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## *ARTICLES*

### THE STATE ACTION PRINCIPLE AND ITS CRITICS

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*Almost all of the Constitution's provisions apply to governments, state and federal, and not directly to private people. But the legal rules of private people are protected by the government, which raises the question of whether exercises of those rights are ever subject to constitutional rules. The state action principle, which is a standard feature of American constitutional law, holds that, in general, the decisions of private people in the exercise of their legal rights are not attributed to the government for purposes of the Constitution, even though the government's coercive power supports those rights. The state action principle has long been a matter of controversy, and several important contemporary scholars of constitutional law have criticized it, suggesting that it rests on a failure to understand that private rights rest on government coercion and that it interferes with the proper implementation of some important substantive constitutional rules. This Article defends the state action principle, arguing that it is conceptually coherent and reflects a vision of the Constitution that, although subject to debate as a normative matter, has much to be said for it. Rather than resting on a failure to see public power*

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*behind private rights, the principle is founded on the idea that private people, when they exercise private rights, are principals who are entitled to act on their own behalf. Government officers and institutions, by contrast, are agents acting on behalf of others. That distinction, not the presence of government coercion, supports the different treatment of private people exercising state-supported private rights and government actors exercising government power. The Article also argues that the state action principle does not undermine the constitutional norms that protect particular forms of liberty or that forbid certain forms of discrimination, as the critics suggest. Rather, the state action principle fits those protections for liberty and equality into a constitutional system in which the vast bulk of legal rules, including in particular the rules that give private people control over material resources, are found in the non-constitutional law and not the Constitution itself.*

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#### INTRODUCTION

THE Constitution consists overwhelmingly of rules about government. It prescribes the intricate set of rules that establish and empower government institutions and lay out their operating

procedures. Best known to most contemporary students of American constitutional law are the provisions that determine the power of government by limiting it. Like the rest, these provisions generally apply only to government and not to private people. Indeed, the Constitution includes hardly any rules that apply directly to private people. Rules that do apply directly to private people are of course made by the government, and they are subject to the requirements of the Constitution, but in many crucial respects such rules are quite different in their content from the laws that apply to the government. For example, Congress may not prefer one religion over another in allocating its resources, but private individuals may do so. States may take individuals' race into account in only limited circumstances, but private individuals are permitted to make decisions based on race except in specified situations. Though the Constitution constrains the way in which the law may regulate private individuals, the constraint is very loose, and an enormous range of rules for private conduct are constitutionally permissible. Taxes and spending may be high or low, for all the Constitution cares.

The standard way to express the foregoing observation is to say that constitutional rules apply only to state action and not to private action. An appropriation from Congress is state action under the Establishment Clause, whereas an individual's contribution to a church is private action. Laws about marriage are state action and may not take race into account, but individuals' decisions about whom to marry are not state action and may be based on race. We will refer to this general feature of American constitutional law as the state action principle.

Much ordinary, sub-constitutional law—think in particular of the common law rules of property, tort, and contract—defines and secures private rights. What are conventionally denominated as private-law rules enable private actors to make decisions concerning the use of resources they control. The government then enforces private actors' decisions. These government-backed private decisions routinely thwart the desires of other private persons who do not control the relevant resource. If *A* forbids *B* from taking a shortcut across *A*'s back yard, and the government enforces *A*'s decision, *B*'s freedom of action is limited. Thus one person's right is another person's duty; *A*'s empowerment is *B*'s constraint. Note

that the constraint on *B* arises from a combination of private and public choice, namely *A*'s private choice to exclude *B*, backed by the government's public choice to enforce it. The applicable rules of property—in this case the rule that gives an owner of property the right to exclude others—reflect the government's decision to support *A*'s decision, whatever it may be. The “state action” issue is whether the Constitution regulates the outcome when *A* decides to exclude *B* and the government enforces *A*'s decision. Certainly the Constitution constrains the ways in which the government may regulate *B*. It would in particular cases constrain the government's decision to exclude *B* from government-owned property.<sup>1</sup> Does the government's decision to enforce *A*'s private decision in particular cases to exclude *B* from privately owned property count as government regulation of *B*? Or does the Constitution apply only to the more open-ended general rule of property that allows *A* to exclude *B* if he chooses to do so?

