.”).

²⁰ *Id.*

²¹ See Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 886-88 (1987).

reserved a general police power to the States.²² This refers to the notion that resolving private conflicts is properly the function of the legislative branch, not the judicial.²³ So when courts decide constitutional disputes between individuals, the judiciary encroaches on legislative functions, giving the courts much greater power.²⁴

Even state supreme courts are reluctant to balance competing constitutional rights between private parties, as they view this as encroaching on legislative authority. As the Connecticut Supreme Court stated:

It is not the role of this court to strike precise balances among the fluctuating interests of competing private groups which then become rigidified in the granite of constitutional adjudication. That function has traditionally been performed by the legislature, which has far greater competence and flexibility to deal with the myriad complications which may arise from the exercise of constitutional rights by some in diminution of those of others.²⁵

A third common policy asserted is the state action doctrine avoids imposing responsibility on the State or officials for conduct for which it “cannot fairly be blamed.”²⁶ This can limit the power of the court against private action, and Justice White acknowledges that “[w]hether this is good or bad policy, it is a fundamental fact of our political order.”²⁷ Some legal commentators have even gone so far to assert that the concept of state action has lost much of its utility.²⁸

²² *United States v. Morrison*, 529 U.S. 598, 618 n.8 (2000) (quoting *New York v. United States*, 505 U.S. 144, 155 (1992)).

²³ Nordstrand, *supra* note 17, at 324.

²⁴ See *Alderwood Associates v. Washington Env'tl. Council*, 96 Wash. 2d 230, 250–51 (1981) (Dolliver, J., concurring) (“Now there is no limit to the range of wrongs which this court may right subject only to the court's notion of balancing interests.”).

²⁵ *Southcenter Joint Venture v. Nat'l Democratic Policy Comm.*, 780 P.2d 1282, 1288 (1989) (quoting *Cologne v. Westfarms Assocs.*, 192 Conn. 48, 65 (1984)).

²⁶ *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982); see also *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2000).

²⁷ *Lugar*, 457 U.S. at 936.

²⁸ Jerre S. Williams, *The Twilight of State Action*, 41 TEX. L. REV. 347, 367 (1963) (“A court decision resolving a private legal dispute is state action. Police action in the enforcement of a private interest is state action. State action is broadly found in many businesses or organizations which are substantially private in nature but have some public concern connected with them. Indeed, all rights of private property and of contract are based upon state law. So the enforcement of these laws is state action.”).

A. Finding of State Action

Since the Supreme Court's decision in *Lugar*, the state action doctrine requires "[1] an alleged constitutional deprivation 'caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible,' and [2] that 'the party charged with the deprivation must be a person who may fairly said to be a state actor.'"²⁹ Courts have long grappled with the second requirement, as determining who can justifiably be considered a "state actor" continues to prove difficult.

To successfully assert virtually any constitutional right, state action must be shown, as private action is not confined by the restrictions of the Fourteenth Amendment, "however discriminatory or wrongful."³⁰ The constitutional amendments, except for the Thirteenth Amendment,³¹ do not apply to private parties unless those private parties' actions are determined to be state action.³² However, there are certain instances where private action becomes state action for constitutional purposes.

III. WHEN IS PRIVATE ACTION ACTUALLY "STATE ACTION?"

In most cases, the state actor is an officer, elected official, or employee of state government, and it is fairly simple to find that the person's actions are fairly attributable to the state.³³ Finding when a private party's action becomes state action is tricky because there is no bright-line between state action and private action, and the Supreme Court has admitted that the cases determining when private action would be state action "have not been a model of consistency."³⁴

In analyzing whether a private action constitutes state action, the criteria for judging state action is not set, but is based on normative judgment.³⁵ For a finding of state action, a court must find such a "close nexus between the State and the challenged action" that the challenged action can be fairly attributed to the State.³⁶ While the Supreme Court has used several state

²⁹ *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (quoting *Lugar*, 457 U.S. at 937).

³⁰ *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349 (1974) (quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948)); *Lugar*, 457 U.S. at 936 (quoting *Flagg Bros. v. Brooks*, 436 U.S. 149, 156 (1978)); see also *Civil Rights Cases*, 109 U.S. 3 (1883) ("[M]ost rights secured by the Constitution are protected only against infringement by governments.").

³¹ *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968) ("We hold that § 1982 bars all racial discrimination, *private as well as public*, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment." (emphasis added)); *United States v. Allen*, 341 F.3d 870, 884 (9th Cir. 2003) ("[U]nlike the Fourteenth Amendment, the Thirteenth Amendment reaches purely private conduct.").

³² *Cooper v. U.S. Postal Serv.*, 577 F.3d 479, 491 (2d Cir. 2009).

³³ *Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 823 (7th Cir. 2009).

³⁴ *Sprauve v. W. Indian Co.*, 799 F.3d 226, 229 (3d Cir. 2015) (quoting *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378 (1995)).

³⁵ *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2000).

³⁶ *Rodriguez*, 577 F.3d at 823 (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)).

action tests, there is no explicit or “infallible” test for finding state action.³⁷ Because of this, federal circuit and state courts have employed a variety of approaches,³⁸ and the Ninth Circuit concluded there are at least seven such tests.³⁹

In the federal courts, virtually all of the circuits apply four state action tests: (1) the public function test,⁴⁰ (2) the joint action test, (3) the nexus test,⁴¹ and (4) the state compulsion test. A few courts have applied additional tests, including the “symbiotic relationship” test,⁴² but the four mentioned above are the tests generally agreed upon by federal circuit courts. All of the tests operate by examining the facts and weighing the circumstances,⁴³ and regardless of the name, the underlying question in each state action test is whether alleged conduct causing the constitutional deprivation is “‘fairly attributable to the State.’”⁴⁴

A. Public Function Test

The public function test was derived from the Supreme Court opinions including *Jackson v. Metropolitan Edison Company*,⁴⁵ and *Flagg Bros., Inc. v. Brooks*.⁴⁶ Under the public function test, state action is found “in the exercise by a private entity of powers traditionally exclusively reserved to

³⁷ *Reitman v. Mulkey*, 387 U.S. 369, 378 (1967) (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722) (“This Court has never attempted the ‘impossible task’ of formulating an infallible test for determining whether the State ‘in any of its manifestations’ has become significantly involved in private discriminations. ‘Only by sifting facts and weighing circumstances’ on a case-by-case basis can a ‘nonobvious involvement of the State in private conduct be attributed its true significance.’”).

³⁸ *Lee v. Katz*, 276 F.3d 550, 554 (9th Cir. 2002).

³⁹ *Florer v. Congregation Pidyon Shevuyim, N.A.*, 639 F.3d 916, 924 (9th Cir. 2011) (citing *Brentwood Acad.*, 531 U.S. at 296); *Hallinan v. Fraternal Order of Police of Chicago Lodge No. 7*, 570 F.3d 811, 815-16 (7th Cir. 2009) (listing numerous approaches the Supreme Court has used to determine state action).

⁴⁰ *See, e.g., Alberto San, Inc. v. Consejo De Titulares Del Condominio San Alberto*, 522 F.3d 1, 4 (1st Cir. 2008); *Grogan v. Blooming Grove Volunteer Ambulance Corps*, 768 F.3d 259, 263-64 (2d Cir. 2014); *Kach v. Hose*, 589 F.3d 626, 646 (3d Cir. 2009); *Cornish v. Corr. Servs. Corp.*, 402 F.3d 545, 549 (5th Cir. 2005); *Chapman v. Higbee Co.*, 319 F.3d 825, 833 (6th Cir. 2003); *Rodriguez*, 577 F.3d at 823-24 (7th Cir. 2009); *Florer*, 639 F.3d at 924-25 (9th Cir. 2011); *Wittner v. Banner Health*, 720 F.3d 770, 775 (10th Cir. 2013); *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1277 (11th Cir. 2003).

⁴¹ *See, e.g., Grapentine v. Pawtucket Credit Union*, 755 F.3d 29, 32 (1st Cir. 2014); *Sprauve v. West Indian Co.*, 799 F.3d 226, 229 (3d Cir. 2015); *Cornish v. Corr. Servs. Corp.*, 402 F.3d 545, 549 (5th Cir. 2005); *Chapman v. Higbee Co.*, 319 F.3d 825, 833 (6th Cir. 2003); *S.H.A.R.K. v. Metro Parks Serving Summit Co.*, 499 F.3d 553, 565 (6th Cir. 2007); *Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 823-24 (7th Cir. 2009); *Wickersham v. City of Columbia*, 481 F.3d 591, 597 (8th Cir. 2007); *Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984, 995 (9th Cir. 2013); *Wasatch Equal. v. Alta Ski Lifts Co.*, 820 F.3d 381, 387 (10th Cir. 2016); *Focus on the Family*, 344 F.3d at 1277-8.

⁴² *Logiodice v. Trustees of Maine Cent. Inst.*, 296 F.3d 22, 37 (1st Cir. 2002).

⁴³ *Tarpley v. Keistler*, 188 F.3d 788, 792 (7th Cir. 1999).

⁴⁴ *Wasatch Equal.*, 820 F.3d at 387 (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)).

⁴⁵ *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974); *see Wilcher v. City of Akron*, 498 F.3d 516, 519 (6th Cir. 2007).

⁴⁶ *Flagg Bros. v. Brooks*, 436 U.S. 149, 157-61 (1978) (concluding that state action arises when private actor engages in “an exclusively public function”).

the State.”⁴⁷ While the government performs many functions, very few have been *exclusively* reserved to the State.⁴⁸ In applying this test, courts focus on whether the function is traditionally “exclusive” to the state, but the simple fact that “a private entity performs a function which serves the public does not make its acts state action.”⁴⁹ The public function test has been interpreted narrowly, and federal courts generally find that only functions like holding elections, exercising eminent domain, and operating a company-owned town, constitute state action.⁵⁰

One function that has been repeatedly upheld as a traditionally exclusive state function is holding elections. In the *White Primary Cases*,⁵¹ the Supreme Court was asked if the Democratic Party could exclude African-Americans from voting in the party primaries, and the Court held the Party was a state actor because they were conducting primary elections, a traditionally exclusive public function.⁵² However, both federal and state courts have found that when political parties are conducting internal party affairs rather than elections, the party is not a state actor.⁵³ Several circuit courts have also found that the exclusive power to regulate free speech in a public forum is state action,⁵⁴ and the building and maintaining the roads, including toll roads, is a traditionally exclusive government function.⁵⁵ Even recently under the public function test, the Second Circuit found an animal rescue foundation to be a state actor when the state delegated the foundation authority to perform surgery on seized animals.⁵⁶

However, courts have found that because certain activities are not traditionally *exclusive* to the state, state action is not present under the public function test. State action has not been found using this test in the contexts

⁴⁷ *Santiago v. Puerto Rico*, 655 F.3d 61, 68 (1st Cir. 2011) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974)); see also *Horvath v. Westport Library Ass'n*, 362 F.3d 147, 151 (2d Cir. 2004).

⁴⁸ *Flagg Bros.*, 436 U.S. at 158.

⁴⁹ *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982).

⁵⁰ *Reguli v. Guffee*, 371 F. App'x 590, 600 (6th Cir. 2010) (citing *Chapman v. Higbee Co.*, 319 F.3d 825, 833 (6th Cir. 2003)).

⁵¹ *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *United States v. Classic*, 313 U.S. 299 (1941); *Grove v. Townsend*, 295 U.S. 45 (1935).

⁵² *Terry*, 345 U.S. at 469.

⁵³ See, e.g., *Seergy v. Kings Cty. Republican Cty. Comm.*, 459 F.2d 308, 314 (2d Cir. 1972); *Lynch v. Torquato*, 343 F.2d 370, 372 (3d Cir. 1965); *Banchy v. Republican Party of Hamilton Cty.*, 898 F.2d 1192, 1196 (6th Cir. 1990); *Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 92 (Tex. 1997).

⁵⁴ *Lee v. Katz*, 276 F.3d 550, 556 (9th Cir. 2002) (“[T]he regulation of speech in the Commons [a public forum] is a public function and the OAC became a State actor when the City delegated that regulation to the OAC.”); see also *Lansing v. City of Memphis*, 202 F.3d 821, 828–29 (6th Cir. 2000) (holding that a private party given *non-exclusive* powers over a traditional public forum does not become a state action if the State has the complete power to regulate free speech in the public forum).

⁵⁵ *Brown v. Transurban USA, Inc.*, 144 F. Supp. 3d 809, 836 (E.D. Va. 2015); *Gordon v. Nash*, No. 4372, 1940 WL 958, at *3 (D. Alaska July 26, 1940); *Bester v. Chicago Transit Auth.*, 676 F. Supp. 833, 838 (N.D. Ill. 1987).

⁵⁶ *Fabrikant v. French*, 691 F.3d 193, 208 (2d Cir. 2012) (citing *West v. Atkins*, 487 U.S. 42, 49 (1988)) (“The spaying and neutering of the dogs, like the search and arrest, constituted state action because they were part of the state function of animal control delegated to the SPCA by state law. Those actions, indeed, would not have been possible but for the SPCA defendants’ prior state action.”).

of providing education,⁵⁷ providing care to foster children,⁵⁸ providing utility service,⁵⁹ providing care for the mentally disabled,⁶⁰ storing and auctioning guns confiscated by police,⁶¹ bringing suit by a bar association to enforce the unauthorized-practice-of-law statute,⁶² or even detaining a shoplifter.⁶³

B. Joint Action Test

The joint action test⁶⁴ was derived from Supreme Court cases including *Adickes v. S.H. Kress & Co.*⁶⁵ and *Dennis v. Sparks*,⁶⁶ and federal courts have concluded joint action exists when the state has “so far insinuated itself into a position of interdependence with [the private entity] that it must be recognized as a joint participant in the challenged activity”⁶⁷ “Under the joint action approach, private actors can be state actors if they are ‘willful participant[s] in joint action with the state’”⁶⁸ An additional way the joint action test can be satisfied is if the state knowingly accepts the benefits, then the private conduct can be state action.⁶⁹ Under the joint action test, courts focus on whether state officials and private parties acted together in a deprivation of constitutional rights.⁷⁰

For example, in *Simon v. CommunityCare HMO, Inc.*,⁷¹ an employee of the city of Tulsa was randomly selected to be drug tested under the city’s drug-testing policy, and he tested positive for marijuana.⁷² The city made his continued employment contingent on undergoing a substance abuse program recommended by CommunityCare, a private corporation contracting with the city to provide substance abuse counseling.⁷³ The

⁵⁷ *Santiago v. Puerto Rico*, 655 F.3d 61, 73 (1st Cir. 2011); *Klunder v. Brown Univ.*, 778 F.3d 24, 32 (1st Cir. 2015).

⁵⁸ *Leshko v. Servis*, 423 F.3d 337, 343 (3d Cir. 2005).

⁵⁹ *Miller v. Bd. of Managers of Whispering Pines at Colonial Woods Condo. II*, 457 F. Supp. 2d 126, 130 (E.D.N.Y. 2006).

⁶⁰ *Sybalski v. Indep. Grp. Home Living Program, Inc.*, 546 F.3d 255, 259 (2d Cir. 2008).

⁶¹ *Jarvis v. Vill. Gun Shop, Inc.*, 805 F.3d 1, 12 (1st Cir. 2015), *cert. denied*, 136 S. Ct. 2020 (2016).

⁶² *The Real Estate Bar Ass’n for Mass., Inc. v. Nat’l Real Estate Info. Servs.*, 608 F.3d 110, 122 (1st Cir. 2010) (citing *Flagg Bros. v. Brooks*, 436 U.S. 149, 164-65 (1978) (“An action undertaken by a private party does not become state action merely because the action is authorized by state statute.”)).

⁶³ *Chapman v. Higbee Co.*, 319 F.3d 825, 834 (6th Cir. 2003).

⁶⁴ A few courts treat the joint action test identical to the nexus test, but the nexus test will be discussed separately. *See, e.g., Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1277 (11th Cir. 2003).

⁶⁵ *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970).

⁶⁶ *Dennis v. Sparks*, 449 U.S. 24, 27 (1980).

⁶⁷ *Gorenc v. Salt River Project Agric. Improvement & Power Dist.*, 869 F.2d 503, 507 (9th Cir. 1989) (alteration in original) (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961)).

⁶⁸ *George v. Pac.-CSC Work Furlough*, 91 F.3d 1227, 1231 (9th Cir. 1996) (alteration in original) (quoting *Dennis v. Sparks*, 449 U.S. 24, 27 (1980)).

⁶⁹ *Nat’l Collegiate Athletic Ass’n v. Tarkanian*, 488 U.S. 179, 192 (1988); *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1140 (9th Cir. 2012).

⁷⁰ *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1453 (10th Cir. 1995).

⁷¹ *Simon v. CommunityCare HMO, Inc.*, 234 F.3d 1121 (10th Cir. 2000).

⁷² *Id.* at 1122.

⁷³ *Id.*

employee objected to the program because of its religious content, and the employee brought suit against both the city and the private corporation, alleging they conspired to violate his religious liberty on threat of termination.⁷⁴ The court applied the joint action test to determine whether CommunityCare was a state actor for constitutional purposes, stating the joint action test could be satisfied if “the public and private actors engaged in a conspiracy . . . that both public and private actors share a common, unconstitutional goal . . . show[ing] agreement and concerted action.”⁷⁵ But because the city acted independently in its decision to terminate the employee, the court held the private company was not a state actor and CommunityCare was not liable for the alleged constitutional violation.⁷⁶

C. Nexus Test

Similarly, under the nexus test,⁷⁷ a plaintiff must demonstrate there is a sufficiently close nexus between the government and the challenged conduct such that the conduct may be fairly attributed to the State itself.⁷⁸ The nexus test applies where “the state has so far insinuated itself into a position of interdependence with the [private party] that it was a joint participant in the enterprise.”⁷⁹ For most courts, neither state regulation, even when extensive, nor public funding alone is sufficient to find state action under the nexus test.⁸⁰

In *Wasatch Equal. v. Alta Ski Lifts Co.*,⁸¹ a private ski lift company operated a ski area on Forest Service land through a special permit, and under the terms of that permit, the Forest Service reviews and approves the company’s operation plan each year.⁸² The company had instituted a ban on snowboards, and several plaintiffs brought suit against the company alleging violations of snowboarders’ equal protection and due process rights.⁸³ Because the Forest Service was required to approve the plan, including the snowboard ban, the plaintiffs sought a declaratory judgment that the ban was state action and therefore, unconstitutional.⁸⁴

⁷⁴ *Id.*

⁷⁵ *Id.* at 1126.

⁷⁶ *Id.* at 1127.

⁷⁷ Some courts, including the First and the Fifth Circuits, apply the joint action test and the nexus test as the same. See *Bass v. Parkwood Hosp.*, 180 F.3d 234, 242 (5th Cir. 1999) (applying the nexus and joint action tests as the same); *Alberto San, Inc. v. Consejo De Titulares Del Condominio San Alberto*, 522 F.3d 1, 4 (1st Cir. 2008) (applying the nexus and joint action tests as the same).

⁷⁸ *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1448 (10th Cir. 1995).

⁷⁹ *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1277 (11th Cir. 2003).

⁸⁰ *Lansing v. City of Memphis*, 202 F.3d 821, 830 (6th Cir. 2000) (citing Supreme Court cases).

⁸¹ *Wasatch Equal. v. Alta Ski Lifts Co.*, 820 F.3d 381, 381 (10th Cir. 2016).

⁸² *Id.* at 384.

⁸³ *Id.* at 385.

⁸⁴ *Id.*

The Tenth Circuit applied several state actions tests, including the nexus test, to determine whether the operating company was a state actor.⁸⁵ In analyzing the facts, the court noted that general awareness of the ban was not sufficient to establish state action and “[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient” to find state action.⁸⁶ The Forest Service did not make the special permit contingent on the ban nor did the agency coerce or encourage the ban, and the Tenth Circuit held the complaint failed to establish state action under the nexus test.⁸⁷

In *Willis v. University Health Services*,⁸⁸ the Eleventh Circuit was faced with a question of whether a private corporation operating a hospital under a lease agreement with the County Hospital Authority was a state actor.⁸⁹ While the plaintiff was a registered nurse at the hospital, she wrote a letter to a newspaper editor discussing her opinions on obstetrical practices, and the hospital subsequently fired her.⁹⁰ The plaintiff filed a lawsuit claiming violations of her constitutional rights, particularly her First Amendment rights.⁹¹ To determine the constitutional implications, the Eleventh Circuit applied the nexus/joint action test, but because the lease under which the hospital operated relinquished the state Hospital Authority from all liability and required the hospital to enforce all regulations and protections, the court found there was no “symbiotic relationship” to satisfy the nexus/joint action test.⁹²

Even the presence of police officers does not necessarily transform the conduct of private parties into state action.⁹³ In *Gallagher*, the Tenth Circuit refused to find state action where police officers observed private parties conducting pat-down searches of customers entering a concert.⁹⁴ The court applied four state action tests, including the public function test, concluding there was no state action, as the “mere performance of security functions” did not constitute action of the state.⁹⁵ The Fifth Circuit likewise found that a private company is not a state actor merely because it takes advantage of law enforcement services provided to the public.⁹⁶

⁸⁵ *Id.* at 389.