According to standard doctrine, the general answer is that the Constitution stops with the governmental decision to adopt the open-ended rule and does not look into either the reasons for, or the results of, private exercises of discretion that the law will enforce. That result, dictated by the state action principle, is often attributed to the related principle—that the Constitution consists of rules for the government alone—of which it seems to be a straightforward application.

The principle sounds simple enough, but it is subject to longstanding objections, which have been refined by several prominent contemporary scholars. These scholars generally argue that the principle rests on distinctions—between public and private power, for example, or between state action and inaction—that do not reflect actual differences. They conclude that the constitutional line the state action doctrine draws between private action and state action is normatively and conceptually untenable. Though they tend

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<sup>1</sup> See, e.g., *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515–16 (1939) (making void ordinances forbidding holding public meetings in public places without permits); *Schneider v. State*, 308 U.S. 147, 164 (1939) (holding a municipality cannot “require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval”); *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 754 (1995) (stating that Ohio cannot, “on the claim of misperception of official endorsement, ban all private religious speech from the [public] square”).

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not to specify what the legal order would look like were the validity of their criticisms acknowledged and state action's function as a limit on the legal reach of constitutional norms discarded, the scholars insist that the line ought to be redrawn so that either the courts can more freely apply constitutional norms to private behavior or Congress can redefine the Constitution's boundaries and thus redistribute private power in explicit pursuit of constitutional values.

The criticisms of the state action doctrine do not implicate all constitutional rules, but the rules they do implicate are those with the highest profile in current thinking: constitutional protections of liberty and constitutional bans on discrimination. Suppose that *A* refuses *B* permission to take the shortcut across *A*'s land because *B* wears a political button expressing an opinion that *A* finds offensive. A law creating and compensating property owners for general pedestrian rights-of-way across private property with an exception for people expressing messages like *B*'s would violate principles of free expression.<sup>2</sup> The more general rule of property law that would enforce *A*'s private decision to exclude *B* would produce the same result as far as *B* is concerned. In both cases, *B*'s free expression would be limited and the limitation would be enforced by the government. According to the state action doctrine's critics, the two situations are the same in constitutionally relevant respects, and should be treated the same way by the Constitution. Parallel reasoning applies when *A*'s action is based not on *B*'s expression, but on *B*'s race. If the government could not grant pedestrian rights-of-way exclusively to members of one race, why should *A* be able to use government power to enforce his decision to do something similar? It can be easily seen, therefore, that eliminating the state action principle would dramatically expand constitutional constraints on government decisions concerning private control over resources.

As we read the critics, they have concluded that the state action principle is either a product of a mistake or it is a piece of obfuscation used to disguise a hidden agenda. Perhaps, they sometimes

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<sup>2</sup> It would also violate the Fifth Amendment's Takings Clause unless it provided for compensation to property owners, but we put that issue aside for the moment. See U.S. Const. amend. V.

imply, it is a form of self-deception combining the two. The mistake is the failure to grasp the significance of the fact that private power is backed by government power, and thus wrongly to continue to insist that private power and public power can be meaningfully distinguished and that private power is less to be feared by those whose liberty is restricted by it than public power. The obfuscation is the use of spurious distinctions between private and public to defend the existing distributions of private rights. The critics imply that state action's defenders normatively approve of existing distributions. They suggest that the doctrine's defenders entertain the view, which the critics consider to be unenlightened, that existing distributions are just and that, since they are just, the Constitution respects them and does not demand redistribution.

This Article defends the state action principle. Our defense may be mistaken, but it will not make the particular mistake of failing to acknowledge and come to grips with the fact that either private power rests on government power or that someone who is disadvantaged by a government-backed private choice is indeed disadvantaged. Nor does our defense rest on or imply that we embrace the view that existing distributions are necessarily just or that they ought not be revised.

Our thesis emerges from a conception of the Constitution that regards the document's principal function as having been to establish, empower, and limit government rather than to specify the content of rules that regulate private behavior or to ordain the distributional particulars of a just society. Whatever the normative merits of this conception, we believe both that it accurately (if incompletely) describes the constitutional system the Framers devised and that it encompasses the general state action principle. The principle we defend is the following: the exercise of a coercively enforced legal advantage by a private person is not a sufficient condition for the application to that person of constitutional norms addressed to government. The principle holds regardless of the impact the private behavior might have on the relative ability of other private individuals to accomplish their chosen ends by using their own legal rights. We do not believe that the state action principle instantiates constitutional liberties, nor do we think it describes a sphere of private power not reachable by government regulation. We do think it describes a sphere of private power that

is not subject to constitutional norms even though government coercion underwrites it. In other words, we concede that the state acts when it enforces private rights, but we think this fact is not determinative of the question whether state enforcement transforms private decisions into state action for constitutional purposes.

The Article will proceed as follows. Part I will briefly describe the main lines of argument upon which the chief critics of the state action principle rest. We identify these critics as Robert Hale, Cass Sunstein, Michael Seidman, and Mark Tushnet. Though we will pay somewhat more attention to recent work by Mark Tushnet that explicitly identifies the state action principle with the rejection of constitutional welfare rights, we will for the most part stick to main outlines of the critics' arguments. Were we to explore the seemingly infinite analytic byways that these and other scholars pursue, we would soon unmanageably exceed the scope of the task we have set for ourselves.<sup>3</sup> Part II will address the critics' conceptual claim that the fact that the actions of both state and private actors are backed by state power undermines the coherence of the state action doctrine. We argue that the state action principle does not turn on the presence or absence of government power, but that it turns instead on whether a public or a private choice invokes the application of that power. We describe the differences between state actors and private actors and explain why the differences matter. Part III addresses the implication for substantive constitutional norms of the distinction we identify between private and state actors. In addition it challenges the critics' claim that there is no difference in principle between state action and state inaction.

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<sup>3</sup> We acknowledge and regret that our decision to narrow, and we hope thereby to sharpen, our focus has required us to neglect some important and interesting recent work by other scholars, especially those who have been laboring so productively in comparative constitutional law. See, e.g., Stephen Gardbaum, The "Horizontal Effect" of Constitutional Rights, 102 Mich. L. Rev. 387, 389 (2003) (arguing that only a comparative lens can provide a full answer to the fundamental question of the extent to which constitutional rights govern in the private sphere in American law).

## I. THE CRITICS

Pride of place among the critics of the state action principle belongs to Robert Hale.<sup>4</sup> Hale had heard once too often that the reason government is subject to special limitations is that government possesses coercive power and that private choice absent government regulation is free and not coerced. Hale responded that in a system of private property, private choice is made under constraints imposed by others' private rights, rights found in law and enforced by government, which means enforced by violence if necessary.<sup>5</sup> Arthur Leff wrote in the spirit of Hale when he said that "behind every [American] Judge stands ultimately the naked power of the 101st Airborne."<sup>6</sup> In Hale's terminology, private property is simply delegated public power and thus the 101st Airborne stands behind every exercise of private property rights.<sup>7</sup>

Hale's critique works in more than one context. To some extent he was engaged in a struggle over the labels freedom and coercion, labels that are probably worth struggling over though they are not our concern here. Something more substantive was also at stake,

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<sup>4</sup> See Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 *Geo. L.J.* 779, 789 (2004) (crediting Hale, along with Wesley Hohfeld, with demonstrating that "the state action doctrine is analytically incoherent because . . . state regulation of so-called private conduct is always present, as a matter of analytic necessity, within a legal order").

<sup>5</sup> See Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 *Pol. Sci. Q.* 470, 471 (1923) [hereinafter Hale, *Coercion and Distribution*] ("What is the government doing when it 'protects a property right'? Passively, it is abstaining from interference with the owner when he deals with the thing owned; actively, it is forcing the non-owner to desist from handling it, unless the owner consents."); Robert L. Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 *Colum. L. Rev.* 149, 197-98 (1935) ("If the power to set judicial machinery in motion for the enforcement of legal duties be recognized as a delegation of state power, it would be immaterial that those who have that power are not 'acting in matters of high public interest.'). But cf. *id.* at 199 ("It is perhaps fortunate, in some respects, that the courts have been blind to the fact that much of the private power over others is in fact delegated by the state, and that all of it is 'sanctioned' in the sense of being permitted."); Barbara H. Fried, *The Progressive Assault on Laissez Faire: Robert Hale and the First Law and Economics Movement* 71 (1998); Neil Duxbury, *Robert Hale and the Economy of Legal Force*, 53 *Mod. L. Rev.* 421, 434 (1990) ("Throughout many of his works he treats 'personal control' and 'public regulation' as two sides of the same coin.") (internal footnote omitted).