⁸⁶ *Wasatch Equal.*, 820 F.3d at 389–90 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004–05 (1982)).

⁸⁷ *Id.* at 390.

⁸⁸ *Willis v. Univ. Health Servs., Inc.*, 993 F.2d 837 (11th Cir. 1993).

⁸⁹ *Id.* at 838.

⁹⁰ *Id.*

⁹¹ *Id.* at 839.

⁹² *Id.* at 841.

⁹³ *See, e.g., Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1450 (10th Cir. 1995); *Soldal v. County of Cook*, 942 F.2d 1073, 1075 (7th Cir. 1991) (en banc), rev’d on other grounds, 506 U.S. 56 (1992); *Greco v. Guss*, 775 F.2d 161, 168 (7th Cir. 1985); *United States v. Coleman*, 628 F.2d 961, 964 (6th Cir. 1980); *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507 (5th Cir. 1980), cert. denied, 449 U.S. 953 (1980).

⁹⁴ *Gallagher*, 49 F.3d at 1450.

⁹⁵ *Id.* at 1457.

⁹⁶ *Rundus v. City of Dallas, Tex.*, 634 F.3d 309, 314–15 (5th Cir. 2011).

D. State Compulsion Test

The fourth common approach to state action is the state compulsion test. When courts use the state compulsion test, state action is found “when the State ‘has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.’”⁹⁷ Under this approach, a private actor becomes a state actor when some state law or custom requires or compels a certain course of action.⁹⁸ But simply following a regulatory scheme generally does not make a private party a state actor,⁹⁹ and like the nexus test, state regulation of an entity alone is not sufficient to show state action under the state compulsion test.¹⁰⁰

In *Estades-Negroni*, the plaintiff received medical treatment from a doctor of a private medical company.¹⁰¹ Under the Puerto Rico Health Reform Plan, the Puerto Rico Health Insurance Administration was created and given the power to contract with private health insurers to provide care for those who could not afford medical help.¹⁰² The plaintiff was forcibly restrained and the doctor filed a petition for the state to authorize the plaintiff’s involuntary commitment.¹⁰³ After her discharge, the plaintiff filed suit against the state and the company, claiming her constitutional rights were violated, but the District Court held she could not satisfy any of the state action tests to allege a violation of her constitutional protections.¹⁰⁴

On appeal, the First Circuit applied the state compulsion test, the nexus/joint action test, and the public function test.¹⁰⁵ Under the state compulsion test, the First Circuit held there was no finding of state action because, even though there was a state statutory scheme regulating involuntary commitment, the law did not “compel or encourage involuntary commitment,” but simply provided a mechanism for it.¹⁰⁶ The court held that none of the three tests were satisfied, and affirmed the dismissal of the

⁹⁷ *Jarvis v. Vill. Gun Shop, Inc.*, 805 F.3d 1, 12 (1st Cir. 2015) (citing *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982)); *United States v. Stein*, 541 F.3d 130, 147 (2d Cir. 2008) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)); see also *Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir. 1992); *Lansing*, 202 F.3d at 829; *Estades-Negroni v. CPC Hosp. San Juan Capestrano*, 412 F.3d 1, 5 (1st Cir. 2005).

⁹⁸ *George v. Pac.-CSC Work Furlough*, 91 F.3d 1227, 1232 (9th Cir. 1996) (citing *Gorenc v. Salt River Project Agric. Improvement & Power Dist.*, 869 F.2d 503, 508 (9th Cir. 1989)).

⁹⁹ See *Estades-Negroni v. CPC Hosp. San Juan Capestrano*, 412 F.3d 1, 5 (1st Cir. 2005).

¹⁰⁰ See, e.g., *Wolotsky v. Huhn*, 960 F.2d 1331, 1336 (6th Cir. 1992); *Santiago v. Puerto Rico*, 655 F.3d 61, 71 (1st Cir. 2011); *Wilcher v. City of Akron*, 498 F.3d 516, 520 (6th Cir. 2007) (citing *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 95 S.Ct. 449 (1974) (“The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment.”)).

¹⁰¹ *Estades-Negroni*, 412 F.3d at 2.

¹⁰² *Id.* at 2–3.

¹⁰³ *Id.* at 3.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 5.

¹⁰⁶ *Id.* at 5–6.

plaintiff's federal causes of action.¹⁰⁷ Other courts have similarly found that when the statutory language is permissive but does not influence or compel a private party to act, there is no state action under the state compulsion test.¹⁰⁸

E. Symbiotic Relationship or Entwinement Test

Finally, another test sometimes used by circuits is the symbiotic relationship test. This test is often treated identically to the entwinement test, in which a private entity qualifies as a state actor if it "is entwined with governmental policies, or when government is entwined in its management or control."¹⁰⁹ It is similar to both the nexus test and the joint action test.¹¹⁰

For example, in *Grogan v. Blooming Grove Volunteer Ambulance Corps.*, the plaintiff alleged the disciplinary charges and suspension without a hearing from the volunteer service violated her constitutional due process rights, arguing this amounted to state action because the state imposed regulations on volunteer services and had the authority to inspect the services.¹¹¹ However, under the entwinement test, the court found the plaintiff could not show her suspension was state action because, like the state compulsion test, statutes and regulations alone are not enough to make a private party into a state actor.¹¹² Instead, the court stated the plaintiff was required to show that the State was so entwined with the management that personnel decisions were fairly attributable to the State, because the state action must be in the decision to hire or fire, not the decision to establish or regulate a private entity.¹¹³

III. APPLICATION OF THESE FEDERAL STATE ACTION TESTS

These state action tests arise in myriad situations, including private police, private prisons, and racial discrimination. Many issues in these areas surround alleged violations of constitutional rights, which can only be invoked if there is state action. This section will discuss the current status of several pressing situations in which private parties have been determined to be state actors.

¹⁰⁷ *Estades-Negroni v. CPC Hosp. San Juan Capestrano*, 412 F.3d 1, 9 (1st Cir. 2005).

¹⁰⁸ *See, e.g., Wittner v. Banner Health*, 720 F.3d 770, 776 (10th Cir. 2013) ("When the state regulates a private medical facility but does not mandate its employees to make particular decisions regarding patient care, '[w]e cannot say that the State . . . is responsible for the physician's decision.'")

¹⁰⁹ *Grogan v. Blooming Grove Volunteer Ambulance Corps*, 768 F.3d 259, 268 (2d Cir. 2014) (citing *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2000)).

¹¹⁰ *Logiodice v. Trustees of Maine Cent. Inst.*, 296 F.3d 22, 37 (1st Cir. 2002) ((quoting *Barrios-Velazquez v. Asociacion de Empleados del Estado Libre Asociado de Puerto Rico*, 84 F.3d 487, 494 (1st Cir. 1996)); *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1451 (10th Cir. 1995)).

¹¹¹ *Grogan*, 768 F.3d at 261–62.

¹¹² *Id.* at 268.

¹¹³ *Id.* (citing *United States v. Int'l Bhd. of Teamsters*, 941 F.2d 1292, 1296 (2d Cir.1991)).

A. Private Police Officers

Taking away a person's "life, liberty, or the pursuit of happiness" is one of the deepest deprivations an individual could experience. But are constitutional protections implicated when a police officer is private rather than a traditional state officer? As some courts have recognized, the "Supreme Court has explicitly declined to decide the question of whether and under what circumstances private police officers may be said to perform a public function[.]"¹¹⁴

When private police officers are involved, circuit courts have found state action only in certain narrow circumstances, generally following the Seventh Circuit's decision in *Payton*¹¹⁵ and its line of cases: when private security guards are given *plenary police powers* so they are actually de facto police officers, they can be considered state actors, but if private defendants have "police-like" powers but not plenary police authority, they are not considered state actors for constitutional purposes.¹¹⁶ State action in cases involving private police officers has been found when those private officers have plenary police authority.¹¹⁷ For example, the Sixth Circuit in *Romanski* held that because the plenary arrest power was traditionally the "exclusive prerogative of the state," the private officer was licensed under the state statute licensing private security officers and was on duty at the time, the officer was a state actor.¹¹⁸

However, when a private police officer only has limited power, but not *plenary* police power, courts generally have found that there is no state action under the public function test.¹¹⁹ Citing *Romanski*, the Fourth Circuit in *U.S. v. Day* were posed with the question of whether armed private security guards, authorized under Virginia statutory law to make arrests, violated Day's constitutional rights when the security guards searched Day, and then questioned Day about drugs in his possession without first providing a *Miranda* warning.¹²⁰ Day admitted to having drugs on his person, and the security guards arrested him.¹²¹ A grand jury indicted Day

¹¹⁴ *United States v. Day*, 591 F.3d 679, 690 (4th Cir. 2010) (quoting *Romanski v. Detroit Entertainment, L.L.C.*, 428 F.3d 629, 636 (6th Cir. 2005)).

¹¹⁵ *Payton v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 184 F.3d 623, 630 (7th Cir. 1999) (holding that private police officers licensed to make arrests can be state actors).

¹¹⁶ *Romanski v. Detroit Entm't, L.L.C.*, 428 F.3d 629, 637–38 (6th Cir. 2005) (emphasis added).

¹¹⁷ *Henderson v. Fisher*, 631 F.2d 1115 (3d Cir. 1980) (per curiam) (university policemen with plenary police authority throughout the university's campus); *Rojas v. Alexander's Dept. Store, Inc.*, 654 F.Supp. 856 (E.D.N.Y. 1986) (New York City special patrolman with plenary police authority patrolling a department store).

¹¹⁸ *Romanski*, 428 F.3d at 640.

¹¹⁹ See, e.g., *Johnson v. LaRabida Children's Hosp.*, 372 F.3d 894, 896–97 (7th Cir. 2004) (hospital security guards who had authority to patrol and eject people but not to carry guns and who had to call the police if someone became hostile and belligerent); *Boykin v. Van Buren Twp.*, 479 F.3d 444, 452 (6th Cir. 2007) (holding that "a private security guard, who merely places a call to police that a suspected shoplifting has occurred, but in no way directly confronts the suspect," is not a state actor).

¹²⁰ *United States v. Day*, 591 F.3d 679, 681 (4th Cir. 2010).

¹²¹ *Id.*

on drug and possession charges, and Day filed a motion to suppress the drug and all statements made during the arrest.¹²² The district court granted the suppression motion in part to drugs found during the arrest and Day's statements because the court concluded the private security guards were "were acting as governmental agents in their interactions with Day" and because the officers had conducted a search, found nothing, and then questioned Day without providing a *Miranda* warning, the guards violated his constitutional rights.¹²³

On appeal, the Fourth Circuit reversed, holding the private security guards were not state actors.¹²⁴ The court found that while the Fourth Amendment protected against unreasonable searches and seizures by state actors, the Fourth Amendment does not provide protection against searches by private individuals when acting in a private capacity, and thus no constitutional violation.¹²⁵ Using the public function test, the Court looked to whether the arrest powers conferred to the private security guards were traditionally the exclusive prerogative of the State,¹²⁶ acknowledging that "[i]t is beyond dispute that the police function is 'one of the basic functions of government,'" and that an arrest is most commonly associated with the power of the police.¹²⁷ But the Court found that because Virginia only authorizes an armed security officer to arrest for an offense occurring in his presence,¹²⁸ but did not provide plenary arrest authority, the Fourth Circuit in *Day* held the private guards were not state actors.¹²⁹

The dissent in *Day* argued strongly the opposite while applying the very same public function test.¹³⁰ Judge Davis stated:

Officers Costa and Slader, uniformed, armed security officers clothed with broad law enforcement authority by, and subject to pervasive regulation under, Virginia law, detained Appellee Mario Day at gunpoint, handcuffed him, searched his car and his person, and interrogated him, and thereby collected critical evidence for the government in its prosecution of Day [yet t]he majority expansively concludes, nevertheless, that the officers' actions were not 'fairly attributable' to the Commonwealth.¹³¹

¹²² *Id.* at 681–82.

¹²³ *Id.* at 682.

¹²⁴ *Id.* at 682–83.

¹²⁵ *Day*, 591 F.3d at 683 (citing *United States v. Jarrett*, 338 F.3d 339, 344 (4th Cir. 2003)).

¹²⁶ *Id.* at 687.

¹²⁷ *Id.* (quoting *Rodriguez v. Smithfield Packing Co.*, 338 F.3d 348, 355 (4th Cir. 2003)).

¹²⁸ VA. CODE ANN. § 9.1-146 (emphasis added).

¹²⁹ *Day*, 591 F.3d at 688.

¹³⁰ See *id.* at 689 (Davis, J. dissenting).

¹³¹ *Id.* at 689–90.

Judge Davis would have found the private security guards to be state actors. Not only did the guards have generous arrest authority with very few differences existing in the authority between a private security guard and a state officer, but these security guards were highly regulated, were vetted and trained by the State, and continued to be subject to disciplinary action.¹³²

Some courts do not require such a high burden, and instead find state action in the context of private police under the joint action test rather than the public function test.¹³³ In *Tsao v. Desert Palace, Inc.*, the court decided that “[b]y training Desert Palace security guards, providing information from the records department, and delegating the authority to issue citations,” the State was in such a position of interdependence with Desert Palace that both must be joint participants.¹³⁴ *Tsao* involved private security guards who were trained by the police department, who after training had the authority to issue citations that compel individuals to appear in court, thereby performing law enforcement functions, despite limitations on their power.¹³⁵ The Ninth Circuit relied heavily on this limited authority in determining that the state and private officers were joint actors.¹³⁶ But in applying the joint action test, the court also focused on the fact that once the city-employed police officer arrived on the scene, the officer did not simply arrest the suspect on his own authority but took over the investigation, even signing the summons together with the private officer.¹³⁷

In the context of the Fourth Amendment, federal courts have also recognized that a search by a private citizen may constitute a governmental search implicating the Fourth Amendment “if the government coerces, dominates or directs the actions of a private person” conducting the search or seizure.¹³⁸ This test uses agency principles to determine whether a private party’s action becomes state action, and most federal courts consider (1) whether the government knew of and acquiesced in the intrusive conduct, and (2) whether the party performing the search intended to assist law enforcement or to further the private party’s own interests.¹³⁹

¹³² *Id.* at 692–93.

¹³³ See *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1140 (9th Cir. 2012).

¹³⁴ *Id.* at 1140 (quoting *Gorenc v. Salt River Project Agric. Improvement & Power Dist.*, 869 F.2d 503, 507 (9th Cir. 1989)).

¹³⁵ *Id.* at 1132–33.

¹³⁶ *Id.* at 1140.

¹³⁷ *Id.* at 1142.

¹³⁸ *U.S. v. Smythe*, 84 F.3d 1240, 1242 (1996).

¹³⁹ *Id.* at 1242–43 (quoting *United States v. Miller*, 688 F.2d 652, 657 (9th Cir.1982)); see also *Skinner v. Railway Labor Exec. Assn.*, 489 U.S. 602, 614 (1989) (“Although the Fourth Amendment does not apply to a search or seizure . . . effected by a private party on its own initiative, the Amendment protects against such intrusions if the private party acted as an instrument or agent of the Government.”); *United States v. Alexander*, 447 F.3d 1290, 1295 (10th Cir. 2006); *United States v. Jarrett*, 338 F.3d 339, 345 (4th Cir. 2003); *United States v. Steiger*, 318 F.3d 1039, 1045 (11th Cir. 2003); *United States v. Young*, 153 F.3d 1079, 1080 (9th Cir. 1998); *United States v. Shahid*, 117 F.3d 322, 325 (7th Cir. 1997); *United States v. Jenkins*, 46 F.3d 447, 460 (5th Cir. 1995); *United States v. Malbrough*, 922 F.2d 458, 462 (8th Cir.1990); *United States v. Lambert*, 771 F.2d 83, 89 (6th Cir. 1985).

State courts have similarly applied agency principles in determining whether a search or seizure by a private party constituted state action.¹⁴⁰ In *Coston v. Commonwealth of Virginia*,¹⁴¹ the plaintiff was stopped by a private security officer, gave a fake name, and when the private officer issued the plaintiff a summons, the plaintiff signed the summons with the same fake name.¹⁴² He was convicted for forgery of the summons—a public document—and appealed, claiming his summons was not issued by a “public officer.”¹⁴³ The question before the court of appeals was whether the private security guard who issued the summons was a “public officer.”¹⁴⁴ The state appellate court held, under the state statute, the private security guard was a state actor because he was engaged in a duty specifically authorized by statute, and was “clothed . . . with many of the powers reserved for public employees or officers.”¹⁴⁵ However, the court was careful to limit the holding to this case, upholding the “general rule” that a private security officer is not considered to be a state actor.¹⁴⁶

So why do some courts require such a high delegation of state authority, not just some power but plenary arresting authority, before state action can be found? What is additionally perplexing is the types of functions the courts have held as traditionally exclusive public functions. As noted above, private police officers are not always state actors, yet some courts have held that firefighting has traditionally been the exclusive function of the state.¹⁴⁷ It is difficult to reconcile this with the fact that many courts do not view generally private police officers as state actors, particularly when police have a direct relationship with individual constitutional rights.

B. Private Prison Employees as State Actors

Private prisons are also a pressing topic in today’s society, with many claiming private prisons are a poor substitution for government-run prisons,¹⁴⁸ and can lead to more abusive conditions.¹⁴⁹ The use of private prisons begs the question: are private prisons and their employees state

¹⁴⁰ See, e.g., *State v. Santiago*, 217 P.3d 89, 95 (2009).

¹⁴¹ *Coston v. Commonwealth*, 512 S.E.2d 158, 159–60 (Va. Ct. App. 1999).

¹⁴² *Id.* at 351.

¹⁴³ *Id.* at 351–52.

¹⁴⁴ *Id.* at 352.

¹⁴⁵ *Id.* at 352–53.

¹⁴⁶ *Id.* at 353 (citing *United States v. Francoeur*, 547 F.2d 891, 893 (5th Cir. 1977), *cert. denied*, 431 U.S. 932 (1977) (holding that amusement park security guards are not state actors for Fourth Amendment search and seizure purposes); *Mier v. Commonwealth*, 407 S.E.2d 342, 346 (Va. Ct. App. 1991) (holding that security agents are not state actors for Fifth Amendment custodial interrogation purposes)).

¹⁴⁷ See, e.g., *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 345 (4th Cir. 2000).

¹⁴⁸ Joseph Margulies, *This Is the Real Reason Private Prisons Should Be Outlawed*, TIME (Aug. 24, 2016), <http://time.com/4461791/private-prisons-department-of-justice/>.

¹⁴⁹ Emily Wagster Pettus, *Analysis: US phases out private prisons, Mississippi shuts 1*, WASH. TIMES (Sept. 18, 2016) <http://www.washingtontimes.com/news/2016/sep/18/analysis-us-phases-out-private-prisons-mississippi/>.

actors for constitutional purposes and can they be liable for constitutional violations?

It is not clear whether private prisons and their employees are *always* state actors. In general, because private prisons perform a “traditionally exclusive state function”—incarcerating prisoners—they are state actors.¹⁵⁰ In *Rosborough v. Management & Training Corp.*,¹⁵¹ a private prison was sued because a prisoner claimed he was subjected to cruel and unusual punishment, violating the Eighth Amendment when a private guard slammed a door on the prisoner’s fingers, severing two fingertips.¹⁵² Under the public function test, the Fifth Circuit determined a private prison company could be sued for a constitutional violation because confinement of wrongdoers is a “fundamentally governmental function,”¹⁵³ and other courts have come to the same conclusion.¹⁵⁴

However, the Fourth Circuit was presented with a similar issue in *Holly v. Scott*.¹⁵⁵ There, the Fourth Circuit was faced with the question of whether private prison employees were liable under *Bivens*—a judicial creation recognizing an implied cause of action against federal prison officials for constitutional violations¹⁵⁶—for Eighth Amendment violations for failing to provide adequate medical care to a prisoner.¹⁵⁷ However, the court found because the defendants were employees of a wholly private corporation in which the federal government only had a contractual relationship, the court would not extend constitutional liability.¹⁵⁸

Even under the public function test, the Fourth Circuit found the operation of a prison was not a traditionally exclusive state function, citing

¹⁵⁰ See *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) (imprisonment is “traditionally the exclusive prerogative” of government); *West v. Atkins*, 487 U.S. 42, 49–51, 57 (1988) (a private prison’s power to engage in this public function is “possessed by virtue of state law and made possible only because [it] is clothed with the authority of state law”); *Knows His Gun v. Montana*, 866 F. Supp. 2d 1235, 1244 (D. Mont. 2012) (“Defendants’ actions are fairly attributable to the state . . . caused by the exercise of the state’s exclusive power to incarcerate prisoners.”).

¹⁵¹ *Rosborough v. Mgmt. & Training Corp.*, 350 F.3d 459 (5th Cir. 2003).

¹⁵² *Id.* at 460.

¹⁵³ *Id.* at 461.