<sup>6</sup> Arthur Allen Leff, *Law and*, 87 *Yale L.J.* 989, 997 (1978).

<sup>7</sup> Another early critique along these lines was made by legal realist Morris Cohen. See Morris R. Cohen, *Property and Sovereignty*, 13 *Cornell L.Q.* 8, 22 (1927).



however, at least if we count the idea that power is dangerous and must be controlled as a substantive commitment. Hale's point in this connection was to stress that power is power, and hence that to the extent one is simply concerned about power one should not care whether it is delegated by the state or exercised by the state directly.<sup>8</sup> As will appear in more detail presently, and as is true of the other critics as well, we agree with some of Hale's premises but reject many of his conclusions—not surprising in an article that defends the state action principle.

Cass Sunstein is one of the three more contemporary state action critics whose arguments we undertake to challenge. Sunstein's thoughts on the issue are sufficiently subtle that any characterization runs the risk of misreading him, but his influence on the debate has been such that no discussion of the topic would be complete without him.<sup>9</sup> As we understand him, Sunstein believes that American constitutional law needs some doctrine or set of doctrines that will determine when constitutional norms apply and when they do not. He maintains that much of the current doctrine that performs that function is substantively nonsensical. That doctrine is the state action principle. Sunstein insists that he is not offering a fundamental challenge to the state action doctrine. At least when viewed as “a product of an understanding that the Constitution is directed to acts of government rather than to acts of private individuals,”<sup>10</sup> he says, “[private individuals and organizations] need not be concerned about the Constitution.”<sup>11</sup> But his defense of the state action principle is, as others have noted, “extremely narrow.”<sup>12</sup> Sunstein's arguments imply that, when applying the state action doctrine, courts routinely ask the wrong question and rou-

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<sup>8</sup> Hale, *Coercion and Distribution*, supra note 5, at 478.

<sup>9</sup> For a sampling of the many reviews of Sunstein's book, *The Partial Constitution*, in which he articulated his state action analysis at some length, see Robert W. Bennett, *Of Gnarled Pegs and Round Holes: Sunstein's Civic Republicanism and the American Constitution*, 11 *Const. Comment.* 395 (1994); Gregory E. Maggs, *Yet Still Partial to It*, 103 *Yale L.J.* 1627 (1994); Frederick Schauer, *Acts, Omissions, and Constitutionalism*, 105 *Ethics* 916 (1995); Mark Tushnet, *The Bricoleur at the Center*, 60 *U. Chi. L. Rev.* 1071 (1993).

<sup>10</sup> Cass R. Sunstein, *The Partial Constitution* 71 (1993).

<sup>11</sup> *Id.*

<sup>12</sup> Peller & Tushnet, supra note 4, at 814. Indeed, in his review of *The Partial Constitution*, Tushnet expressed the view that Sunstein had reformulated the doctrine in such as way as to “eliminate[] it as a doctrine.” Tushnet, supra note 9, at 1107.

tinely draw constitutional lines in the wrong place, or risk doing so, because the question they ask is based on illusions.

Sunstein's main idea is that current state action doctrine regards as state action any deviation from "status quo neutrality," or the baseline.<sup>13</sup> Exactly what Sunstein means to denote by the baseline is not clear. At times it seems to be a matter of temporal framing, in which the baseline is arbitrarily framed as the legal situation before some particular government decision was made.<sup>14</sup> We suspect, though, that he means to put more weight on another characterization, under which state *inaction* is found in traditional functions of government or the pre-New Deal common law whereas government decisions that deviate from that baseline constitute state action.<sup>15</sup> He describes the pre-New Deal understandings—the common law baseline—as having been regarded as "part of nature,"<sup>16</sup> or "pre-political."<sup>17</sup> Thus a law against racial discrimination in housing is state action but its repeal is not, because the latter returns the world to the common law baseline and the common law baseline is not state action.

According to Sunstein, to determine the reach of constitutional norms by reference to whether a challenged practice departs from or returns to a common law baseline makes no sense. In the first place, he points out, there is nothing natural or pre-political about the common law. The common law may or may not be good policy, and Sunstein indicates that he thinks it is often a good idea. Indeed, he defends the market as "a source of important human goods, including individual freedom, economic prosperity, and respect for different conceptions of the good."<sup>18</sup> In other words, Sunstein thinks that the common law often produces good results, but that it is no more special or privileged than any other good policy, like rules against discrimination in housing. His point is that common law rules comprise a state-enforced regulatory system no less than any other regulatory system. Also, because the common law is now little protected from change by ordinary legislation—a devel-

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<sup>13</sup> Sunstein, *supra* note 10, at 72.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 68.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 69.

<sup>18</sup> *Id.* at 341.

opment of constitutional doctrine that Sunstein refers to as the revolution of 1937<sup>19</sup>—it makes even less sense than it did before 1937 to use traditional or common law rules as the measure of state action. At least before 1937, on Sunstein’s account of constitutional history, constitutional doctrine itself gave special status to the existing distribution of property, so there was some reason to think that deviation from it was to be treated with special suspicion. But with substantial constitutional protection for private rights of property and contract largely gone, the current state action principle is merely the ghost of the great example of such protection, *Adkins v. Children’s Hospital*,<sup>20</sup> sitting crowned upon its own grave.

At times Sunstein seems to be advancing an even more fundamental reason for thinking that the idea of state action is useless when it comes to setting the limits of constitutional norms. In Sunstein’s view, once an exercise of public power has been identified, what matters for constitutional purposes are the “purposes and effects”<sup>21</sup> of that exercise of power. Exercises of public power are not hard to come by, because “state action is always present, and the real question involves the merits—the meaning of the relevant constitutional guarantees.”<sup>22</sup> Indeed, he asserts, “[m]uch discussion of the state action question . . . [is] confused, because it disregards the extent to which the state is present in the arrangements under challenge.”<sup>23</sup> As Sunstein seems to understand things, the government’s choice to *allocate* resources through private property rights, and to expend government resources to enforce private owners’ decisions regarding resources, renders the government responsible for the particular *distributions* of resources that emerge from those decisions from time to time. Because “governmental rules lie behind the exercise of rights of property, contract, and tort,”<sup>24</sup> the government does “not ‘act’ only when it disturb[s] existing distributions. It

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<sup>19</sup> Id. at 40–67.

<sup>20</sup> 261 U.S. 525 (1923).

<sup>21</sup> Sunstein, *supra* note 10, at 205.

<sup>22</sup> Cass R. Sunstein, *State Action Is Always Present*, 3 Chi. J. Int’l L. 465, 467 (2002).

<sup>23</sup> Id.; see also Sunstein, *supra* note 10, at 159–60 (“[T]he state action doctrine calls for an inquiry into whether the state action at issue in the relevant case violates the pertinent provision of the Constitution.”) (internal emphasis omitted).

<sup>24</sup> Sunstein, *supra* note 10, at 204.

[is] responsible for those distributions in the first instance.”<sup>25</sup> Thus, though “[private individuals and organizations] need not be concerned about the Constitution,”<sup>26</sup> the Constitution must worry about them.

His point seems to be something like the following: an event can be attributed to an actor, including a corporate actor like a government, when the actor is the cause of the event. An actor is the cause of an event when a different decision by the actor would have avoided the event. In order to make this line of reasoning meaningful when talking about law and government, it is of course necessary to know what other laws and government actions there could have been. Only someone seduced by a lawyer’s idea of sovereignty would think that all conceivable legal rules are in fact possible actions by the government. But even within those limits there are plenty of government choices that plausibly could have been different. Consider anti-discrimination laws, for example. Many such laws have been adopted and more extensive laws are clearly on the political table. Before the Civil Rights Act of 1964, Congress had scarcely begun to exercise its power to forbid private race discrimination. Because Congress had substantial power it could have but had not exercised, it was natural to say that one cause of race discrimination in employment was Congress’s failure to ban it. Yet, if Congress is not allowed to cause race discrimination, Congress’s failure to act was impermissible and Congress was in fact required to legislate.