¹⁵⁴ See, e.g., *Skelton v. Pri-Cor, Inc.*, 963 F.2d 100, 102 (6th Cir. 1991) (holding a private company administering a state corrections facility could be sued under § 1983); *Plain v. Flicker*, 645 F.Supp. 898, 907 (D.N.J. 1986) (“[I]f a state contracted with a private corporation to run its prisons it would no doubt subject the private prison employees to § 1983 suits under the public function doctrine.”); *Davenport v. Saint Mary Hosp.*, 633 F.Supp. 1228, 1233–34 (E.D. Pa. 1986) (if state delegates traditional public functions, a sufficiently close nexus is present between the state and the challenged conduct of the private entity); *Flores v. GEO Grp., Inc.*, No. CIV.A. 1:09-1198, 2011 WL 1100491, at *1 (W.D. La. Mar. 3, 2011) (holding private-prison management corporations and employees may be sued under § 1983 because “they are performing a governmental function traditionally reserved for the state.”).

¹⁵⁵ *Holly v. Scott*, 434 F.3d 287 (4th Cir. 2006).

¹⁵⁶ The court attempts to distinguish § 1983 liability and *Bivens* liability, asserting the “Congress has authorized the former, and Congress has in no way authorized the latter.” *Id.* at 294 n.4. The distinction between *Bivens* and § 1983 liability is beyond the scope of this article.

¹⁵⁷ *Id.* at 288.

¹⁵⁸ *Id.* at 291.

Richardson v. McKnight.¹⁵⁹ But this comparison is arguably suspect, as *Richardson* was a Supreme Court case on the narrow issue of whether private prison guards were entitled to qualified immunity, and did “not address[] whether the defendants are liable under § 1983 even though they are employed by a private firm.”¹⁶⁰ The Fourth Circuit in *Holly* stated they were required to focus on the specific conduct in the plaintiff’s complaint,¹⁶¹ and the allegation of inadequate medical care “unquestionably arises out of defendants’ operation of the prison, not the fact of Holly’s incarceration.”¹⁶² The court held providing medical care in a private prison was not a public function,¹⁶³ but provided that “[i]t is an open question in this circuit whether § 1983 imposes liability upon employees of a private prison facility under contract with a state.”¹⁶⁴ In 2012, the Supreme Court upheld this conclusion in *Minneci v. Pollard*¹⁶⁵ on a similar fact pattern.

Furthermore, while businesses with contracts to take part of the responsibility of a state’s constitutional obligation to provide medical care for prisoners can be found to be state actors,¹⁶⁶ medical providers who have “only an incidental or transitory relationship” with a prisoner generally are not considered state actors.¹⁶⁷ In *Shields*, the two doctors had only met with the prisoner-patient briefly and did not schedule any follow-up appointments nor take responsibility for treatment.¹⁶⁸ Therefore, the Seventh Circuit held neither doctor had a sufficient relationship with the prisoner to be a state actor.¹⁶⁹ But in the Sixth Circuit, the appellate court has held contracting out medical services still constituted state action and held the state liable.¹⁷⁰ So in analyzing these cases, when the private prison is not acting solely within the scope of incarcerating prisoners, private prisons and their employees may not always be considered state actors, thus not bound by the Constitution.

¹⁵⁹ *Richardson v. McKnight*, 521 U.S. 399 (1997).

¹⁶⁰ *Id.* at 413.

¹⁶¹ *Holly v. Scott*, 434 F.3d 287, 293 (4th Cir. 2006) (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 51 (1999)).

¹⁶² *Id.*

¹⁶³ *Id.* at 294.

¹⁶⁴ *Id.* at 292 n.3.

¹⁶⁵ *Minneci v. Pollard*, 565 U.S. 118, 131 (2012).

¹⁶⁶ See, e.g., *Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 831 (7th Cir. 2009) (holding the medical “provider was acting in the stead of the state in providing medical care to Mr. Rodriguez”); *Skelton v. Pri-Cor, Inc.*, 963 F.2d 100, 102 (6th Cir. 1991) (holding that a private company that administers a prison can be held liable under section 1983).

¹⁶⁷ *Shields v. Ill. Dep’t of Corr.*, 746 F.3d 782, 797–98 (7th Cir. 2014), cert. denied, 135 S. Ct. 1024 (2015) (quoting *Rodriguez*, 577 F.3d at 827).

¹⁶⁸ *Id.* at 798.

¹⁶⁹ *Id.*

¹⁷⁰ *Leach v. Shelby Cty. Sheriff*, 891 F.2d 1241, 1250 (6th Cir. 1989) (quoting *West v. Atkins*, 487 U.S. 42 (1988)) (“Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State’s prisoners of the means to vindicate their Eighth Amendment rights.”); see also *Hicks v. Frey*, 992 F.2d 1450, 1458 (6th Cir. 1993) (providing medical services to prison inmates is a “traditional state function” (citing *West*, 487 U.S. at 54)).

This contrasts with the fact that a physician employed by the *state* to provide medical services to inmates would undoubtedly be a state actor, as the Court explicitly stated in *West*,¹⁷¹ as “the State has a constitutional obligation, under the Eighth Amendment, to provide adequate medical care to those whom it has incarcerated.”¹⁷² This would effectively allow the state to “sidestep” its constitutional obligation to provide medical treatment to prisoners, something the Court has said should not be permitted simply by delegating the state’s authority to a private entity.¹⁷³

IV. STATES’ ANALYSIS OF STATE ACTION

Generally, constitutional claims arise in the federal context under 42 U.S.C. § 1983, and when determining the existence of state action under the federal Constitution, state courts follow federal precedent in applying state action tests.¹⁷⁴ State action can also arise under state constitutions, where federal precedent, while persuasive, is not binding.¹⁷⁵ It is well-settled that while the federal constitution first requires state action for constitutional rights to be implicated, states may adopt greater protections for constitutional rights, including free speech.¹⁷⁶ When interpreting their own state constitutions, some states look to the Federal Constitution for guidance, while others have implemented their own state action tests and analysis.¹⁷⁷ The first question to ask is whether the state constitution even requires state action before the states can apply a state action test. If the state constitution does require state action, is it the same standard as the federal constitution, or a lesser requirement of state action before the state constitution is applied?

¹⁷¹ *West v. Atkins*, 487 U.S. 42, 54 (U.S. 1988).

¹⁷² *Id.* (citing *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)).

¹⁷³ *See Rendell-Baker v. Kohn*, 457 U.S. 830, 849 (1982) (Marshall, J., dissenting) (citing *Terry v. Adams*, 345 U.S. 461 (1953)); *Frazier v. Bd. of Trustees of Nw. Miss. Reg’l Med. Ctr.*, 765 F.2d 1278, 1287 n.20 (5th Cir.), amended, 777 F.2d 329 (5th Cir. 1985) (“A sham delegation of state tasks would clearly implicate both the state action and the under-color-of-law requirements of section 1983.”).

¹⁷⁴ *See, e.g., United Food & Commercial Workers Union, Local 919, AFL-CIO v. Crystal Mall Assoc., L.P.*, 852 A.2d 659, 676 n.20 (Conn. 2004) (describing the “three prominent bright-line federal tests used to determine whether a court can treat a private defendant as a state actor.”).

¹⁷⁵ *Fed. Home Loan Mortg. Ass’n v. Kelley*, 858 N.W.2d 69, 72 (2014) (quoting *Wilcoxon v. Mill Mining & Mfg. Co.*, 597 N.W.2d 250 (Mich. App. 1999) (“Though not binding on this Court, federal precedent is generally considered highly persuasive when it addresses analogous issues.”); *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wash. 2d 297, 331 (2008).

¹⁷⁶ *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 80–81 (1980) (noting that although First Amendment did not grant right of free expression in shopping centers, states may adopt greater free speech rights).

¹⁷⁷ *See, e.g., Eastwood Mall, Inc. v. Slanco*, 626 N.E.2d 59, 61, 63 (Ohio 1994) (“[Article I, Section 11, Ohio Constitution provides] Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech.” “[T]he free speech guarantees accorded by the Ohio Constitution are no broader than the First Amendment, and that the First Amendment is the proper basis for interpretation of Section 11, Article I of the Ohio Constitution.”).

A. States Interpreting their State Constitutions to Have the Same Protections as the Federal Constitution and Following Federal State Action Tests

Like the federal courts, most states interpret their state constitutions to require state action prior to finding a constitutional violation.¹⁷⁸ When state courts find the protections of their state constitutions are identical to the United States Constitution's protections, they often apply federal precedent to find state action under both the federal and state constitutions.¹⁷⁹ For example, the Minnesota Supreme Court in *State v. Wicklund*,¹⁸⁰ after determining that the privately-owned property was not public property for the purposes of state action under the U.S. Constitution, held that Article I, Section 3 of the Minnesota Constitution did not offer greater protection to speech than the First Amendment, and affirmed the court of appeals without even discussing state action under the Minnesota state constitution.¹⁸¹ Furthermore, the state courts in Minnesota have determined that state action may be established either under the nexus test or the symbiotic relationship test,¹⁸² and Minnesota state courts of appeals have also applied a type of entwinement test in finding state action under the Minnesota constitution.¹⁸³

¹⁷⁸ See, e.g., *Dossett v. First State Bank*, Loomis, Neb., 261 Neb. 959, 967 (2001) ("Having equated the guarantee of free speech under the Nebraska Constitution with that under the federal Constitution, we conclude that in order to bring a claim for violation of the Nebraska Constitution's guarantee of freedom of speech under Neb. Const. art. I, § 5, the alleged violation must involve state action . . ."); *State v. Beecroft*, 813 N.W.2d 814, 837 (Minn. 2012) (quoting *State v. Wicklund*, 589 N.W.2d 793, 801 (Minn. 1999) (providing "[t]he Minnesota Constitution does not accord affirmative rights to citizens against each other; its provisions are triggered only by state action."); *Schreiner v. McKenzie Tank Lines, Inc.*, 432 So. 2d 567, 570 (Fla. 1983) ("When this provision was adopted, the law was clear that the constitution did not provide protection against the individual invasion of individual rights."); *Hatfield v. Rochelle Coal Co.*, 813 P.2d 1308, 1311 (Wyo. 1991) ("We hold that our constitution does not require due process in the absence of state action."); *Schreiner*, 432 So. 2d at 569 (holding the inalienable rights and deprivation clauses of State Constitution apply only to state action); *Johnson v. Columbia Falls Aluminum Co., LLC*, 350 Mont. 562 ("It is well established that the privacy section of the Montana Constitution applies only to state action."); *Commonwealth v. Cooper*, 899 S.W.2d 75, 78 (Ky. 1995) ("Section Eleven of the Constitution of Kentucky and the Fifth Amendment to the Constitution of the United States are coextensive and provide identical protections against self-incrimination. State action is indispensable."); *Walker v. Cromartie*, 696 S.E.2d 654, 656 (Ga. 2010) (citing *Peterson v. Columbus Med. Ctr. Found.*, 533 S.E.2d 749 (Ga. 2000) ("Absent a showing of state action, appellants cannot sustain a claim that OCGA § 9-11-9.1 interferes with their right to due process, their right to equal protection, or their right to trial.")).

¹⁷⁹ See, e.g., *Beecroft*, 813 N.W.2d at 837 (applying the entwinement test to find state action under the Minnesota State Constitution); *City of Sioux City v. Jacobsma*, 862 N.W.2d 335, 340 (Iowa 2015) ("Because the Due Process Clauses of the Iowa and Federal Constitutions are similar, we often look to federal cases when interpreting the state due process clause."); *Northup v. Poling*, 761 A.2d 872, 875 n.5 (Me. 2000) ("The due process rights guaranteed by the Maine Constitution, Me. Const. art. I, § 6-A, are coextensive with those guaranteed by the Fourteenth Amendment of the U.S. Constitution.").

¹⁸⁰ *State v. Wicklund*, 589 N.W.2d 793 (Minn. 1999).

¹⁸¹ *Id.* at 803; See also *Tatro v. Univ. of Minn.*, 816 N.W.2d 509, 516 (Minn. 2012) ("Because the Minnesota constitutional right to free speech is coextensive with the First Amendment, we look primarily to federal law for guidance.").

¹⁸² See e.g., *Brennan v. Minneapolis Soc. for Blind, Inc.*, 282 N.W.2d 515, 525 (Minn. 1979); *Wicklund*, 589 N.W.2d at 802.

¹⁸³ See *Chenoweth v. City of New Brighton*, 655 N.W.2d 821, 827 (Minn. Ct. App. 2003) ("We conclude that the city's provision of tax-increment financing and contracting with IEG for development with financial incentives provided by the city policies did not so entwine the conduct of the private

In *Green v. Racing Ass'n of Cent. Iowa*,¹⁸⁴ the court was faced with the question of whether the Racing Association of Central Iowa (RACI) violated jockeys' due process rights by excluding the jockeys from the track.¹⁸⁵ The claims were alleged under the due process clauses of both the federal and Iowa constitutions, which the court found both required state action, and the RACI could only be liable if it was a state actor.¹⁸⁶ The court applied several tests, including the symbiotic relationship test and the nexus test, but the court held there was insufficient state action to satisfy the doctrine, even though the County leased the land to the track and appointed four of the thirteen RACI board of directors.¹⁸⁷ However, the court never discussed the Iowa state constitution after initially equating it with the federal constitution's due process clause, paralleling the state court's analysis of state action with federal precedent and citing U.S. Supreme Court cases for support.¹⁸⁸

Some courts have explicitly adopted Supreme Court precedent in regards to state action.¹⁸⁹ The New Hampshire Supreme Court in *Hippopress, LLC v. SMG*¹⁹⁰ held state action is required to find a violation of Article 22 of the New Hampshire Constitution, and the court applied the nexus test, public function test, and the symbiotic relationship test, using federal precedent as persuasive.¹⁹¹ In *Hippopress*, SMG would not allow HippoPress to distribute newspapers in the Arena, and the state court held there was no state action under the New Hampshire Constitution, noting "the Federal Constitution affords HippoPress no greater protection than does the State Constitution under these circumstances."¹⁹²

Similarly, in *Estes v. Kapiolani Women's and Children's Medical Center*,¹⁹³ the Hawai'i Supreme Court was asked to determine whether the refusal of a private hospital to allow activists to distribute leaflets inside the building was sufficient state action to violate the activists' free speech rights under the Hawai'i state constitution.¹⁹⁴ Article I, § 4 of the Hawai'i constitution provides: "No law shall be enacted . . . abridging the freedom

developer with the city as to give rise to state action [under Minnesota Constitution art. I, § 13] necessary to support a claim for inverse condemnation."); *Konze v. City of Onamia*, No. A11-2263, 2012 WL 4328953, at *3 (Minn. Ct. App. Sept. 24, 2012).

¹⁸⁴ *Green v. Racing Ass'n. of Cent. Iowa*, 713 N.W.2d 234 (Iowa 2006).

¹⁸⁵ *Id.* at 236.

¹⁸⁶ *Id.* at 238.

¹⁸⁷ *Id.* at 243.

¹⁸⁸ *See id.* at 238.

¹⁸⁹ *See, e.g., Landers v. Jameson*, 355 Ark. 163, 179 (2003) ("Consistent therewith, for purposes of determining whether one has been deprived of property in violation of the Arkansas Constitution's due process provision, article 2, § 8, we adopt the analysis of state action as enunciated in the federal context by *Lugar v. Edmondson Oil Co.*, 457 U.S. at 937 [102 S.Ct. 2744]").

¹⁹⁰ *Hippopress, LLC v. SMG*, 837 A.2d 347 (N.H. 2003).

¹⁹¹ *Id.* at 352.

¹⁹² *Id.* at 356.

¹⁹³ *Estes v. Kapiolani Women's and Children's Medical Center*, 787 P.2d 216 (Haw. 1990).

¹⁹⁴ *Id.* at 219.

of speech,”¹⁹⁵ which, like the federal Constitution, only protects against state action, not private conduct.¹⁹⁶ Under the Hawai‘i state constitution, the initial question was whether the free speech provision in the Hawai‘i Constitution was broader than the federal protections.¹⁹⁷ The state supreme court in *Estes* applied federal precedent in analyzing the state action claim under the state constitution, using the nexus test to determine that, while there were some elements of state control of the Hospital including state funding, state regulation and performing a public purpose,¹⁹⁸ the hospital was not a state actor under the Hawai‘i constitution.¹⁹⁹

However, in a subsequent case involving the due process clause of the Hawai‘i Constitution, the state supreme court in *State v. Bowe* determined that because the “due process protection under our state constitution is not necessarily limited to that provided by the United States Constitution,” the court had broadened a person’s due process rights in criminal proceedings.²⁰⁰ In *Bowe*, a defendant’s confession was coerced by a private actor rather than the state.²⁰¹ While acknowledging that due process is protection against governmental action and “some sort of state action” was required for this constitutional claim, the Hawai‘i state supreme court held coercive conduct of a private person may be enough to make a confession inadmissible under article 1, sections 5 and 10 of the Hawai‘i Constitution, rejecting U.S. Supreme Court precedent.²⁰²

While state action has been an issue in the federal courts since the *Civil Rights Cases*, some state courts have just recently addressed the issue of state action under some provisions of their state constitutions. Until 1992, the Illinois Supreme Court did not have the opportunity to determine whether the free speech provision of the Illinois state constitution applied to only state action or if it extended to private individuals.²⁰³ After considering the state’s past decisions, looking to persuasive decisions from other jurisdictions, and considering the generally accepted doctrine involving state constitutions, the court held the constitutional protections under Article I of the state constitution applied only to state action.²⁰⁴

Similarly, before 1997, the Texas Supreme Court was not presented with the opportunity to address whether the state constitution required state action

¹⁹⁵ HAW. CONST. art. I, § 4 (1978).

¹⁹⁶ *Estes*, 787 P.2d 216.

¹⁹⁷ *State v. Viglielmo*, 105 Haw. 197, 211, 95 P.3d 952, 966 (2004) (emphasis added).

¹⁹⁸ Lisa A. Laun & Mark D. Lofstrom, *Estes v. Kapiolani Women’s and Children’s Medical Center: State Action and the Balance Between Free Speech and Private Property Rights in Hawaii*, 13 U. HAW. L. REV. 233, 234 (1991).

¹⁹⁹ *Estes*, 787 P.2d at 221.

²⁰⁰ *State v. Bowe*, 881 P.2d 538, 545 (Haw. 1994).

²⁰¹ *Id.* at 540.

²⁰² *Id.* at 547.

²⁰³ *People v. DiGuida*, 604 N.E.2d 336, 344 (Ill. 1992).

²⁰⁴ *Id.*

to be implicated.²⁰⁵ In Texas, the courts have stated that “[b]ecause we are concerned with the affirmative provisions of the Texas Constitution, rather than first amendment freedoms of the federal constitution, we are not restricted to the same tests used by the federal courts.”²⁰⁶ Furthermore, the court acknowledged it *could* adopt a test which requires a lower threshold of state action.²⁰⁷

In *Republican Party of Texas v. Dietz*, the Texas Supreme Court looked to the literal text, purpose, historical context, and intent of the framers to determine whether state action was necessary under the state constitution, and determined that state action was necessary to bring a claim for deprivation free speech, equal rights, and due process under the Texas Bill of Rights.²⁰⁸ The court applied federal precedent similar to the facts in *Dietz*, and determined the Republican Party’s conduct in denying the Log Cabin Republicans a booth and advertisement at the Party convention was an internal party affair rather than a public function—like an election process—holding the Party was not a state actor under the public function test.²⁰⁹ However, the court acknowledged the Party could possibly be a state actor in situations involving public activities, such as holding primary elections.²¹⁰

The Rhode Island Supreme Court used a test similar to the federal entwinement test to determine whether an interscholastic league who prohibited boys from playing on an all-girls team was a state actor under the equal protection clause of the Rhode Island state constitution.²¹¹ In the court’s analysis, because the league was funded by dues from the schools which were mainly public, league games were held in public school arenas, and state funds supported most of the schools paying dues, the league was a state actor under the Rhode Island state constitution.²¹² Other courts who have analyzed whether organizations similar to the league are “state actors have found that those organizations are so intertwined with the state that their acts constitute state action.”²¹³

But in *Gorman v. St. Raphael Academy*,²¹⁴ the Rhode Island Supreme Court refused to hold that a private school was a state actor.²¹⁵ Although the court acknowledged education is one of the most important functions of the

²⁰⁵ *Republican Party of Texas v. Dietz*, 940 S.W.2d 86, 89 (Tex. 1997) (“Several Texas courts of appeals have concluded that some quantum of state action is required before a litigant can maintain a lawsuit for the deprivation of a Texas constitutional right, but this Court has never squarely confronted the issue before today.”).

²⁰⁶ *Jones v. Mem’l Hosp. Sys.*, 746 S.W.2d 891, 895 (Tex. App. 1988).

²⁰⁷ *Id.*

²⁰⁸ *Dietz*, 940 S.W.2d at 89.

²⁰⁹ *Id.* at 93.

²¹⁰ *Id.*

²¹¹ *Kleczek v. Rhode Island Interscholastic League, Inc.*, 612 A.2d 734, 735 (R.I. 1992).

²¹² *Id.* at 735–36.

²¹³ *Israel by Israel v. W. Virginia Secondary Sch. Activities Comm’n*, 388 S.E.2d 480, 490 n.4 (1989) (citing cases).

²¹⁴ *Gorman v. St. Raphael Acad.*, 853 A.2d 28 (R.I. 2004).