In their book *Remnants of Belief*,<sup>27</sup> Mike Seidman and Mark Tushnet offer a critique along similar lines of the version of the state action principle that they consider to have been vindicated in *DeShaney v. Winnebago County Social Services Department*.<sup>28</sup> Seidman and Tushnet ask why the state laws that assigned custody of Joshua DeShaney to his abusive natural father do not count as state action. Put another way, they ask why the Court regarded the state’s failure to protect Joshua from his father as state inaction

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<sup>25</sup> Cass R. Sunstein, Free Speech Now, *in* *The Bill of Rights in the Modern State* 255, 265 (Geoffrey R. Stone et al. eds., 1992).

<sup>26</sup> Sunstein, *supra* note 10, at 71.

<sup>27</sup> Louis Michael Seidman & Mark V. Tushnet, *Remnants of Belief: Contemporary Constitutional Issues* 49–71 (1996).

<sup>28</sup> 489 U.S. 189 (1989).

rather than state action. They cannot find what they regard as a coherent answer to their question because they are convinced that the state could have protected Joshua had it chosen to do so, and its choice not to do so is as much action as a decision to protect him would have been.<sup>29</sup> This line of reasoning leads them to conclude that there is no such thing as state inaction, though their conclusion emerges from a subtly different chain of reasoning than Sunstein's. For Seidman and Tushnet, there is no such thing as state inaction because they can discern no sensible "set of principles that [they] might use to map the boundary between the public and private"<sup>30</sup> or between state decisions "to act" and decisions not "to act," and thus to leave private action to run its (too often tragic) course.

According to Seidman and Tushnet, the function of the modern state action doctrine is different from that of the doctrine Justice Bradley endorsed in the *Civil Rights Cases*.<sup>31</sup> For Justice Bradley, the doctrine limited the power of the political branches of the federal government. State action's modern function, however, is to limit only the power of the judicial branch.<sup>32</sup> Seidman and Tushnet trace this change to the revised understandings of the scope of legislatures' power to regulate economic activity that emerged from the New Deal and the Supreme Court's eventual endorsement of it. On account of the Court's having removed the constraints on regulatory activity that had previously been thought ordained by "natural rights ideology,"<sup>33</sup> it became apparent—to legal realists anyway—that the distinction between the public sphere and the private realm had no principled substance and that "government was always confronted with the option of reallocating burdens and benefits."<sup>34</sup> With the demise of natural rights ideology, legislatively enacted government regulation became the norm, after which it required but a short mental leap to embrace the notion that government had the power to enact any regulation and to redistribute existing burdens and benefits in any way it thought just and for which it could muster the political will. Any inequity that the gov-

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<sup>29</sup> Seidman & Tushnet, *supra* note 27, at 57.

<sup>30</sup> *Id.* at 63.

<sup>31</sup> *Id.* at 64–65 (discussing *The Civil Rights Cases*, 109 U.S. 3 (1883)).

<sup>32</sup> *Id.* at 66–67.

<sup>33</sup> *Id.* at 66.

<sup>34</sup> *Id.*

ernment permitted to persist, by failing to rectify it, must thus be taken to have been “caused” by government.<sup>35</sup> Put in the terms of our topic, government decisions not to intervene to correct private power or wealth imbalances are “state action” just as decisions to intervene had always been recognized to be. But the full implication of this conception proved unacceptable even to those who found the reasoning behind it compelling, for accepting it would have required discarding as illusory the idea that any sphere of human freedom remains constitutionally and permanently immune to government invasion.

Thus, according to Seidman and Tushnet, despite the fact that it rests on an incoherent distinction between the public and private spheres and a nonexistent one between state action and state inaction, and despite the fact that at least as a formal matter the state could rectify every distributional inequity that might plague society from time to time, the modern Court has preserved the state action doctrine and thereby shielded some state failures to rectify injustice from constitutional scrutiny. The reason it has done so is not that the doctrine embodies intrinsic or genuine differences between actions of the state and actions of private individuals. Rather it is because the move was necessary to avoid judicial activism that, though they seem to think it wholly justified in principle, would be perceived as excessive. Explicit recognition that decisions not to act are “state action” would subject every government decision not to intervene in the private sphere to constitutional review. Judicial intervention in policy decisions would soon reach intolerable levels. In addition, at least the way Seidman and Tushnet interpret what the doctrine presently stands for, the Court has retained the state action doctrine as a means of preserving both the reality and the idea of individual freedom by rendering some private actions immune from governmental sanction<sup>36</sup> “despite their wrongness.”<sup>37</sup>

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<sup>35</sup> *Id.* at 66–67.