²¹⁵ *Id.* at 39.

state government and the private school discharges a public duty, the court held “absent a showing of substantial or significant involvement in the decision-making process of the private entity, state action is not implicated.”²¹⁶ Federal courts have reached similar conclusions under the public function test, finding that private schools are not state actors because education is not a traditionally exclusive state function.²¹⁷ However, there have been some courts who disagree, including one New York state court finding a private college was a state actor.²¹⁸

Some state courts have determined that when private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found.²¹⁹ One example of this is in the termination of parental rights.²²⁰ The Montana Supreme Court has determined that even in private terminations, because the “challenged state action remains essentially the same” and the state is integral in the process because no power other than the State can terminate a parent-child relationship, there is state action sufficient to implicate the equal protection clause of the Montana Constitution.²²¹ However, a mere enactment of the procedure for *private* remedies does not constitute state action when the procedure itself does not require any state involvement, thus precluding the application of state constitutions.²²² In *Parker*, the court found that even though the General Assembly created the procedure for non-judicial foreclosures, “[t]here is clearly no involvement by a state official, no aid from state officials, nor any conduct otherwise chargeable to the state, during the foreclosure process. Accordingly, there can be no state due-process violation.”²²³ Other courts have also found that non-judicial foreclosures do not constitute state action.²²⁴

But some federal courts have found state action when the court is asked to enforce the validity of the non-judicial foreclosure. In *U.S. Bank, N.A. v. SFR Investments Pool 1, LLC*,²²⁵ the defendants completed a non-judicial foreclosure of a property, and the plaintiff sued, arguing that, among other things, it was deprived of Due Process because the statute did not require lienors to be given written notice of impending foreclosure may extinguish

²¹⁶ *Id.*

²¹⁷ *See, e.g.,* *Santiago v. Puerto Rico*, 655 F.3d 61, 69 (1st Cir. 2011).

²¹⁸ *Ryan v. Hofstra Univ.*, 67 Misc. 2d 651, 668, 324 N.Y.S.2d 964, 982 (N.Y. Sup. Ct. 1971), supplemented, 68 Misc. 2d 890, 328 N.Y.S.2d 339 (Sup. Ct. 1972) (“Hofstra is discharging a public function for the State, as part of a State policy of mobilizing higher education resources.”).

²¹⁹ *See Tulsa Prof'l Collection Servs. v. Pope*, 485 U.S. 478 (1988).

²²⁰ *In re Adoption of A.W.S.*, 339 P.3d 414, 418 (Mont. 2014).

²²¹ *Id.*

²²² *Parker v. BancorpSouth Bank*, 253 S.W.3d 918, 925 (Ark. 2007).

²²³ *Id.*

²²⁴ *See, e.g.,* *Apao v. Bank of New York*, 324 F.3d 1091, 1094–95 (9th Cir. 2003); *Garfinkle v. Superior Court of Contra Costa Cnty.*, 578 P.2d 925 (Cal. 1978); *Northup v. Poling*, 761 A.2d 872, 876 (Me. 2000); *Citi Mortgage, Inc. v. Drake*, 410 S.W.3d 797, 804 (Tenn. Ct. App. 2013).

²²⁵ *U.S. Bank, N.A. v. SFR Investments Pool*, 124 F. Supp. 3d 1063 (D. Nev. 2015).

their liens.²²⁶ While acknowledging that the notice requirement under the Due Process clause is only applicable when there is state action, not private action, the Court relied on *Shelley* in holding “SFR has invoked the power of the Court to enforce potentially constitutionally problematic state statutes against U.S. Bank just as the neighboring homeowners in *Shelley* sought to invoke the power of the state courts to enforce the constitutionally problematic covenants against the Shelleys.”²²⁷ Therefore, the Court was obliged to address the due process claims in determining whether to dismiss the Counterclaim, even though there may be no state action in the non-judicial foreclosure itself.²²⁸

Furthermore, some state courts have discussed state action similar to the context of *Shelley*. In *SPUR at Williams Brice Owners Ass’n, Inc. v. Lalla*,²²⁹ the state appellate court found court enforcement of a restrictive covenant to be state action.²³⁰ Citing *Shelley* directly, the court held while the private acts and agreements of individuals do not implicate the Equal Protection Clause, the action of state courts is regarded as state action within the meaning of the Fourteenth Amendment.²³¹ But unlike *Shelley*, the court found the restrictive covenant did not violate the equal protection clause of the state constitution.²³²

Similarly, the Supreme Court of Wisconsin analogized the enforcement of an employment contract with a church to the context in *Shelley*.²³³ In *DeBruin v. St. Patrick Congregation*, the court was faced with the question of whether an employee’s complaint alleging she was terminated for an improper reason stated a claim under the First Amendment and Article I, § 18 of the Wisconsin State Constitution.²³⁴ The court compared the underlying constitutional principles in *Shelley*—finding state action by judicially enforcing an unconstitutionally restrictive covenant between private parties—to the facts in this case.²³⁵ Here, the court determined that these same principles were implicated, where an employee sought state court enforcement of a provision in a private contract to invalidate St. Patrick’s reason for terminating her employment.²³⁶

Because state action would be found in *DeBruin*, the state Supreme Court held that permitting this type of claim for breach of contract—where

²²⁶ *Id.* at 1075. (However, the Court granted the motion based on the Due Process Clause of the Fifth Amendment, not based on the Due Process Clause of the Fourteenth Amendment, as argued by the Plaintiffs.)

²²⁷ *Id.* at 1078.

²²⁸ *Id.*

²²⁹ *Spur at Williams Brice Owners Ass’n v. Lalla*, 781 S.E.2d 115 (S.C. Ct. App. 2015).

²³⁰ *Id.* at 122.

²³¹ *Id.*

²³² *Id.* at 124.

²³³ *DeBruin v. St. Patrick Congregation*, 816 N.W.2d 878, 882 (2012).

²³⁴ *Id.*

²³⁵ *Id.* at 880.

²³⁶ *Id.*

the court would review the *reason* for termination of a church employee and thereby enforce a private agreement between the church and its employee—would impermissibly “interfere in a religious institution’s choice of ministerial employees, in violation of the First Amendment of the United States Constitution and Article I, Section 18 of the Wisconsin Constitution.”²³⁷

B. States Interpreting their own State Constitutions as Having a Different Standard of “State Action” and Broader Scope for Constitutional Protection

A few states have interpreted a different standard of state action to implicate protections under their state constitutions. This situation commonly arises in the context of free speech, due process, and equal protection under a state constitution and whether the state’s protections are broader than the U.S. Constitution.

Some state constitutions, like the Washington Constitution, do not explicitly require state action in the text.²³⁸ The Washington Supreme Court has determined the requirement of state action to be different than the Fourteenth Amendment, and “[f]reed from those restraints, we are able to be more sensitive to the speech and property interests in each case and, consequently, can strike a more just balance than that dictated by the Fourteenth Amendment.”²³⁹ Even so, although there was no express reference to state action in the free speech provision of the Washington state constitution, the court held there was an implicit state action limitation.²⁴⁰

In relation to free speech, many states have found the protections of their state constitutions to be identical to the federal constitutional protections.²⁴¹ But New Jersey, California, and Colorado have determined their state constitutions provide broader free speech rights than the U.S. Constitution. Unlike the federal Constitution, the New Jersey state constitution guarantees

²³⁷ *Id.* at 878.

²³⁸ WASH. CONST. art. I, § 5 (1889) (“Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.”).

²³⁹ *Alderwood Assocs. v. Washington Envtl. Council*, 96 Wash. 2d 230, 243 (1981).

²⁴⁰ *Southcenter Joint Venture v. Nat’l Democratic Policy Comm.*, 780 P.2d 1282, 1287 (1989).

²⁴¹ *See, e.g., City of W. Des Moines v. Engler*, 641 N.W.2d 803, 805 (Iowa 2002); *Fiesta Mall Venture v. Mecham Recall Comm.*, 767 P.2d 719, 723 (Ariz. 1988); *Cahill v. Cobb Place Associates*, 519 S.E.2d 449, 451 (Ga. 1999) (holding that “Georgia’s constitutional free speech provision does not confer any greater free speech right than that protected by the First Amendment”); *Citizens for Ethical Gov’t, Inc. v. Gwinnett Place Associates*, 392 S.E.2d 8, 9–10 (Ga. 1990); *People v. DiGuida*, 604 N.E.2d at 344–45; *Woodland v. Michigan Citizens Lobby*, 378 N.W.2d 337, 347 (Mich. 1985); *Dossett v. First State Bank*, 627 N.W.2d 131, 138 (2001); *S.O.C., Inc. v. Mirage Casino-Hotel*, 23 P.3d 243, 251 (Nev. 2001); *SHAD Alliance v. Smith Haven Mall*, 488 N.E.2d 1211, 1215 (N.Y. 1985); *State v. Felmet*, 273 S.E.2d 708, 712 (N.C. 1981); *Eastwood Mall, Inc. v. Slanco*, 68 Ohio St.3d 221, 626 N.E.2d 59, 62 (1994); *Stranahan v. Fred Meyer, Inc.*, 11 P.3d 228, 243 (Or. 2000); *W. Pennsylvania Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co.*, 515 A.2d 1331, 1339 (Pa. 1986); *Charleston Joint Venture v. McPherson*, 417 S.E.2d 544, 548 (S.C. 1992); *Jacobs v. Major*, 407 N.W.2d 832, 836–37 (1987).

a broad affirmative right to free speech, one of the broadest in the country.²⁴² Article I of the state constitution provides: “Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press.”²⁴³ The New Jersey Constitution not only protects free speech from abridgment by the government, but also protects against unreasonably restrictive or oppressive conduct by private parties in certain circumstances.²⁴⁴ The broader protection of free speech rights under the state constitution was designed prevent inhibitory actions which unreasonably infringed or obstructed the individual rights of expression and association.²⁴⁵

In interpreting their state constitution, the New Jersey Supreme Court created a balancing test between the constitutional right to freedom of speech and the right to privately-owned property to determine when an owner of private property may be required to permit others to exercise free speech rights “subject to suitable restrictions.”²⁴⁶ The court examined the competing interests in leafletting and property interests in private shopping malls, likening the private malls to a public square, and determined the purpose of the private property was “all-embracing.”²⁴⁷ In balancing those two competing interests, the court found the test favored expressive conduct rights over the private property interests.²⁴⁸

Recently, the New Jersey Supreme Court further defined this balancing approach, stating the court should focus on the purpose of the expression relating to the rights of the private property to determine the fairness of the private restrictions on free speech.²⁴⁹ Using this balancing approach, the court found the resident’s right to free speech outweighed the defendants’ concerns, holding the prohibition violated the state constitution’s free speech guarantee.²⁵⁰

Similarly, the California state constitution provides: “Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.”²⁵¹ California’s highest court has stated the

²⁴² See *Mazdabrook Commons Homeowners’ Ass’n v. Khan*, 210 N.J. 482, 492 (2012).

²⁴³ N.J. CONST. art. I, ¶ 6.

²⁴⁴ *Dublirer v. 2000 Linwood Ave. Owners, Inc.*, 103 A.3d 249, 254 (N.J. 2014) (quoting *State v. Schmid*, 84 N.J. 535, 560 (1980)).

²⁴⁵ *State v. Schmid*, 423 A.2d 615, 628 (N.J. 1980).

²⁴⁶ *Id.* at 563. (“This standard must take into account (1) the nature, purposes, and primary use of such private property, generally, its ‘normal’ use, (2) the extent and nature of the public’s invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property.”)

²⁴⁷ *N.J. Coal. Against War in the Middle E. v. J.M.B.*, 650 A.2d 757, 775–76 (N.J. 1994).

²⁴⁸ *Id.* at 775–76.

²⁴⁹ *Dublirer*, 103 A.3d at 257.

²⁵⁰ *Id.* at 260.

²⁵¹ CAL. CONST. art. I, § 2(a).

California State Constitution has always been, a “document of independent force and effect particularly in the area of individual liberties.”²⁵² The free speech provision in the state constitution is even “broader” and “greater” than the U.S. Constitution.²⁵³ In fact, in *Fashion Valley Mall, Inc. v. N.L.R.B.*, there was no application of any state action test, only that shopping malls had long been held to be public forums even when privately owned, implicating the free speech protections of the California constitution and applying strict scrutiny.²⁵⁴

Similarly, the Colorado state constitution has been interpreted to encompass broader individual protections and more expansive protection than the federal Constitution.²⁵⁵ The Colorado Supreme Court stated this is because the Colorado Constitution is more protective of liberty interests than the federal Constitution.²⁵⁶ Furthermore, the Colorado Supreme Court has stated because the state constitution is more protective of free speech than the federal constitution, the federal state action doctrine is inapplicable.²⁵⁷ Likewise, the Ohio Constitution’s free exercise clause has been interpreted as broader than the federal constitutional protection, and therefore, the Ohio state courts apply a different standard than the federal courts.²⁵⁸

One state supreme court has even declined to use U.S. Supreme Court precedent as not comporting with the free speech provisions of their state constitution. In *Trusz v. UBS Realty Inv’rs, LLC*,²⁵⁹ the Connecticut Supreme Court noted that while the federal Constitution provides a minimum protection, there is nothing prohibiting the state from providing a higher level of protection for rights.²⁶⁰ The free speech provision of the Connecticut state constitution was separate and distinct from that of the First Amendment, providing more protection than the First Amendment in free speech matters relating to employee speech.²⁶¹ In the court’s analysis, the total factors provided support for the claim that the *Garcetti* standard did not

²⁵² *Fashion Valley Mall, LLC v. N.L.R.B.*, 172 P.3d 742, 749 (Cal. 2007).

²⁵³ *Id.*

²⁵⁴ *Id.* at 758. (citing *Robins v. Pruneyard Shopping Ctr.*, 23 Cal. 3d 899, 910 (1979), *aff’d*, 447 U.S. 74 (1980)).

²⁵⁵ See, e.g., *People v. Hillman*, 834 P.2d 1271, 1280 (Colo. 1992); *Charnes v. DiGiacomo*, 612 P.2d 1117 (Colo. 1980) (adopting more protective standard of privacy under Colorado Constitution for records of bank depositor than is available under United States Supreme Court’s decision); *Bock v. Westminster Mall Co.*, 819 P.2d 55 (Colo. 1991) (construing Free Speech Clause of Colorado Constitution in a manner more protective of speech than United States Supreme Court’s First Amendment jurisprudence); *People v. Paulsen*, 601 P.2d 634 (Colo. 1979) (rejecting United States Supreme Court’s restrictive analysis of federal Double Jeopardy Clause and interpreting the Colorado counterpart in more expansive manner); *People ex rel. Juhan v. Dist. Court for Jefferson Cty.*, 439 P.2d 741 (Colo. 1968) (construing Due Process Clause of Colorado Constitution in manner more protective of liberty interests of accused than required under federal due process standards).

²⁵⁶ *Hillman*, 834 P.2d at 1280.

²⁵⁷ *Bock*, 819 P.2d at 64.

²⁵⁸ *Humphrey v. Lane*, 728 N.E.2d 1039, 1045 (Ohio. 2000).

²⁵⁹ *Trusz v. UBS Realty Inv’rs, LLC*, 319 Conn. 175 (2015).

²⁶⁰ *Id.* at 1221.

²⁶¹ *Id.* at 1221.

comply with the free speech provisions of the state constitution, and the state supreme Court adopted the *Pickering/Connick* balancing test, as modified by Justice Souter in his dissenting opinion in *Garcetti*, extending the same free speech protections under the state constitution to both public and private employees.²⁶²

Other courts have determined that their state constitutions have a lesser requirement for state action under certain provisions. For example, the New York state constitution's due process clause does not explicitly require State deprivation of individual rights for its invocation,²⁶³ but the New York courts have determined that this simply allows them to apply a more flexible state involvement requirement than is applied in the federal courts.²⁶⁴ In the state action test under the Due Process clause of the New York state constitution,²⁶⁵ the factors to consider in determining whether state action is present include:

[T]he source of authority for the private action; whether the State is so entwined with the regulation of the private conduct as to constitute State activity; whether there is meaningful State participation in the activity; and whether there has been a delegation of what has traditionally been a State function to a private person.²⁶⁶

Because the test is not simply state involvement, but rather *significant* state involvement, just one of these factors may not enough to find state action.²⁶⁷ While having a lower standard for state action, the application by the New York courts is similar to the tests used by federal courts: the entwinement test, the joint action test, and the public function test. Furthermore, New York courts have applied a public function test in determining the presence of state action, finding that, under New York law, only activities that are traditionally the *exclusive* function of the State are public functions.²⁶⁸

²⁶² *Id.* at 1234--35.

²⁶³ *Doe v. Harrison*, 2006 WL 2109433, at *5 (S.D.N.Y. July 28, 2006) (interpreting the New York state constitution under New York state precedents).

²⁶⁴ *Id.* (quoting *Sharrock v. Dell Buick-Cadillac, Inc.*, 45 N.Y.2d 152, 160 (N.Y. 1978)); *see also* *SHAD Alliance v. Smith Haven Mall*, 66 N.Y.2d 496, 503 (N.Y. 1985).

²⁶⁵ N.Y. CONST. art. I, § 6, provides that "[n]o person shall be deprived of life, liberty or property without due process of law."

²⁶⁶ *SHAD Alliance*, 66 N.Y.2d at 505.

²⁶⁷ *Id.*

²⁶⁸ *See, e.g., Catholic Home Bureau for Dependent Children v. City of N.Y.*, 65 N.Y.2d 344 (N.Y. 1985) (applying the two-prong public function test to public contractor's claim that its actions are not State actions for the purpose of the Equal Protection Clause of the New York and federal Constitution); *In re Claim of Atkinson*, 586 N.Y.S.2d 319, 321 (N.Y. App. Div.3d Dep't 1992) (applying the two-prong public function test to employee's claim that a government contractor's random drug testing program violated the New York State Constitution's protection against unreasonable search and seizure).

But there are several circumstances when the New York state constitution protects individual rights in the absence of state action. In the context of racially discriminatory preemptive challenges to jury selection, New York state's highest court has determined that Article 1, § 11 of the New York State Constitution prohibits both state *and* private discrimination as to civil rights.²⁶⁹ Section 11 provides:

No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation or institution, or by the state or any agency or subdivision of the state.²⁷⁰

While the first sentence of the clause is limited to state action, the second sentence has been held to prohibit discrimination by both public and private parties.²⁷¹ Therefore, the court held racial discrimination in the exercise of peremptory challenges, whether by the prosecution or the defense counsel, is prohibited by the Civil Rights Clause of the New York state constitution.²⁷² Similarly, while the Illinois state constitution requires state action to invoke some provisions, the state Supreme Court has determined that Section 12 of the Illinois State Constitution does not require state action to be invoked.²⁷³

Under the Oregon state constitution, the Oregon Supreme Court has used common-law agency principles to determine whether an act by a private person constituted state action.²⁷⁴ In *Sines*, the housekeeper anonymously called child protective services because she suspected the defendant was sexually abusing his adopted daughter.²⁷⁵ The state employee told the housekeeper several times that he could not tell her to take the victim's underwear, but the housekeeper took a pair anyways, and gave it to the police, resulting in the defendant being charged and convicted based on that evidence.²⁷⁶ The defendant claimed the evidence should be suppressed because the search violated the Oregon State Constitution, Article I, Section 9,²⁷⁷ but the court determined the state constitution applies only to state

²⁶⁹ *People v. Kern*, 75 N.Y.2d 638, 651 (1990).

²⁷⁰ N.Y. CONST. art. I, § 11.

²⁷¹ *Kern*, 75 N.Y.2d at 653.

²⁷² *Id.*

²⁷³ *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1097 (Ill. 1997).

²⁷⁴ *State v. Sines*, 359 Or. 41, 59 (2016).

²⁷⁵ *Id.* at 43.

²⁷⁶ *Id.*

²⁷⁷ OR. CONST. art. I, § 9.

No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported

actions, not those of private citizens, even if citizens act unlawfully in obtaining the evidence the state later uses.²⁷⁸

However, the Oregon Supreme Court looked to a common-law agency approach similar to the federal entwinement test, stating “a private citizen’s conduct in pursuing his or her own search and seizure may become so intertwined with the conduct of a state actor that the private citizen’s actions are essentially those of the state,” making it state action and subject to constitutional restrictions.²⁷⁹ The court also suggested that they may find state action in a “joint endeavor” by both a private person and a state actor.²⁸⁰

In applying the common-law agency principles, the Oregon Court asked whether the conduct or statements of the state officials showed that those officials told the housekeeper that they were authorized to act for the state.²⁸¹ But because the idea of taking the evidence was solely that of the housekeeper and the state employee did not direct or instruct the housekeeper, the court concluded seizing the evidence was private conduct and therefore did not violate the state constitution.²⁸² The court also rejected the argument that a private party illegally obtaining evidence and giving it over to state authorities constituted state action because this private conduct could not be attributed to the state.²⁸³

As noted at the beginning of this Article, some states do not have an equal protection clause in the state constitution analogous to the federal constitution. One such example is New Jersey, which has a clause providing “[n]o person shall be denied . . . nor be discriminated against in the exercise of any civil or military right,”²⁸⁴ but does not have an equal protection clause analogous to the federal Constitution’s. However, the New Jersey Supreme Court read in an equality provision into Article 1 of its Constitution,²⁸⁵ holding that a woman alleging she was not promoted because of her gender even though the actor was a private university without any allegation of state action.²⁸⁶

by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

²⁷⁸ *Sines*, 359 Or. at 50 (citing *State v. Luman*, 223 P.3d 1041 (2009)).

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 51.

²⁸¹ *Id.* at 59.

²⁸² *Id.* at 62.

²⁸³ *Id.* at 61 (citing *State v. Luman*, 347 Or. 487, 493 (Or. 2009)).

²⁸⁴ N.J. CONST. art. I, ¶ 5.

²⁸⁵ N.J. CONST. art. I, ¶ 1. (“All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.”).

²⁸⁶ *Peper v. Princeton Univ. Bd. of Trustees*, 389 A.2d 465, 477–78 (N.J. 1978); *see also State v. Fernandez*, 506 A.2d 1245, 1250 (N.J. App. Div. 1986) (“although the New Jersey Constitution does not contain a specific equal protection clause analogous to that found in the Fourteenth Amendment of the United States Constitution, Article I, paragraph 1 of the State Constitution is most frequently cited as the source of equal protection guarantees.”).

Another such example is in *Gay Law Students Assn. v. Pac. Tel. & Tel. Co.*,²⁸⁷ where the California Supreme Court held that, while the utility was privately owned, there was sufficient state action to trigger the equal protection clause of the state constitution.²⁸⁸ This finding of state action was because the utility had a state franchise with virtually a monopoly on telephone services, was subject to a pervasive state regulation, and had certain quasi-governmental powers.²⁸⁹ Therefore, the court “conclude[d] that arbitrary exclusion of qualified individuals from employment opportunities by a state-protected public utility does, indeed, violate the state constitutional rights of the victims of such discrimination.”²⁹⁰ This is based on the state’s policy that gay individuals are entitled to the same legal rights given to all other individuals and are protected from discrimination based on their sexual orientation.²⁹¹

Finally, some courts have simply left open the possibility that their state constitutions could be interpreted to have broader protections than the U.S. Constitution. The Connecticut Supreme Court has said there may be some instances where the protections of citizens by the Connecticut Constitution goes beyond the protections provided by the federal Constitution,²⁹² but the court in *United Food* left for another day to find the exact contours of our state action doctrine, and if it was distinct from the federal Constitution.²⁹³

V. WHAT DOES THIS LOOK INTO THE STATE AND LOWER FEDERAL DECISIONS TELL US?

This delve into state and lower federal court decisions was not just because it was entertaining, but to understand how the courts on the “front line” analyze state action and to understand the contours of the current state action doctrine, as the Supreme Court has long left this area in some obscurity. After this long discussion of what these courts have said, the next question becomes: what is our understanding of this immense body of law?

²⁸⁷ *Gay Law Students Assn. v. Pac. Tel. & Tel. Co.*, 595 P.2d 592 (Cal. 1979).

²⁸⁸ *Id.* at 472.

²⁸⁹ *Id.* at 469–72.

²⁹⁰ *Id.* at 469. At the time *Gay Law Students* was decided, there was no statute explicitly prohibiting discrimination based on homosexuality or sexual orientation. California’s current employment discrimination statute explicitly prohibits discrimination either on the basis of sex or on the basis of sexual orientation. *In re Marriage Cases*, 183 P.3d 384, 428 n.56 (Cal. 2008).

²⁹¹ *Id.* at 428.

²⁹² *United Food & Commercial Workers Union, Local 919, AFL-CIO v. Crystal Mall Assoc., L.P.*, 852 A.2d 659, 676 (Conn. 2004) (citing *State v. Dukes*, 547 A.2d 10 (Conn. 1988); *State v. Stoddard*, 537 A.2d 446, 452 (Conn. 1988); *State v. Kimbro*, 496 A.2d 498, 507 (Conn. 1985); *State v. Marsala*, 579 A.2d 58, 63 (Conn. 1990). Thus, should an appropriate case present itself, we may reconsider the issue; see, e.g., *State v. Hinton*, 630 A.2d 593, 609 n.27 (Conn. 1993); *State v. Avis*, 551 A.2d 26, 36 n.6 (Conn. 1988), cert. denied, 489 U.S. 1097 (1989).

²⁹³ *Crystal Mall Assoc.*, 852 A.2d at 676.

A. Courts Treat this as a Threshold Question to Invoking the Constitution

In this modern world, the state is almost everywhere, regulating almost everything.²⁹⁴ And in a small number of cases, the court has recognized the involvement of the state in private interactions, the most iconic being that of *Shelley*. But since *Shelley*, courts have not consistently recognized this principle there is state action in many actions, and at times many courts seem to stretch the rationale of state action, likely due to doctrinal allegiance. “Precisely when . . . judicial involvement in private litigation assumes constitutional dimensions is a problem that has perplexed courts and scholars for decades.”²⁹⁵

These cases tell us the state action doctrine has been so ingrained into our constitutional jurisprudence that many courts simply treat it as a prong or threshold question to a constitutional claim rather than a question of whether the state should be liable for this action.²⁹⁶ Courts have lost the original principle of the state action doctrine: that private discrimination was prohibited through the common law rather than the federal Constitution, and discrimination would be “vindicated by resort to the laws of the state for redress.”²⁹⁷ The state action doctrine was meant to leave private conduct to regulation by statutes and common law.²⁹⁸ The state has the power to stop private discrimination, and a state’s “failure to do so constitutes a state decision to permit the violations.”²⁹⁹ As discussed above, courts have held mere state regulation generally does not make private action attributable to the state, but substantial state funding and extensive state regulation can be factors that weigh in favor of a finding of state action.³⁰⁰ Furthermore, courts have acknowledged “our cases have found state action when private parties make extensive use of state procedures with the overt, significant assistance of state officials.”³⁰¹

Courts have tended to stretch their analysis of the state action doctrine to prevent states from being held liable, which one commentator asserts that because state action is required to invoke the Equal Protection clause, courts can “bow out early” at the threshold question rather than allow protracted and intense scrutiny under the Constitution.³⁰² Take for example, *Ohno*

²⁹⁴ Lawrence Sager, Unacknowledged Constitution 8 (Jan. 29, 2016) (unpublished manuscript) (on file with author).

²⁹⁵ Dahl v. Akin, 630 F.2d 277, 280 (5th Cir. 1980).

²⁹⁶ John Fee, *The Formal State Action Doctrine and Free Speech Analysis*, 83 N.C. L. REV. 569, 569 (2005) (“The state action doctrine is fundamental to constitutional law. Its primary value, however, is not as a threshold requirement, as it is usually understood.”).

²⁹⁷ U.S. v. Stanley, 109 U.S. 3, 17 (1883).

²⁹⁸ Logiodice v. Trustees of Maine Cent. Inst., 296 F.3d 22, 26 (1st Cir. 2002) (citing U.S. v. Stanley, 109 U.S. 3, 17 (1883)).

²⁹⁹ Chemerinsky, *supra* note 1, at 521.

³⁰⁰ Goldstein v. Chestnut Ridge Volunteer Fire Co., 218 F.3d 337, 347 (4th Cir. 2000).

³⁰¹ Edmonson v. Leesville Concrete Co., 500 U.S. 614, 622 (1991).

³⁰² Jessica Heyman, *Introducing the Jury Exception: How Equal Protection Treats Juries Differently*, 69 N.Y.U. ANN. SURV. AM. L. 185 (2013).

described in Part III(c). The court went out of its way to distinguish between *making* the judgment and *enforcing* the judgment, while both would have the same exact effect in this case. While this distinction may be true in the actual enforcement of the foreign judgment, this should not be the principles relied on for analyzing state action, as the state action and the result is exactly the same in both circumstances. Instead of analyzing the Establishment Clause claim, the court simply dismissed the case on a finding of no state action.³⁰³ Similarly, in constitutional claims involving private police, courts often require plenary power conferred to the private officer before finding state action. But this is stretching the requirement for state action a bit thin. For example, in *U.S. v. Day*, the officers were statutorily granted limited authority to make arrests, but the court decided these private officers were not state actors because they did not have *plenary* authority.³⁰⁴

The Warren court significantly expanded the definition of state action to combat racial discrimination, but since then several commentators have viewed the court as restricting the definition,³⁰⁵ as courts recently have been hesitant to find state action when racial discrimination is not involved.³⁰⁶ In characterizing the evolving history of the Equal Protection decisions, one scholar noted “the current trend would be one of contraction.”³⁰⁷ What courts have seemed to have forgotten, however, is that the state action doctrine is about *responsibility*, not solely causation, even though causation is normally how the responsibility arises.³⁰⁸ A state is responsible for the equal protection of its citizens, and allowing structural injustice to continue is action for which the state is responsible.

B. State Action Doctrine is in Disarray

A second lesson we can glean from this long delve into state action is that, while the Supreme Court and federal circuit courts have recognized its state action decisions are not necessarily consistent,³⁰⁹ the current status of the state action doctrine is in more shambles than previously thought. Neither the lower federal courts’ nor state courts’ decisions exhibit a model of consistency.

³⁰³ *Ohno v. Yasuma*, 723 F.3d 984, 1000 (9th Cir. 2013) (“Because the Church’s constitutional claim fails at the state action stage, we need not decide directly whether the First Amendment’s protections actually do reach the assertedly religious expression at issue in the Japanese suit.”).

³⁰⁴ *United States v. Day*, 591 F.3d 679, 688 (4th Cir. 2010).

³⁰⁵ Terri Peretti, *Constructing the State Action Doctrine, 1940-1990*, 35 LAW & SOC. INQUIRY 273 (2010); Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 SUP. CT. REV. 59, 73–74 (2010); *Phelan ex rel. Phelan v. Torres*, 843 F. Supp. 2d 259, 268 (E.D.N.Y. 2011), *aff’d sub nom. Phelan ex rel. Phelan v. Mullane*, 512 F. App’x 88 (2d Cir. 2013).

³⁰⁶ *Alabama Republican Party v. McGinley*, 893 So. 2d 337, 343 n.3 (Ala. 2004) (citing cases).

³⁰⁷ K. G. Jan Pillai, *Societal Discrimination and the Equal Protection Clause of the United States Constitution*, 14 GEO. MASON U. C.R. L.J. 1 (2004).

³⁰⁸ Don Herzog, *The Kerr Principle, State Action, and Legal Rights*, 105 MICH. L. REV. 1 (2006).

³⁰⁹ See *Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 823 (7th Cir. 2009); *Int’l Soc’y for Krishna Consciousness v. Air Canada*, 727 F.2d 253, 255 (2d Cir. 1984).

A good showing of these contradictions between federal circuits in finding state action is in the context of police officers enforcing private rules. In *Villegas v. Gilroy Garlic Festival Association*,³¹⁰ the plaintiffs, a motorcycle club, brought suit against the city and the Gilroy Garlic Festival Association (GGFA) for alleged violations of the plaintiffs' civil rights: the Festival's chair of security, an off-duty police officer, requested an on-duty police officer to enforce the GGFA's dress code policy of prohibiting guests from wearing "gang colors or other demonstrative insignia, including motorcycle club insignia."³¹¹ The Ninth Circuit refused to find the GGFA was a state actor, even though the City required a permit, thereby retaining control over the property, and billed the GGFA for its security services.³¹² The Fourth Circuit in *United Auto Workers v. Gaston Festivals, Inc.*³¹³ and the Fifth Circuit in *Rundus v. City of Dallas*³¹⁴ both came to the same conclusion—no state action—on similar sets of facts.³¹⁵

However, the Sixth Circuit found state action when a state official, the Fairborn Parks and Recreation Department Superintendent, told the defendant he could not display a sign or distribute literature in the park during the Fairborn Sweet Corn Festival.³¹⁶ The circuit court found because "[government] officials engaged in state action by supporting and actively enforcing the solicitation policy in place at the Festival," the constitution was implicated in the enforcement of the private party's solicitation policy.³¹⁷ Similarly, the Eighth Circuit also held that police enforcement of a private nonprofit's speech restrictions constituted state action and violated the First Amendment.³¹⁸

Likewise, states are not consistent in their application of the state action doctrine. In the context of preemptory juror challenges on the basis of race or gender, because the judge must excuse the juror, the racially discriminatory preemptory challenges become state action and thereby violate the Equal Protection Clause.³¹⁹ The Hawai'i state constitution had express prohibitions against gender discrimination,³²⁰ so excluding women from a jury solely based on their sex violated the state's equal protection clause.³²¹ However, other courts have determined that the use of the courts is not enough to constitute state action.³²²

³¹⁰ *Villegas v. Gilroy Garlic Festival Ass'n*, 541 F.3d 950 (9th Cir. 2008).

³¹¹ *Id.* at 953.

³¹² *Id.* at 956.

³¹³ *United Auto Workers v. Gaston Festivals, Inc.*, 43 F.3d 902 (4th Cir. 1995).

³¹⁴ *Rundus v. Dallas*, 634 F.3d 309 (5th Cir. 2011).

³¹⁵ *Gaston*, 43 F.3d at 908; *Rundus*, 634 F.3d at 315.

³¹⁶ *Bays v. City of Fairborn*, 668 F.3d 814, 818 (6th Cir. 2012).

³¹⁷ *Id.* at 820.

³¹⁸ *Wickersham v. City of Columbia*, 481 F.3d 591, 599 (8th Cir. 2007).

³¹⁹ *State v. Levinson*, 795 P.2d 845, 849 (Haw. 1990).

³²⁰ HAW. CONST. art. I, § 5; N.Y. CONST. art. I, § 11.

³²¹ *Levinson*, 795 P.2d at 849–50.

³²² *Johnson v. Encompass Ins. Co.*, 130 S.W.3d 553, 558 (Ark. 2003).

Another example of state inconsistencies is whether the state's use of false testimony violated the Due Process clause. In *People v. Brown*,³²³ an Illinois Supreme Court case, the Court held "[i]n the absence of an allegation of the knowing use of false testimony, or at least some lack of diligence on the part of the State, there has been no involvement by the State in the false testimony to establish a violation of due process."³²⁴ Instead, the court decided the action of a witness falsely testifying was the action of a private individual, thereby not violating the Due Process clause, even if it resulted in the conviction of another individual.³²⁵ Other courts have held the same, requiring the knowledge of the state that the testimony was false before finding state action.³²⁶ However, the Texas Criminal Court of Appeals came to a different conclusion, finding the Due Process Cause can be violated when the State uses false testimony to attain a conviction, "regardless of whether it does so knowingly or unknowingly."³²⁷

A third example of conflicting state action holdings is in adoption proceedings. The Tenth Circuit previously held that there was no state action in an adoption proceeding as the plaintiff only alleged state involvement by the state issuing the adoption decree.³²⁸ However, the Montana Supreme Court determined the state was an integral part of the private termination process, finding that whether an termination proceeding is initiated by the state or by a private party through an adoption petition, the challenged state action is essentially the same: "[a parent] resists the imposition of an official decree extinguishing, as no power other than the State can, her parent-child relationships."³²⁹ The Supreme Court of North Dakota and the Supreme Court of Iowa have found the same.³³⁰

One last example to demonstrate this inconsistency is in the use of the public function test, specifically as to firefighters and prison guards. The Fourth Circuit has determined that firefighting is a traditionally exclusive public function, so that a private volunteer firefighting company is a state

³²³ *People v. Brown*, 660 N.E.2d 964, 970 (Ill. 1995).

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ See, e.g., *Hayes v. Brown*, 399 F.3d 972, 978 (9th Cir. 2005) (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959)) ("[A] conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment.").

³²⁷ *Ex Parte Chavez*, 371 S.W.3d 200, 207–08 (Tex. Crim. App. 2012) (emphasis added). However, to constitute a due process violation, the testimony had to be "material." Because the court found the defendant failed to show a reasonable likelihood that the false testimony affected the sentence, there was no due process violation. *Id.* at 210.

³²⁸ *Johnson v. Rodrigues*, 293 F.3d 1196, 1206 (10th Cir. 2002).

³²⁹ *In re Adoption of A.W.S.*, 339 P.3d 414, 418 (Mon. 2014).

³³⁰ *Matter of Adoption of K.A.S.*, 499 N.W.2d 558, 566 (N.D. 1993) ("Because termination of parental rights in an adoption proceeding is accomplished through a state mechanism, and state agencies remain involved throughout the proceedings, we believe that state involvement in a stepparent adoption is substantial . . . [and the] state is sufficiently involved in Adoption Act proceedings to actuate the constraints of the constitutional requirement."); *In re S.A.J.B.*, 679 N.W.2d 645, 650 (Iowa 2004).

actor,³³¹ and the Second Circuit determined firefighting was a traditionally exclusive public function, making it state action.³³² But the Fifth Circuit determined the exact opposite, holding a volunteer firefighting company is not a state actor under the public function test.³³³ There is a similar split in whether maintaining a prison is a public function, as discussed above, where the Fourth Circuit found there was no state action, but other courts have.³³⁴

C. Lessening of State Action Requirement in Racial Discrimination Contexts

The final lesson we can observe is many of the courts have lessened the requirement of state action in the context of racial discrimination,³³⁵ which can even allow the constitution to be implicated based on state inaction. This issue will be discussed in much more detail below. Courts have held that where the state has become sufficiently involved, “its inaction, acquiescence or continuation of its involvement under circumstances where it could withdraw, may be sufficient.”³³⁶ The Second Circuit Court of Appeals, in explaining the distinctions between cases involving racial discrimination in which state action was alleged and all other alleged state action, stated the following: “This dichotomy is explained in part by the double ‘state action’ standard which has been recognized one, a less onerous test for cases involving racial discrimination, and a more rigorous standard for other claims.”³³⁷ This same “double standard” where traditional state action tests, such as the nexus test, may be inapplicable, providing the “rationale for the double standard derives from the historic relationship of the equal protection clause and race and from the fact that where racial discrimination is concerned, even governmental inaction takes on the appearance of affirmative approval and support.”³³⁸ Justice Friendly has argued repeatedly

³³¹ *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 348 (4th Cir. 2000).

³³² *Janusaitis v. Middlebury Volunteer Fire Dep't*, 607 F.2d 17, 25 (2d Cir. 1979).

³³³ *Yeager v. City of McGregor*, 980 F.2d 337, 343 (5th Cir. 1993).

³³⁴ See *supra* notes 153–164 and accompanying texts.

³³⁵ See *supra* section V; *Jackson v. Statler Found.*, 496 F.2d 623, 629 (2d Cir. 1974); *Girard v. 94th St. & Fifth Ave. Corp.*, 530 F.2d 66, 69 (2d Cir. 1976) (“This Court has recognized the existence of a ‘double standard’ of review for state action. In cases involving racial discrimination, a particularly offensive class-based discrimination, the court has used a ‘less onerous’ test than for other claims.”).

³³⁶ See, e.g., *Seidenberg v. McSorleys’ Old Ale House, Inc.*, 317 F. Supp. 593, 596 (S.D.N.Y. 1970) (citing *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961)); *Scott v. Eversole Mortuary*, 522 F.2d 1110, 1119 (9th Cir. 1975).

³³⁷ *Lockwood v. Killian*, 172 Conn. 496, 503 (1977) (quoting *Jackson v. Statler Foundation*, 496 F.2d 623, 629 (2d Cir.)).

³³⁸ See, e.g., *Lefcourt v. Legal Aid Soc’y*, 445 F.2d 1150, 1155 n.6 (2d Cir. 1971) (“The reason for this is that in the area of racial discrimination, State inaction or neutrality has often been found to constitute affirmative encouragement.”); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Simkins v. Moses H. Cone Mem’l Hosp.*, 323 F.2d 959 (4th Cir. 1962), *cert. denied*, 376 U.S. 938 (1964); *Robinson v. Florida*, 378 U.S. 153 (1964); *Bell v. Maryland*, 378 U.S. 226 (1964); *Lombard v. Louisiana*, 373 U.S. 267 (1963); *cf. Kerr v. Enoch Pratt Free Library*, 149 F.2d 212 (4th Cir.), *cert. denied*, 326 U.S. 721 (1945); *but see Evans v. Abney*, 396 U.S. 435 (1970); *R.I. Chapter, Associated Gen. Contractors of Am., Inc. v. Kreps*, 450 F. Supp. 338, 349 n.6 (D.R.I. 1978) (citing *Lefcourt v. Legal Aid Soc’y*, 445 F.2d 1150, 1155 n.6 (2d Cir. 1971)).

for this double for a lesser standard of state action when racial discrimination is involved.³³⁹ While some courts have recognized this double standard,³⁴⁰ not all courts have adopted this, and it is not consistently enforced.

Courts have held onto this concept of state action doctrine, at least in part because the Supreme Court has been so unclear with the contours of the doctrine, or even its lasting vitality, as the Supreme Court has not decided a state action case in some time. But why should this matter? Why should keeping the state action doctrine be of greater importance than protecting the constitutional rights and equal protection of our people, specifically that of the constitutional right to equal protection?

VI. POLICIES OF THE STATE ACTION DOCTRINE

The question now becomes: *why* does a court find state action is not implicated in some instances and are these policies sound? As discussed above, the state action requirement serves to avoid imposing responsibility on the State for conduct for which they cannot fairly be blamed.³⁴¹ Consistent with this approach, constitutional standards are generally invoked only when it can be said that the State is responsible for the specific conduct alleged.³⁴²

A. Separation of Powers

Is the separation of powers concern—to keep courts from treading on the power of the legislature in deciding areas of private interaction—a valid rationale for the state action doctrine? The three branches of government were not intended to be completely separate, and the Supreme Court has “squarely rejected the argument that the Constitution contemplates a complete division of authority between the three branches.”³⁴³ In contemporary society, concerns about the workability of government are especially weighty. But the state action doctrine prevents the courts from protecting individual rights when the legislature fails to act.

A basic purpose of the separation of powers doctrine is to guard against power being concentrated in one branch,³⁴⁴ but in an ever-growing complex society, the Constitution diffuses power throughout the three branches so the government can work efficiently.³⁴⁵ While the Constitution separates governmental power the better to secure liberty, it also understands that

³³⁹ See, e.g., *Coleman v. Wagner Coll.*, 429 F.2d 1120, 1127 (2d Cir. 1970); HENRY J. FRIENDLY, *THE DARTMOUTH COLLEGE CASE AND THE PUBLIC-PRIVATE PENUMBRA* 26 (1968).

³⁴⁰ See, e.g., *Gibson v. Dixon*, 579 F.2d 1071, 1077 n.5 (7th Cir. 1978).

³⁴¹ *Lugar v. Edmonson Oil Co., Inc.*, 457 U.S. 922, 936 (1982).

³⁴² *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); see also *Ohno v. Yasuma*, 723 F.3d 984, 994 (9th Cir. 2013).

³⁴³ *Nixon v. Adm’r of Gen. Services*, 433 U.S. 425, 443 (1977).

³⁴⁴ *Butt v. State of California*, 842 P.2d 1240, 1267 (Ca. 1992) (Mosk, J., concurring and dissenting).

³⁴⁵ See *Mistretta v. United States*, 488 U.S. 361, 381 (1989).

practice will required integration of powers into a workable government.³⁴⁶ To allow *only* the legislature to determine the rights between private parties, but not the courts, could in some cases prevent the Constitution from being enforced, and “[w]e know that the Framers did not envision ‘so narrow a role for this basic guaranty of human rights.’”³⁴⁷

However, this argument does not contradict the underlying separation of powers policy. The Framers of the federal Constitution left the regulation of private conduct to the legislature.³⁴⁸ The states should have a duty to ameliorate institutional injustice, but this is left to the legislature to determine how to go about solving these issues, and courts must still abide by the separation of powers doctrine. In many instances, including racial discrimination, there should be a lesser requirement of state action before providing constitutional protection, but again, this is left to the state legislatures to determine. However, when the legislatures fail to act, the courts should hold the states accountable for their inaction, thereby rectifying institutional injustice.

B. Personal Liberty Argument

Most often used to support the state action doctrine is the personal liberty argument. This argument, as described above, is that limiting the constitutional protections to only state action preserves an area of individual freedom by limiting the reach of federal law and federal judicial power.³⁴⁹ Professor Lawrence Tribe explained:

[B]y exempting private action from the reach of the Constitution's prohibitions, it stops the Constitution short of preempting individual liberty—of denying to individuals the freedom to make certain choices Such freedom is basic under any conception of liberty, but it would be lost if individuals had to conform their conduct to the Constitution's demands.³⁵⁰

While this may be the case, Chemerinsky eloquently noted, in the overall effect of the state action doctrine to enhance individual liberty, every time an individual's freedom to violate another's constitutional right is

³⁴⁶ *Id.* (quoting *Youngstown Sheet & Tube Co. v. Sawyer* 343 U.S. 579, 635 (1952) (conc. opn. of Jackson, J.)).

³⁴⁷ *Dist. Att'y for Suffolk Dist. v. Watson*, 381 Mass. 648, 662 (1980) (quoting *Furman v. Georgia*, 408 U.S. 238, 268 (1972) (Brennan, J., concurring)).

³⁴⁸ *DeShaney v. Winnebago City Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989) (“The Framers were content to leave the extent of governmental obligation in the latter area [private interaction] to the democratic political processes.”).

³⁴⁹ *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982).

³⁵⁰ Tribe, *supra* note 19, at 1149.

protected, “a victim’s liberty is sacrificed.”³⁵¹ By putting the violator’s constitutional rights above the victim’s simply because they are a private actor is to disregard the intent behind the Equal Protection Clause, and under the current state action doctrine, the private violator is always favored over the victim.³⁵² The state action doctrine fails to protect personal liberty because it does not necessarily result in a net increase in individual liberty, as one person’s constitutional rights may be infringed much more severely than the violator’s rights would be if redressed by the state.³⁵³

Furthermore, this personal liberty concern has little force when it comes to state-enacted legislation. States have the prerogative to regulate and restrict private actions, and when legislatures enact law, this generally restricts personal liberty to do something outside that law.³⁵⁴ For example, forty-five states have enacted public accommodations laws, prohibiting discrimination on the grounds of race, gender, ancestry and religion, while only Alabama, Georgia, Mississippi, North Carolina, and Texas have not.³⁵⁵ The rights of citizens are always subordinated to reasonable restrictions of the states.³⁵⁶ Because the Constitution reserves the “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, . . . to the States respectively, or to the people,”³⁵⁷ the states have the power to regulate private interactions. Unlike the federal Constitution, a state constitution does not create grants of power but limits the otherwise plenary power of a state legislature.³⁵⁸

So why would the state action doctrine protect personal liberty? The short answer is that it does not. Either way, a person’s constitutional rights may be disregarded, while another’s is protected. But instead of balancing the two competing constitutional rights, the state action doctrine would always protect the private violator’s constitutional rights to choose. Therefore, the “state action doctrine adds absolutely nothing to the protection of individual liberties.”³⁵⁹

³⁵¹ Chemerinsky, *supra* note **Error! Bookmark not defined.**, at 536.

³⁵² *Id.*, at 537.

³⁵³ John L. Watts, *Tyranny by Proxy: State Action and the Private Use of Deadly Force*, 89 NOTRE DAME L. REV. 1237 (2014).

³⁵⁴ William P. Marshall, *Diluting Constitutional Rights: Rethinking “Rethinking State Action,”* 80 NW. U. L. REV. 558, 559 (1985).

³⁵⁵ *State Public Accommodation Laws*, NAT’L CONF. OF STATE LEGISLATORS (July 13, 2016), <http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx>.

³⁵⁶ *Paron v. City of Shakopee*, 226 Minn. 222, 229 (1948) (quoting *State v. Hovorka*, 100 Minn. 249, 252 (1907)).

³⁵⁷ U.S. CONST. amend. X.

³⁵⁸ See *State v. Granger*, 982 So. 2d 779 (La. 2008); *Almond v. Rhode Island Lottery Comm’n*, 756 A.2d 186, 196 (R.I. 2000); *Kennedy v. State*, 654 A.2d 708, 710 (R.I. 1995).

³⁵⁹ Chemerinsky, *supra* note 1, at 538.

C. Federalism Concern Inapplicable in Context of State Constitutions

The last common policy argument in favor of the state action doctrine is to protect the concept of federalism between the states and the federal government. This relates to allowing the state to regulate activities between private parties, and the federal Constitution establishes a floor where the states cannot go below.³⁶⁰ As noted above, states have plenary power, but while the federal constitution sets a minimum level for individual rights, state constitutions can provide more protection if desired.³⁶¹ In the context of constitutional rights in the *states*, as there is no federalism concern to state action under state constitutions, any state standard for state action should be more flexible, and require less than its federal counterpart.³⁶² Therefore, this underlying policy of federalism does not have the same effect when applied to state constitutions.³⁶³

Because at least two of the three state action policies described above are weaker if not nonexistent in the application of the state action doctrine to state constitutions, then state constitutions should provide more protection to constitutional rights by broadening the definition of state action. However, some courts note the state action requirement is a threshold question because “Constitutions were not designed to micromanage disputes between citizens, and, to resolve most lawsuits, citizens must resort to statutes and the common law.”³⁶⁴ This is true, as the constitutions are outlines delegating power to the branches of government, and the states have the plenary power to implement protections under these constitutions. If the state legislature does not implement these protections, but rather permits the private discriminations to occur, states should have a *duty* to rectify racial injustice even when there is no state action.

VII. UNACKNOWLEDGED CONSTITUTION: STATE INACTION CONSTITUTES STATE ACTION

The modern state pervades almost every aspect of our lives, from regulation of contracts and property, to issues such as race and gender.³⁶⁵ Our world has changed drastically over the past century, and the size and scope of both the federal and state governments and their pervasive involvement in private actions makes it extremely difficult to create a clear

³⁶⁰ *State v. Sieyes*, 168 Wash. 2d 276, 292 (2010).

³⁶¹ *Heitman v. State*, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991).

³⁶² *United Food & Commercial Workers Union, Local 919, AFL-CIO v. Crystal Mall Assoc., L.P.*, 270 Conn. 261, 290 (2004) (quoting *Cologne*, 192 Conn. at 82, 469 A.2d 1201 (Peters, J., dissenting)).

³⁶³ *Sheff v. O'Neill*, 238 Conn. 1, 22–23 (1996) (“Principles of federalism, however, do not restrict our constitutional authority to enforce the constitutional mandates contained in [our state constitution].”).

³⁶⁴ *Putensen v. Hawkeye Bank of Clay City*, 564 N.W.2d 404, 408 (Iowa 1997).

³⁶⁵ See Sager, *supra* note 294; Paul Imperatore, *When Cheerleading Becomes State Action*, 102 GEO. L.J. ONLINE 7 (2013).

distinction between state and private action.³⁶⁶ Even a New York state court acknowledged this as early as 1971, stating, “Society’s administration has become so complex that private organizations are in a position of performing governmental functions and in the discharge of such function may be subject to the constitutional requirements of using fair and equal procedures.”³⁶⁷ Several scholars have argued that because the state has the power to regulate private behavior, the state has effectively given its permission or authorization for all conduct it does not prohibit.³⁶⁸ Through this lens of our world, state inaction can always be viewed as state action.

While many courts have held that regulation alone is insufficient to constitute state action,³⁶⁹ other courts have found that extensive regulation or when the state commits an unconstitutional act in enforcing private rights can lead to a finding of state action.³⁷⁰ At the very least, state regulation can be a factor in finding state action.³⁷¹ The Supreme Court of Illinois has held that enactment of a statute is obviously state action, and found in one case this to be sufficient state action to support a constitutional claim.³⁷² Furthermore, a state passing an unconstitutional statute in a state legislature and enforcing it in state courts constitutes state action, and can even subject private litigants who make use of the statute to constitutional liability.³⁷³

State action often is an ambiguous term, and not clearly defined. But we have found there are two ways of viewing state action: either (1) the private party was a state actor so it can be said the state actually committed an act, or (2) the state was responsible for the private party’s actions and by its inaction violated the constitution. Courts have generally failed to distinguish between these two views, simply applying all tests to determine whether state action was present.

To explain the distinction between these two views, the use of a hypothetical case may be helpful. In this hypothetical situation, a private

³⁶⁶ *Watts*, *supra* note 353, at 1252–53 (citing *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349–50 (1974) (“While the principle that private action is immune from the restrictions of the Fourteenth Amendment is well established and easily stated, the question whether particular conduct is ‘private,’ on the one hand, or ‘state action,’ on the other, frequently admits of no easy answer.”)).

³⁶⁷ *Ryan v. Hofstra Univ.*, 67 Misc. 2d 651, 664 (Sup. Ct. 1971), *supplemented*, 68 Misc. 2d 890 (Sup. Ct. 1972).

³⁶⁸ ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 510–11 (3d ed. 2006); Kenneth L. Karst & Harold W. Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, SUP. CT. REV. 39, 55 (1967).

³⁶⁹ *See, e.g.,* *Lansing v. City of Memphis*, 202 F.3d 821, 830 (6th Cir. 2000) (citing Supreme Court cases); *Wolotsky v. Huhn*, 960 F.2d 1331, 1336 (6th Cir. 1992); *Santiago v. Puerto Rico*, 655 F.3d 61, 71 (1st Cir. 2011); *Wilcher v. City of Akron*, 498 F.3d 516, 520 (6th Cir. 2007) (citing *Metropolitan Edison*, 419 U.S. at 350, 95 S. Ct. 449 (“The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment.”)).

³⁷⁰ *Andrews v. Fed. Home Loan Bank of Atlanta*, 998 F.2d 214, 219 (4th Cir. 1993).

³⁷¹ *See SHAD Alliance v. Smith Haven Mall*, 66 N.Y.2d 496, 503 (N.Y. 1985); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 622 (1991).

³⁷² *In re Adoption of L.T.M.*, 214 Ill. 2d 60, 74–75 (2005).

³⁷³ *Yanaki v. Iomed, Inc.*, 319 F. Supp. 2d 1261, 1265 (D. Utah 2004), *aff’d*, 415 F.3d 1204 (10th Cir. 2005).

employer makes a racially discriminatory decision, and there is a finding of state action by the court. The first view would hold that the state actually made this action, as the private employer was a state actor, therefore both the private party and the state are liable for the constitutional violation. It is the party's *action* that violated the constitution. The second view would hold the state was *responsible* for such action, but the private party's actual action did not necessarily violate the Constitution. It was the state's *inaction* to prevent or rectify the private party's action that violated the constitution, not the private party's *action*. This way, the state is held responsible to redress the constitutional violation against the private party.

A. Viewpoint I: Party was a State Actor and State's Action Violated the Constitution

The first way of viewing state action is based on the conduct of the government—when the state itself acts or a private party can be viewed as a state actor because there is joint or entwined action with the state. This view of state action is the basis for the nexus and joint action tests,³⁷⁴ and this occurs when either there is significant encouragement by the state, when the state is so entwined with the private action, or when the private actor is a willing and joint participant of the state.³⁷⁵

One such example of this idea is when the state enforces its laws, such as police ejecting trespassers. Some courts have determined police involvement in support of legitimate private rights does not mean that the private person's actions constitutes state action.³⁷⁶ One such instance is *People v. DiGuida*,³⁷⁷ an Illinois Supreme Court case where the alleged free speech violation was due to police enforcement of a trespass law.³⁷⁸ But the Court found because the state action was exclusively at enforcing the state trespass laws, there was no constitutional deprivation.³⁷⁹

In other contexts, some courts have found state enforcement implicates the Constitution, such as the enforcement of a plea agreement, which results in putting a defendant in custody, assuredly constituting state action.³⁸⁰ But what is generally required by many courts for state action to be found is "overt official involvement" in the enforcement of private parties'

³⁷⁴ *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (quoting *Metropolitan Edison*, 419 U.S. at 351, 95 S. Ct. 449).

³⁷⁵ *Id.*

³⁷⁶ *Southwest Community Resources, Inc. v. Simon Prop. Group, LP*, 108 F. Supp. 2d 1239, 1250 (D.N.M. 2000) (citing *Cape Cod Nursing Home Council v. Rambling Rose Rest Home*, 667 F.2d 238, 243 (1st Cir. 1981)).

³⁷⁷ *People v. DiGuida*, 152 Ill. 2d 104, 125 (1992).

³⁷⁸ *Id.*

³⁷⁹ *Id.* at 346.

³⁸⁰ *United States v. Wilson*, 922 F.2d 1336, 1341 (7th Cir. 1991) (emphasis in original).

remedies.³⁸¹ For example, courts have generally found that merely calling the police to enforce a state statute or invoking state legal procedures does not turn private behavior into state action.³⁸²

But a few courts have found the simple enforcement of an ordinance does constitute state action. In *Green v. Cleary Water, Sewer & Fire Dist.*,³⁸³ the District enacted an ordinance to regulate the use and repair of wastewater disposal systems.³⁸⁴ The District sent letters to the plaintiffs warning of the ordinance and their requirement to comply or the District would turn off the plaintiff's potable water supply.³⁸⁵ In granting the plaintiff's motion to remand, the court held the enactment and enforcement of the Ordinance constituted state action.³⁸⁶ Similarly, in Florida, a plaintiff who owned and operated internet cafes which sold time for using internet computers brought suit claiming amendments to Florida statutes were unconstitutional because the amendments prohibited his promotions of sales through Game Promotions.³⁸⁷ The district court held the state action requirement was "satisfied here because [the Florida statutes] were enacted and amended by the Florida Legislature and as the State Attorney for Miami-Dade County, FL, the Defendant is charged with enforcing the statutes."³⁸⁸

Another example of finding state action when the state acts to enforce a statute is in *Crespo v. U.S. Merit Sys. Prot. Board*.³⁸⁹ There, the plaintiff argued the Hatch Act violated his First Amendment and due process rights,³⁹⁰ and the district court reviewed the claims under the Fifth Amendment Due Process clause because the state action arose from the Office of Special Counsel enforcing the Hatch Act.³⁹¹ Furthermore, a Court of Special Appeals in Maryland held a mortgage foreclosure pursuant to an enacted statute and the rules of the Court of Appeals constituted state action.³⁹² Even private parties acting at the behest of state officials to enforce state laws have been found to be state actors.³⁹³ As Justice Brennan

³⁸¹ See *Apao v. Bank of New York*, 324 F.3d 1091, 1095 (9th Cir. 2003); *Nat'l Fair Hous. All. v. Town & Country-Sterling Heights, Inc.*, No. CIV.A. 07-10385, 2008 WL 4826299, at *2 (E.D. Mich. Aug. 19, 2008).

³⁸² See, e.g., *Hanuman v. Groves*, 41 F. App'x 7, 9 (8th Cir. 2002); *Bugg v. Rutter*, No. 08-4271-CV-C-WAK, 2009 WL 613584, at *2 (W.D. Mo. Mar. 10, 2009).

³⁸³ *Green v. Cleary Water, Sewer & Fire Dist.*, 239 F. Supp. 2d 608 (S.D. Miss. 2003).

³⁸⁴ *Id.* at 609.

³⁸⁵ *Id.* at 609-10.

³⁸⁶ *Id.* at 611.

³⁸⁷ *Incredible Investments, LLC v. Fernandez-Rundle*, 28 F. Supp. 3d 1272, 1277 (S.D. Fla. 2014).

³⁸⁸ *Id.* at 1279.

³⁸⁹ *Crespo v. U.S. Merit Sys. Protection Board*, 486 F. Supp. 2d 680 (N.D. Ohio 2007), *aff'd sub nom.* *Molina-Crespo v. U.S. Merit Sys. Protection Board*, 547 F.3d 651 (6th Cir. 2008).

³⁹⁰ *Id.* at 690.

³⁹¹ *Id.* at 689 n.7.

³⁹² *Knapp v. Smethurst*, 139 Md. App. 676, 706 (2001) (quoting *McCann v. McGinnis*, 257 Md. 499, 505 (1970)).

³⁹³ See, e.g., *Goichman v. Rheuban Motors, Inc.*, 682 F.2d 1320 (9th Cir. 1982) (holding private towing company was state actor and subject to a section 1983 action where it had towed plaintiff's vehicle at the behest of a state police officer for the sole purpose of enforcing a state statute providing for the

described in his dissent, the “State’s involvement in the creation of such a right is also involvement in its enforcement; the State’s assent to the creation of the right necessarily contemplates that the State will enforce the right if called upon to do so.”³⁹⁴

1. *Shelley and its progeny*

Shelley and its progeny would fall under this first view of state action, as the Supreme Court found state action because the court enforced the racially restrictive covenant.³⁹⁵ But *Shelley* did not prohibit covenants, it held that court *enforcement* of those covenants would create state action, invoking the Constitution.³⁹⁶ Not until the court acted did the Constitution come into play. For example, in *U.S. Bank, N.A. v. SFR Investments Pool 1, LLC*,³⁹⁷ the Court, in a non-judicial foreclosure case, relied on *Shelley* in holding “SFR has invoked the power of the Court to enforce potentially constitutionally problematic state statutes against U.S. Bank just as the neighboring homeowners in *Shelley* sought to invoke the power of the state courts to enforce the constitutionally problematic covenants against the Shelleys.”³⁹⁸ Therefore, there was state action to implicate the due process protections.³⁹⁹

While *Shelley* was not confined to a specific context at the time of its decision, many courts since have tried to limit the holding in *Shelley* to racial contexts,⁴⁰⁰ even claiming *Shelley*’s holding has never been applied outside cases involving racial discrimination,⁴⁰¹ and others calling its precedential value “questionable.”⁴⁰² Courts have tried frequently tried to distinguish

towing of illegally parked vehicles); *McCain v. California Highway Patrol*, No. 2:11-CV-01265 KJM, 2011 WL 3818758, at *6 (E.D. Cal. Aug. 26, 2011) (collecting cases holding the same).

³⁹⁴ *Evans v. Abney*, 396 U.S. 435, 455 (1970) (Brennan, J., dissenting).

³⁹⁵ *Shelley v. Kraemer*, 334 U.S. 1, 19 (1948) (“It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.”); *People v. Brown*, 169 Ill. 2d 94, 106 (1995).

³⁹⁶ *Barrows v. Jackson*, 346 U.S. 249, 251 (1953); *Johnson v. Commission on Presidential Debates*, No. CV 15-1580 (RMC), 2016 WL 4468153, at *11 (D.D.C. Aug. 24, 2016).

³⁹⁷ *U.S. Bank, N.A. v. SFR Investments Pool 1, LLC*, 124 F. Supp. 3d 1063 (D. Nev. 2015).

³⁹⁸ *Id.* at 1078.

³⁹⁹ *Id.*

⁴⁰⁰ *Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984, 998 (9th Cir. 2013) (“*Shelley*’s attribution of state action to judicial enforcement has generally been confined to the context of discrimination claims.”); *Davis v. Prudential Secs., Inc.*, 59 F.3d 1186, 1191 (11th Cir.1995) (stating that the holding in *Shelley* “has not been extended beyond the context of race discrimination.”).

⁴⁰¹ *Everett v. Paul Davis Restoration, Inc.*, 771 F.3d 380, 386 n.1 (7th Cir. 2014). This is in fact, wrong, as *Shelley*’s holding has been applied outside the racial context before *Everett* was decided. See *DeBruin v. St. Patrick Congregation*, 2012 WI 94, ¶ 1, 343 Wis. 2d 83, 91 (finding “the constitutional principles that underlie *Shelley* are analogous to other constitutional protections, including those afforded by the First Amendment.”); *Edwards v. Habib*, 397 F.2d 687, 691 (D.C. Cir. 1968) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1963) and *Shelley* for support in finding state action, Judge Skelly Wright wrote, “There can now be no doubt that the application by the judiciary of the state’s common law, even in a lawsuit between private parties, may constitute state action which must conform to the constitutional strictures which constrain the government.”).

⁴⁰² *MedValUSA Health Programs, Inc. v. MemberWorks, Inc.*, 273 Conn. 634, 645 (2005).

cases from *Shelley* to prevent a finding of state action,⁴⁰³ asserting that if enforcement of private rights constituted state action, the distinction between private and state action would be “obliterated.”⁴⁰⁴ Some courts have gone so far to say the enforcement of a contract between two private parties is not state action,⁴⁰⁵ which not only conflicts with the holding in *Shelley*, but also with the holding of other courts, where in some circumstances, state action can be found where state courts enforced an agreement between private parties.⁴⁰⁶

For example, in *Girard v. 94th St. & Fifth Ave. Corp.*,⁴⁰⁷ the plaintiff argued there was state action because the New York state courts enforced the provision in the proprietary lease.⁴⁰⁸ The court admitted *Shelley* held judicial action was state action, but attempted to distinguish *Shelley* on the grounds that there was no discriminatory covenant in the lease, and “[u]nlike in *Shelley*, the action by the state court here did not effectuate a discriminatory purpose which could not have been secured but for its decision.”⁴⁰⁹ On appeal, the Second Circuit upheld this decision, again attempting to distinguish *Shelley* by finding, unlike the covenant in *Shelley*, the lease provision, requiring consent of the board of directors before transfer, is neutral, as there was no suggestion of any prohibition of transfer based on sex.⁴¹⁰

⁴⁰³ See, e.g., *Sherman v. Cmty. Consol. Sch. Dist.* 21, 8 F.3d 1160, 1168 (7th Cir. 1993); *Stevens v. Frick*, 372 F.2d 378, 381 (2d Cir. 1967); *Ginsberg v. Yeshiva Of Far Rockaway*, 358 N.Y.S.2d 477, 482 (1974), *aff'd*, 36 N.Y.2d 706 (1975) (“Unlike the restrictions at bar, the covenants considered in *Shelley* were racially discriminatory on their face.”); *State v. Noah*, 103 Wash. App. 29, 49 (2000), *as amended on reconsideration* (Oct. 30, 2000) (“*Shelley* is distinguishable. In *Shelley*, the state action was more than mere judicial enforcement. The courts had to identify prospective African-American purchasers, determine the scope of the racially restrictive covenants and enforce them against the African-Americans. The covenant did not merely involve two private parties: its exclusionary function against all African-Americans required state action.”); *Einhorn v. LaChance*, No. CIV. A. H-86-3406, 1987 WL 8391, at *3 (S.D. Tex. Mar. 18, 1987) (“*Shelley*, however, does not stand for the proposition that all private individuals who act on their prejudices in a judicial or quasi-judicial forum can establish state action. The holding in *Shelley* was required by the sociological and legal realities of its period.”).

⁴⁰⁴ *Edwards v. Habib*, 397 F.2d 687, 691 (D.C. Cir. 1968); *White v. Communications Workers of America, AFL-CIO, Local 1300*, 370 F.3d 346, 351 (3d Cir. 2004) (“If the fact that the government enforces privately negotiated contracts rendered any act taken pursuant to a contract state action, the state action doctrine would have little meaning.”).

⁴⁰⁵ *In re Estate of Hayes*, 185 Wash. App. 567, 604 (2015) (citing *State v. Noah*, 103 Wash. App. 29, 50 (2000)).

⁴⁰⁶ *Magill v. Avonworth Baseball Conference*, 516 F.2d 1328, 1331 (3d Cir. 1975); *SMI Indus., Inc. v. Lanard & Axilbund, Inc.*, 481 F. Supp. 459, 462 (E.D. Pa. 1979); *Sament v. Hahnmenn Med. Coll. & Hosp. of Philadelphia*, 413 F. Supp. 434, 436 (E.D. Pa. 1976), *aff'd*, 547 F.2d 1164 (3d Cir. 1977).

⁴⁰⁷ *Girard v. 94th St. & Fifth Ave. Corp.*, 396 F. Supp. 450 (S.D.N.Y. 1975), *aff'd*, 530 F.2d 66 (2d Cir. 1976).

⁴⁰⁸ *Id.* at 453.

⁴⁰⁹ *Id.* at 454.

⁴¹⁰ *Girard v. 94th St. & Fifth Ave. Corp.*, 530 F.2d 66, 69 (2d Cir. 1976).

B. Viewpoint II: State is Responsible for Action

This second view of state action is based, not on the action of the state, but that the state is simply *responsible* for the act, so that it was not the private party's action that violated the constitution, but the state's failure to prevent or ameliorate that act which violated the Constitution. For example, in the Fourteenth Amendment context, the argument that the Equal Protection Clause requires the state to protect its citizens against private violence and discrimination does not mean the private act itself violated the Clause; instead, this view argues the Equal Protection Clause is only violated when the state, not a private individual, denies the equal protection of its laws.⁴¹¹ In other words, the state's inaction or failure to prevent the private injustice or discrimination is the state action.⁴¹²

This idea of state action is prominently expressed in *Blum*, where the Supreme Court stated the purpose of the state action doctrine is to ensure that the Constitution is only invoked when the state is responsible for the alleged constitutionally infringing conduct.⁴¹³ The public function test embodies this idea: where state action is found when a private party performs functions traditionally and exclusively reserved to the State.⁴¹⁴ A state is responsible for public functions, and even when a private party performs a public function, but may have no other connection to the state, the state would be responsible for the private party's actions. The state cannot shirk this duty by delegating certain functions to private individuals.⁴¹⁵

As Justice Goldberg put forth: "The Fourteenth Amendment was therefore cast in terms under which *judicial power would come into play where the State withdrew or otherwise denied the guaranteed protection from legal discriminations*, implying inferiority in civil society"⁴¹⁶ As some commenters have noted, one of the central purposes of the Fourteenth Amendment was to establish a federal constitutional right to protection.⁴¹⁷

⁴¹¹ See Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. CIV. RTS. L.J. 219 (2009).

⁴¹² Barbara Rook Snyder, *Private Motivation, State Action and the Allocation of Responsibility for Fourteenth Amendment Violations*, 75 CORNELL L. REV. 1053, 1059 (1990).

⁴¹³ *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

⁴¹⁴ *Santiago v. Puerto Rico*, 655 F.3d 61, 69 (1st Cir. 2011) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974)); see also *Horvath v. Westport Library Ass'n*, 362 F.3d 147, 151 (2d Cir. 2004).

⁴¹⁵ *Giannattasio v. Stamford Youth Hockey Ass'n, Inc.*, 621 F. Supp. 825, 827 (D. Conn. 1985) (citing Supreme Court cases).

⁴¹⁶ *Bell v. State of Md.*, 378 U.S. 226, 296, 304 (1964) (Goldberg, J., concurring) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308) (emphasis added).

⁴¹⁷ Steven J. Heyman, *The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment*, 41 DUKE L.J. 507, 509 (2013–2014). While *DeShaney* may have held "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors," *DeShaney v. Winnebago City. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989), *DeShaney* was a due process case, and the Supreme Court's reasoning in *DeShaney* is not applicable to the equal protection clause, as the *DeShaney* Court stated: "[t]he State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the

One such example of this second view—when the state is simply *responsible* for the action—is in *Seidenberg v. McSorleys' Old Ale House, Inc.*,⁴¹⁸ where the plaintiffs alleged the defendant's refusal to serve women in its bar constituted a denial of their constitutional rights under the Equal Protection Clause of the Fourteenth Amendment.⁴¹⁹ In weighing the facts to determine whether there was sufficient state action, the court acknowledged equal protection must be balanced against the individual freedom of association and freedom of choice in private matters.⁴²⁰ The court was asked to find state action in the licensing of the bar, but no other state action was alleged.⁴²¹ Here, the court found that when a state licenses this enterprise pursuant to a state statute with pervasive control, the state involvement in the business requires the company to comply with the Constitution.⁴²² However, the action would only be state action when connected to the actual license.⁴²³ Furthermore, this "pervasive regulation" concept has generally been limited to that particular case, as the Second Circuit has distinguished *Seidenberg* as the state regulation was found to be particularly pervasive, stating the "mere fact that the defendants here have operated under a license" was not a reason to find state action.⁴²⁴

Examples of when the state is simply *responsible* for a private party's action has been found by some courts when a statute authorizes an action. One such example of this is in *Parks v. "Mr. Ford"*.⁴²⁵ The lower court found there was no state action in a garageman's lien on a car within any of the three categories of state action: (1) where state courts enforced an agreement affecting private parties; (2) where the state "significantly" involved itself with the private party; and (3) where there was private performance of a government function.⁴²⁶ The court even distinguished *Shelley* on the grounds the defendants never invoked the power of the state courts to enforce their liens on the car⁴²⁷—a distinction Justice Gibbons in his concurring opinion on appeal called meritless.⁴²⁸

But on appeal, the Third Circuit majority did find state action in this case, stating that state action is present when a garageman sells a customer's vehicle under the statute.⁴²⁹ The Court's rationale was the garageman's

Equal Protection Clause." *DeShaney*, 489 U.S. at 197 n. 3; *Nabozny v. Podlesny*, 92 F.3d 446, 456 n.7 (7th Cir. 1996).

⁴¹⁸ *Seidenberg v. McSorleys' Old Ale House, Inc.*, 317 F. Supp. 593 (S.D.N.Y. 1970).

⁴¹⁹ *Id.* at 594.

⁴²⁰ *Id.* at 597.

⁴²¹ *Id.* at 598.

⁴²² *Seidenberg v. McSorleys' Old Ale House, Inc.*, 317 F. Supp. 593, 604–05 (S.D.N.Y. 1970).

⁴²³ *Hollander v. Copacabana Nightclub*, 580 F. Supp. 2d 335, 342 (S.D.N.Y. 2008), *aff'd*, 624 F.3d 30 (2d Cir. 2010).

⁴²⁴ *Bond v. Dentzer*, 494 F.2d 302, 306 (2d Cir. 1974).

⁴²⁵ *Parks v. "Mr. Ford"*, 556 F.2d 132, 141 (3d Cir. 1977).

⁴²⁶ *Id.* at 135.

⁴²⁷ *Id.* at 135–36.

⁴²⁸ *Parks v. "Mr. Ford"*, 556 F.2d 132, 155 (3d Cir. 1977) (Gibbons, J., concurring).

⁴²⁹ *Id.* at 141.

power to sell the car arose solely from the legislation and directed him to follow the same procedures employed by a sheriff or constable.⁴³⁰ In enacting its statutory scheme, the court found the state literally gave to private individuals, the powers traditionally exclusively given to sheriffs and constables.⁴³¹

However, when a private person merely uses a self-help remedy recognized by the state without invoking state involvement, most courts have determined those actions do not constitute state action.⁴³² A year after *Parks* was decided, *Flagg Brothers* appeared before the Supreme Court, in which the Court held there was no state action when a warehouseman proposed to sell seized goods entrusted to him for storage, as permitted by New York statute.⁴³³ In holding so, the Court noted even absent statute, there were common-law remedies for a creditor, and the State of New York did not compel the sale of the goods, but “merely announced the circumstances under which its courts will not interfere with a private sale” in the state statute.⁴³⁴ This parallels and confirms the Court’s holdings that “regulation of an entity, standing alone, will not make a private entity an agent of the state.”⁴³⁵ And even when the state issues a trespass notice at the request of a private actor, some courts have held there was not sufficient state action.⁴³⁶

However, even after *Flagg Brothers*, some courts have found state action in this type of lien process. For example, in *Gem Plumbing & Heating Co. v. Rossi*,⁴³⁷ the Rhode Island Supreme Court was faced with the question of whether a mechanical lien implicated the due process clause.⁴³⁸ The court found there was overt and significant governmental assistance in almost every step of the process.⁴³⁹ Similarly, the Supreme Court of Montana found that the state was an integral part in private terminations of parent rights and concluded that the extent of State involvement in adoption proceedings was sufficient to implicate the Montana Constitution.⁴⁴⁰

⁴³⁰ *Id.*

⁴³¹ *Id.*

⁴³² *See, e.g.,* *Luria Brothers & Co. v. Allen*, 672 F.2d 347, 354 (3d Cir. 1982).

⁴³³ *Flagg Brothers v. Brooks*, 436 U.S. 149, 152 (1978).

⁴³⁴ *Id.* at 166.

⁴³⁵ *Andrews v. Fed. Home Loan Bank of Atlanta*, 998 F.2d 214, 218 (4th Cir. 1993); *see* *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176–77 (1972).

⁴³⁶ *Grassle v. City of Davenport, Iowa*, 872 N.W.2d 199 (Iowa Ct. App. 2015) (“The Davenport police officer did not cause or encourage the trespass notice to be issued, but merely filled it out and served it on Grassle at Iossi’s request.”).

⁴³⁷ *Gem Plumbing & Heating Co. v. Rossi*, 867 A.2d 796 (R.I. 2005).

⁴³⁸ *Id.* at 809.

⁴³⁹ *Id.*

⁴⁴⁰ *In re Adoption of A.W.S.*, 339 P.3d 414, 418 (Mont. 2014).

VIII. DO STATES HAVE A DUTY TO AMELIORATE STRUCTURAL INJUSTICE?

“Race matters. Race matters in part because of the long history of racial minorities’ being denied access to the political process. . . . [and is] persistent racial inequality in society—inequality that cannot be ignored and that has produced stark socioeconomic disparities.”⁴⁴¹

Rights that are not protected—particularly the right to be treated as an equal citizen—are worthless. There is no doubt Congress has the power to enforce equal rights of its citizens.⁴⁴² In fact, the plurality in *City of Richmond v. J.A. Croson Co.*⁴⁴³ recognized Congress has a greater power to deal with racial discrimination than the states and local governments, even though both Congress and the states are subject to strict scrutiny.

In this analysis of how state and federal courts interpret the state action requirements, the central concept is determining when constitutional protections come into play. As provided above, in the context of racial discrimination, citizens are not constitutionally protected from discrimination by private parties⁴⁴⁴ but when there is a finding of state action, constitutional protections are implicated.⁴⁴⁵ Some courts have stated the “state is not bound by the United States Constitution to affirmatively forbid private racial discrimination. The state is permitted a neutral position.”⁴⁴⁶ However, other courts have suggested that less government involvement is necessary to constitute state action when the equal protection violation involves racial discrimination,⁴⁴⁷ even claiming *de minimis* state action could satisfy the requirement.⁴⁴⁸ Some courts have even acknowledged this

⁴⁴¹ *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1676 (2014) (Sotomayor, J., dissenting) (citations omitted).

⁴⁴² U.S. Const. amend. XIV.

⁴⁴³ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

⁴⁴⁴ *Single Moms, Inc. v. Montana Power Co.*, 331 F.3d 743, 748 (9th Cir. 2003) (dismissing constitutional claims because “[M]ontana P[ower] C[ompany]’s efforts to influence lawmakers [to deregulate the Montana energy markets] through lobbying were private acts not fairly attributable to the State of Montana.”).

⁴⁴⁵ *See Bible Believers v. Wayne City*, Mich., 805 F.3d 228, 248 (6th Cir. 2015).

⁴⁴⁶ *In re Referendum Petition No. 1968-1 of City of Norman*, 475 P.2d 381, 384.

⁴⁴⁷ *See, e.g., Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 841 n.6 (9th Cir. 1999); *Granfield v. Catholic Univ. of Am.*, 530 F.2d 1035, 1046 n.29, *cert. denied*, 429 U.S. 821 (1976); *Greco v. Orange Memorial Hosp. Corp.*, 513 F.2d 873, 879 (5th Cir. 1975); *Turner v. Impala Motors*, 503 F.2d 607, 611 (6th Cir. 1974); *Jackson v. Statler Foundation*, 496 F.2d 623, 628–29 (2d Cir. 1974); *Fletcher v. Rhode Island Hosp. Trust Nat’l Bank*, 496 F.2d 927, 931 (1st Cir. 1974), *cert. denied*, 419 U.S. 1001 (1974); *Adams v. S. Cal. First Nat’l Bank*, 492 F.2d 324, 334–35 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974); cf. *Lucas v. Wisconsin Electric Power Co.*, 466 F.2d 638, 656 (7th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973); *R.I. Chapter, Associated Gen. Contractors of Am., Inc. v. Kreps*, 450 F. Supp. 338, 350 n.6 (D.R.I. 1978).

⁴⁴⁸ *See Anderson v. Randall Park Mall Corp.*, 571 F. Supp. 1173, 1175 (N.D. Ohio 1983) (citing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961)) (“It is clear that, when racial discrimination

rationale behind lowering the state action standard in racial discrimination could be applicable in cases involving sex discrimination.⁴⁴⁹

But the vital question is: can state *inaction*—amounting to permission—actually constitute state action? This question falls under the second view of state action described above: the state is *responsible* for the action, so that failure to ameliorate the structural injustice actually violates the Constitution. Charles Black was one of the foremost authorities on this issue of state inaction:

[E]qual protection of the laws is denied by the state whenever the legal regime of the state, which numbers amongst its ordinary police powers the power to protect the Negro against discrimination based on his race, elects not to do so—choosing instead to envelop and surround the discriminators with the protection and aids of law and with the assistances of communal life.⁴⁵⁰

Because the state's inaction would violate constitutional protections, it would have an obligation redress the private party's actions. State inaction can just as readily deny equal protection of the laws as state action,⁴⁵¹ as the Eleventh Circuit has recognized: failing to act may be even more detrimental than acting.⁴⁵² One of the earliest examples of inaction, and one of the most famous, is *Marbury v. Madison*.⁴⁵³ The case shows that there are many circumstances where state actors can violate the Constitution by simply failing to perform a constitutional duty.⁴⁵⁴

The plain meaning of the Fourteenth Amendment actually supports the proposition that the government has an affirmative duty, as the text of the Amendment reads: “nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws.”⁴⁵⁵ The double negative in the phrase “to not deny” can be literally interpreted to mean “to provide,”⁴⁵⁶ making state inaction—failing to provide equal protection—constitutionally

is involved, even de minimis state action may be sufficient to bring the challenged activities within the scope of § 1983.”).

⁴⁴⁹ *Barrett v. United Hosp.*, 376 F. Supp. 791, 806 n.26 (S.D.N.Y.), *aff'd*, 506 F.2d 1395 (2d Cir. 1974).

⁴⁵⁰ Black, *supra* note **Error! Bookmark not defined.**, at 108.

⁴⁵¹ See William D. Araiza, *Courts, Congress, and Equal Protection: What Brown Teaches Us About the Section 5 Power*, 47 HOW. L.J. 199 (2004).

⁴⁵² *Taylor By & Through Walker v. Ledbetter*, 818 F.2d 791, 799 (11th Cir. 1987) (holding “children can state a claim based upon deprivation of a liberty interest in personal safety when the officials fail to follow this mandate” of ensuring the well-being and promoting the welfare of children in foster care).

⁴⁵³ *Marbury v. Madison*, 5 U.S. 137 (1803).

⁴⁵⁴ Fee, *supra* note 296, at 590 n.94.

⁴⁵⁵ U.S. CONST. amend. XIV.

⁴⁵⁶ Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 HOFSTRA L. REV. 1379, 1402 (2006).

impermissible.⁴⁵⁷ The Equal Protection Clause “directly and unambiguously” covers state inaction by stating that no state shall “deny . . . equal protection of the laws.” The Equal Protection clause imposes an affirmative obligation for the states to provide for the equal protection of its citizens, and this duty can be violated by state inaction.⁴⁵⁸ Inaction is the classic and most efficient way of denying protection to individuals.⁴⁵⁹

Even before the *Civil Rights Cases*, courts have determined that denying rights includes state inaction and omission to protect.⁴⁶⁰ However, the Supreme Court has generally held in most contexts that simply permitting a private choice does not support a finding of state action.⁴⁶¹ But as described in this Article, courts have sometimes found different requirements for state action in the racial injustice situation. What courts today seemed to have forgotten, however, is that the state action doctrine is about *responsibility*, not solely causation, even though causation often is how that responsibility arises.⁴⁶² A state is responsible for the equal protection of its citizens, and allowing structural injustice to continue is action for which the state is responsible.

A state failing to rectify structural injustice makes the conscious decision to permit the infringement of equal protection for its citizens, and this should constitute state action for the purposes of the Constitution. At the time of the enactment of the Fourteenth Amendment and the formulation of the state action doctrine, the common law was meant to protect against private discrimination. The state action doctrine arose from the Supreme Court’s decision in the *Civil Rights Cases*,⁴⁶³ where the Supreme Court held private discrimination was prohibited through the common law rather than the federal Constitution, as discrimination would be addressed by the laws of the state.⁴⁶⁴ Constitutions were not designed to micromanage private disputes between citizens, but citizens must resort to statutes and the common law to resolve most suits.⁴⁶⁵ The state has the power to stop private discrimination, and a state’s failure to do so constitutes a state decision to permit the violations.⁴⁶⁶ A few courts have found the failure of a state or

⁴⁵⁷ Robin West, *Response to State Action and a New Birth of Freedom*, 92 GEO. L.J. 819, 826 (2004).

⁴⁵⁸ Randy E. Barnett, *We the People: Each and Every One*, 123 YALE L.J. 2576, 2590 (2014).

⁴⁵⁹ Black, *supra* note 7, at 73; James M. Oleske, Jr., “State Inaction,” *Equal Protection, and Religious Resistance to LGBT Rights*, 87 U. COLO. L. REV. 1, 30 (2016).

⁴⁶⁰ *United States v. Hall*, 26 F. Cas. 79, 81 (C.C.S.D. Ala. 1871).

⁴⁶¹ *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 54 (1999).

⁴⁶² Don Herzog, *The Kerr Principle, State Action, and Legal Rights*, 105 MICH. L. REV. 1, 33 (2006).

⁴⁶³ Williams, *supra* note 28, at 347.

⁴⁶⁴ *Civil Rights Cases*, 109 U.S. 3, 17 (1883).

⁴⁶⁵ See, e.g., *Putensen v. Hawkeye Bank*, 564 N.W.2d 404, 408 (Iowa 1997).

⁴⁶⁶ Chemerinsky, *supra* note 1, at 521.

city to act constitutes state action when the state is under a duty to act and that failure to act results in the deprivation of constitutional rights.⁴⁶⁷

One such duty to act comes from our history as a country, where the effects of structural injustice and the continued pattern of discrimination continues today, perpetuated by state inaction. Professor Lawrence Sager persuasively asserts:

If we believe, as we must, that slavery and its aftermath of legally endorsed racial caste was deeply unjust; and if we believe, as we should, that we continue to suffer social and economic divisions along the fault lines of race as a consequence of our history, . . . [as] government at all levels actively supported slavery and condoned the entrenchment of racism, then we have the ingredients of the case that government is obliged to energetically pursue the effacement of injustice's entrenched consequences. The kinds of efforts to which this claim could run include enforced legal restrictions on *private* discrimination in housing and employment of the sort with which we are familiar as well as programs giving minority applicants or enterprises a boost in various public settings.⁴⁶⁸

Several commentators have agreed there is an affirmative obligation on the government to not only to treat citizens equally, but to protect its citizens from private violations of law that undermines their right to equality, even noting that failing to provide equal protection can come easily from inaction or from action.⁴⁶⁹ The failure to see that inaction can be just as harmful as state action actually prevents the equal protection of citizens.⁴⁷⁰ Similarly, many influential commentators argue the Fourteenth Amendment significantly restricts the state's discretion to refuse state or judicial protection, finding state action even when the state chooses not to intervene

⁴⁶⁷ See *Ludtke v. Kuhn*, 461 F. Supp. 86, 94 (S.D.N.Y. 1978).

⁴⁶⁸ Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 411, 421 (1993) (emphasis added); see ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT 23–25 (1994) (noting that denial of state protection to one group of its citizens leaves those citizens profoundly unequal); Steven J. Heyman, *The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment*, 41 DUKE L.J. 507, 546 (1991) (suggesting central purpose of Fourteenth Amendment was to establish right to protection as part of federal constitution); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754 (1985) (discussing race-conscious reconstruction programs enacted concurrently with Fourteenth Amendment).

⁴⁶⁹ Linda E. Fisher, *Anatomy of an Affirmative Duty to Protect*, 42 U.S.C. Section 1986, 56 WASH. & LEE L. REV. 461, 466 (1999).

⁴⁷⁰ See *DeShaney v. Winnebago Cnty. Dep't of Social Servs.*, 489 U.S. 189, 212 (1989) (Brennan, J., dissenting, joined by Marshall and Blackmun, JJ.).

in private disputes.⁴⁷¹ In refusing to apply the Equal Protection clause in racial discriminatory contexts, courts have severely overlooked the fact that “state inaction can be just as heinous as state action,” particularly when it results in violence, intimidation, or discrimination against racial minorities.⁴⁷²

So we must find, in the context of private racial discrimination, state inaction to prevent that injustice equates state action. There have been cases where the court has found state inaction to be state action,⁴⁷³ and the Supreme Court has determined, primarily in voting rights cases, that when the Constitution provides an affirmative constitutional obligation on the legislature, state action can be found by the failure of the legislature to take action.⁴⁷⁴ State courts have come to the similar conclusions under their own constitutions, some seeming to suggest that passive legislation with racially discriminatory features can be found to constitute state action.⁴⁷⁵ When racial discrimination is involved in the alleged conduct, the state action doctrine requires a lesser degree of state involvement to implicate the Constitution.⁴⁷⁶

For example, in *Sheff v. O'Neill*,⁴⁷⁷ the Connecticut Supreme Court was faced with claims by public elementary schoolchildren that the state legislature had a constitutional obligation under the Connecticut state constitution Article Eight, Section One, and Article One, Sections One and Twenty, to remedy alleged educational inequities in state public schools.⁴⁷⁸ The claim was that students in the state public schools were burdened by severe disadvantages because of their racial isolation and socioeconomic deficit, and they were deprived of an equal opportunity to public

⁴⁷¹ Christina Bohannon, *Copyright Infringement and Harmless Speech*, 61 HASTINGS L.J. 1083 (2010); Sunstein, *supra* note 21, at 887; Henry C. Strickland, *The State Action Doctrine and the Rehnquist Court*, 18 HASTINGS CONST. L.Q. 587 (1991) (citing secondary sources).

⁴⁷² See ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT, 92 GEO. L.J. 819 (1994).

⁴⁷³ See *Catlette v. United States*, 132 F.2d 902 (4th Cir. 1943) (affirming the conviction of a sheriff for failing to protect members of a Jehovah's Witnesses group in their constitutional rights of free speech and free exercise of religion); *Azar v. Conley*, 456 F.2d 1382, 1387(6th Cir. 1972); *Ingram v. Dunn*, 383 F.Supp. 1043 (N.D. Ga. 1974), *aff'd*, 514 F.2d 1070; *Minshew v. Smith*, 380 F. Supp. 918, 922 (N.D. Miss. 1974); *Golden v. Biscayne Bay Yacht Club*, 530 F.2d 16, 30–31 (5th Cir. 1976).

⁴⁷⁴ See *Reynolds v. Sims*, 377 U.S. 533, 561–63, 568 (1964); *Bd. of Estimate v. Morris*, 489 U.S. 688, 692–93 (1989); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 227 (1986); *Abate v. Mundt*, 403 U.S. 182, 185–86 (1971); *Moore v. Ogilvie*, 394 U.S. 814, 818 (1969); *United States v. Classic*, 313 U.S. 299, 318–19 (1941).

⁴⁷⁵ See *Kennebec, Inc. v. Bank of the W.*, 565 P.2d 812, 816 (Wash. 1977) (“It is our view that absent racial discrimination overtones, significant ‘state action’ cannot be predicated upon such passive involvement as the enactment of permissive state laws which merely authorize, and to that extent, encourage private conduct.”).

⁴⁷⁶ *Scott v. Eversole Mortuary*, 522 F.2d 1110, 1119 (9th Cir. 1975) (Ely, J., concurring in part and dissenting in part) (citing *Jackson v. Statler Found.*, 496 F.2d 623, 628–29 (2d Cir. 1974); *Lefcourt v. Legal Aid Soc’y*, 445 F.2d 1150, 1155 n.6 (2d Cir. 1971)).

⁴⁷⁷ *Sheff v. O'Neill*, 238 Conn. 1 (1996).

⁴⁷⁸ *Id.* at 4–5.

education.⁴⁷⁹ While the state had no part in the segregation of ethnic minorities and socioeconomic status in Hartford, the state controls the school system and its funding.⁴⁸⁰ As the constitution only protects against violations by the state, the court had to determine whether state action was present.⁴⁸¹

Unlike the federal Constitution, Connecticut's state constitution contains a fundamental right to education and a duty of the state to maintain that right.⁴⁸² The court determined it was not bound by federal precedent when interpreting that affirmative obligation, and noted that even Supreme Court precedent has found state action where the legislature fails to perform its constitutional duty.⁴⁸³ The state constitution imposed an affirmative duty on the legislature to provide an equal educational opportunity for all public schoolchildren, and the state action doctrine could not prevent a claim of constitutional deprivation.⁴⁸⁴ It did not matter whether the state created the conditions, but the essential fact was the state knew about the racial and ethnic isolation and failed to remedy it.⁴⁸⁵ The Connecticut Supreme Court concluded that the state did not meet its affirmative constitutional obligation, constituting sufficient state action to invoke the constitutional protections, despite the fact the legislature did not create the problem.⁴⁸⁶

Likewise, the Fifth Circuit has found state action when a city was responsible for the action but failed to act. In *Jennings v. Patterson*,⁴⁸⁷ a private defendant (white) constructed a barricade across a street preventing the other residents (black) from using that specific road, adding almost two miles to their journey into town, while only the sole white resident has an easement across the barricade.⁴⁸⁸ The defendants filed a civil rights suit against the City, claiming their rights were violated.⁴⁸⁹ In response, the City claimed this road was private property and they did not have the power to remove the barricade.⁴⁹⁰

The Court was faced with the question whether the City's failure to remove the barricade constituted state action.⁴⁹¹ The court looked to the legislative purpose of 42 U.S.C. § 1983, stating the statute was passed to ensure state laws were enforced and individual rights protected.⁴⁹² Because the City failed to remove the barricade, and because these persons were

⁴⁷⁹ *Id.* at 5.

⁴⁸⁰ *Id.* at 10–11.

⁴⁸¹ *Id.* at 23.

⁴⁸² *Id.* at 21.

⁴⁸³ *Sheff*, 238 Conn. at 22–23.

⁴⁸⁴ *Id.* at 23.

⁴⁸⁵ *Id.*

⁴⁸⁶ *Id.*

⁴⁸⁷ *Jennings v. Patterson*, 488 F.2d 436 (5th Cir. 1974).

⁴⁸⁸ *Id.* at 439.

⁴⁸⁹ *Id.*

⁴⁹⁰ *Id.* at 440.

⁴⁹¹ *Id.* at 440–41.

⁴⁹² *Id.* at 441 (citing *Monroe v. Pape*, 365 U.S. 167, 180 (1961)).

black, they were denied the right to use and enjoy their property on the same basis as white persons, the Fifth Circuit held this inaction to be state action.⁴⁹³

However, this type of finding of state inaction constituting state action (if found at all) has often been limited to only racial discrimination cases.⁴⁹⁴ The Fifth Circuit later found in a gender discrimination claim where department stores charged alterations fees for women's clothing but not mens' clothing, that "state inaction with respect to the business practices of private businesses is not state action."⁴⁹⁵ The Court cited *Jennings v. Patterson* for the proposition that there are cases where state inaction could amount to state action because, in *Patterson*, there was a clear duty to act through normal state functions to keep its public roads free of barriers.⁴⁹⁶ But the Fifth Circuit distinguished this alleged gender discrimination on the basis that it is not the normal function of the state to tell private businesses what fees to impose for services.⁴⁹⁷

Similarly, in *Harris v. McRae*,⁴⁹⁸ the plaintiffs brought suit against the state because the government failed to provide funding for abortions needed by poor women, but the Court held that government had no duty to remove barriers "not of its own creation."⁴⁹⁹ Apparently, poverty is simply present, and the government has no duty to alleviate it. Furthermore, other Circuits have maintained the conclusion that, absent state action, there is no constitutional duty to remedy racial discrimination.⁵⁰⁰

However, the Second Circuit Court of Appeals, in explaining the distinctions in its cases in which state action was alleged, stated, "This dichotomy is explained in part by the double 'state action' standard which has been recognized one, a less onerous test for cases involving racial discrimination, and a more rigorous standard for other claims."⁵⁰¹ Even state courts have found this same "double standard" where traditional state action tests, such as the nexus test, are inapplicable, providing the reasoning for the

⁴⁹³ *Jennings*, 488 F.2d at 441.

⁴⁹⁴ See *City of Memphis v. Greene*, 451 U.S. 100, 123 (1981) (finding that the city's action of closing a street did not violate the Constitution, finding the "city has conferred a benefit on certain white property owners but there is no reason to believe that it would refuse to confer a comparable benefit on black property owners. The closing has not affected the value of property owned by black citizens, but it has caused some slight inconvenience to black motorists."); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970) (holding on remand she could establish a violation of the equal protection clause if she could prove that the restaurant owner's actions were taken pursuant to a "state-enforced custom" requiring racial segregation in restaurants).

⁴⁹⁵ *Becnel v. City Stores Co.*, 675 F.2d 731, 733 (5th Cir. 1982).

⁴⁹⁶ *Id.*

⁴⁹⁷ *Id.*

⁴⁹⁸ *Harris v. McRae*, 448 U.S. 297 (1980).

⁴⁹⁹ *Id.* at 316.

⁵⁰⁰ See, e.g., *United States v. Bd. of Sch. Comm'rs of City of Indianapolis, Ind.*, 474 F.2d 81, 84 (7th Cir. 1973); *Holton v. City of Thomasville Sch. Dist.*, 425 F.3d 1325, 1339 (11th Cir. 2005).

⁵⁰¹ *Lockwood v. Killian*, 172 Conn. 496, 503 (1977) (quoting *Jackson v. Statler Found.*, 496 F.2d 623, 629 (2d Cir. 1974)),

double standard derived from the historic connection of the equal protection clause and race as “even governmental inaction takes on the appearance of affirmative approval and support.”⁵⁰² Many commentators have also noted this lower standard for a finding of state action in the racial discrimination context.⁵⁰³

Following *Shelley*’s wake—determining that judicial enforcement of a private racially discriminatory covenant violated the Equal Protection Clause⁵⁰⁴—some scholars argued the state-action doctrine was no longer necessary.⁵⁰⁵ However, others simply criticized the opinion by not providing any guidance on how to determine if state action took place, noting the “not obvious and [] crucial step” is whether the state can be held responsible for giving effect to individual agreements they were entirely free to make.⁵⁰⁶

Many courts still find that purely private discrimination is not constitutionally prohibited. But once the state becomes involved to enforce that decision, there may be sufficient state action. For example, the court in *State v. Brown* was faced with the situation where a private hotel refused service to a person based on his race, and when he refused to leave, the hotel obtained a warrant for his arrest.⁵⁰⁷ The court held that an owner of a private place may constitutionally refuse service based on racial classifications because the Fourteenth Amendment only bars state action.⁵⁰⁸ However, the court cited *Shelley* in deciding that the state cannot enforce racially discriminatory decision by arresting and prosecuting the person for trespass, as “[t]o do so would place the weight of State power behind the discriminatory action of the owner or proprietor.”⁵⁰⁹

Cases like *Shelley* and its progeny perform a key role in fighting structural injustice. One commentator noted that “[e]xpanding ‘state action’ was a way of bypassing Congress; it was functionally equivalent to getting a range of civil rights legislation enacted before Congress was willing to do so. *Shelley v. Kraemer* anticipated the federal open housing laws by more than twenty years.”⁵¹⁰ When the legislature fails to act, who else is left but

⁵⁰² R.I. Chapter, *Associated Gen. Contractors of Am., Inc. v. Kreps*, 450 F. Supp. 338, 349 n.6 (D.R.I. 1978) (citing *Lefcourt v. Legal Aid Soc’y*, 445 F.2d 1150, 1155 n.6 (2d Cir. 1971)).

⁵⁰³ See, e.g., *Imperatore*, *supra* note 365, at 19; Henry J. Friendly, *The Public-Private Penumbras—Fourteen Years Later*, 130 U. PA. L. REV. 1289, 1291 (1982); Jessica Heyman, *Introducing the Jury Exception: How Equal Protection Treats Juries Differently*, 69 N.Y.U. ANN. SURV. AM. L. 185, 188 (2013).

⁵⁰⁴ *Shelley v. Kraemer*, 334 U.S. 1, 23 (1948).

⁵⁰⁵ See, e.g., Chemerinsky, *supra* note 1, at 556.

⁵⁰⁶ Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 29 (1959).

⁵⁰⁷ *State v. Brown*, 195 A.2d 379, 381 (Del. 1963).

⁵⁰⁸ *Id.* at 581.

⁵⁰⁹ *Id.* at 583.

⁵¹⁰ David A. Strauss, *State Action After the Civil Rights Era*, 10 CONST. COMMENT. 409, 413 (1993).

the courts to protect the constitutional rights of the people to not be discriminated?⁵¹¹

Justice Friendly provided that denying constitutional rights demands judicial protection, as “our oath and our office require no less of us.”⁵¹² While this idea of lessening the requirement of state action has not always been present, there is still hope the principle can be maintained. Some continue to argue that racial discrimination is so distinctly offensive and was the primary aim of the Fourteenth Amendment that a less state involvement may constitute state action.⁵¹³ Racial discrimination is a category generally given a broader range in state action analysis.⁵¹⁴ Even following the decision in *Shelley*, the Supreme Court has found that “[o]ur cases make clear that the impetus for the forbidden discrimination need not originate with the State if it is state action that enforces privately originated discrimination.”⁵¹⁵

The state action doctrine may very well be lowered or even removed in racial discrimination contexts. However, this does necessarily advocate ridding the state action doctrine in its entirety. The conclusion is that state action is always present when the state permits private racial discrimination, even when the state did not act, as the failure to prevent the structural injustice to continue violates the equal protection rights of its citizens.⁵¹⁶

IX. CONCLUSION

While the “sun [ha]s [been] setting on the concept of state action”⁵¹⁷ for over forty years, it has not gone down. State action is still a field of confusing litigation and precedent, one that may plague the courts for a long time to come. While the state action doctrine plays a role in preserving the separation of powers between the courts and the legislatures, it does little to protect personal liberty in the sense that state action always chooses the violator’s right to violate another’s constitutional rights rather than balancing the rights between parties. The doctrine’s policies are even less persuasive under the state constitutions, as the state action doctrine was created partly to protect the system of federalism in this country, allowing the states to use their plenary power to regulate private relationships.

⁵¹¹ *Chmill v. City of Pittsburgh*, 412 A.2d 860, 866 (1980); see also William W. Van Alstyne & Kenneth L. Karst, *State Action*, 14 STAN. L. REV. 3, 5 (1961) (“The abdication of local responsibility for assuring racial equality has no doubt contributed to an increased willingness of the Supreme Court to offer protection in the form of national constitutional standards, applicable to more and more activities previously considered ‘private.’”).

⁵¹² *Reynolds v. Sims*, 377 U.S. 533, 566 (1964).

⁵¹³ *Coleman v. Wagner Coll.*, 429 F.2d 1120, 1127 (2d Cir. 1970) (Friendly, J., concurring).

⁵¹⁴ *Scott v. Eversole Mortuary*, 522 F.2d 1110, 1119 (9th Cir. 1975) (“A lesser showing is required in such cases to establish state action than in cases imposing a more rigorous standard for other claims”).

⁵¹⁵ *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972).

⁵¹⁶ Black, *supra* note 7, at 100.

⁵¹⁷ Williams, *supra* note 28, at 389.

State inaction to structural injustice is essentially a state permitting private discrimination to continue, and that inaction violates the constitutional right to equal protection. The second view of state action described above holds the state liable for the action because the state is responsible for the action, and the state legislatures, not the courts, have a duty to ameliorate institutional discrimination. But when the state legislatures fail to act to protect its people from unconstitutional discrimination, even if the state did not create the discrimination, state action is always found and the courts should hold the state constitutionally liable under the state action doctrine.⁵¹⁸ “No person shall be denied the equal protection of the laws of this state,”⁵¹⁹ and the state legislatures need to see no one is.

⁵¹⁸ *Boyd v. United States*, 116 U.S. 616, 635 (1886) (“It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.”).

⁵¹⁹ N.Y. CONST. art. I, § 11; CAL. CONST. art. I, § 7(a); TEX. CONST. art. I, § 3a (“Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin.”).