<sup>36</sup> Seidman and Tushnet apparently embrace the view that a finding that private activity that the Court concludes is not subject to constitutional challenge because it is not state action represents a conclusion that the challenged activity is by definition constitutionally protected from regulation. See *id.* at 67 (“At the moment when the distinction collapsed as a limitation on governmental power, it replicated itself as a limitation on federal judicial power.”). We do not think this is a correct way to characterize the content of present doctrine.

<sup>37</sup> Schauer, *supra* note 9, at 916–17.

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As Seidman and Tushnet see it, the Court has retained the state action doctrine for purely instrumental reasons, and also because of what they apparently regard as an irresistible modern urge to have the cake of (almost unlimited) government power and simultaneously to eat at least what crumbs they can find of human freedom:

We want to repudiate state action rhetoric because we know that it blinds us to human suffering that the state might otherwise ameliorate. Yet we also want to embrace the concept of a private sphere because we know that it preserves a space for individual flourishing that the state might otherwise destroy.<sup>38</sup>

Seidman and Tushnet deplore the doctrine's incoherence and its lack of principle. They can find no satisfying way to reconcile the inconsistencies inherent in its treatment of phenomena that they regard as the same—state action and state inaction—as though they were different. Nevertheless, they imply, the Court has had no choice but to retain it.

Seidman and Tushnet also describe the “baseline problem” to which Sunstein pays so much attention, though they do not give it the pride of place in their analysis that Sunstein gives to status-quo neutrality. The constitutional terrain is littered with the analytical casualties of the Court's efforts to find principled grounding for the doctrine of unconstitutional conditions, and neither the Court nor the commentators have been able to explain to their satisfaction why the government may choose selectively not to subsidize conduct it could not constitutionally proscribe.<sup>39</sup> Seidman and Tushnet

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<sup>38</sup> Seidman & Tushnet, *supra* note 27, at 70. The “we” to whom Seidman and Tushnet refer is not themselves. It is, rather, all participants in the “legal culture we have inherited from the legal realists and the New Deal.” *Id.* at 71.

<sup>39</sup> See Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 *Cornell L. Rev.* 1185, 1195–97 (1990) (discussing the failure of recent scholarly attempts to present a positive theory of unconstitutional conditions law); Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 *Geo. L.J.* 1, 3 (2001) (“Regrettably, more than a century of judicial and scholarly attention to the problem has produced few settled understandings.”); Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 *Harv. L. Rev.* 4, 6 (1988) (stating that unconstitutional conditions doctrine has “bedeviled courts and commentators alike” for more than a hundred years); Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 *Harv. L. Rev.* 554, 572 (1991) (describing the unconstitutional conditions doctrine as a “notorious conceptual quagmire”); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 *U. Pa.*

argue that the problem of when the government can constitutionally make offers that are deliberately designed to encourage citizens to forgo exercising their constitutional rights is utterly intractable. They regard it as inextricably connected to state action: “the effort to sort out permissible from impermissible conditional offers is bedeviled by the same difficulties confronting courts trying to figure out whether there is ‘really’ state action.”<sup>40</sup> Seidman and Tushnet emphasize that government regulation deliberately crafted to affect supposedly free individual choice is a pervasive feature of the activist state. They stress that all existing entitlements—all present “baselines”—are created by government and enjoyed by virtue of the rules supplied by government. And they conclude that, since “all individual decisions are inevitably made against the backdrop of a network of government offers and threats,”<sup>41</sup> the search for a neutral, natural constitutional baseline to underpin the search for social justice is as fruitless as “the search for a state of nature in which people exercise their rights to make free and private decisions.”<sup>42</sup> Both searches, they conclude, are doomed.

In later work, Tushnet, alone<sup>43</sup> and in work co-authored with Gary Peller,<sup>44</sup> has expanded his criticism of the state action princi-

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L. Rev. 1293, 1298 (1984) (noting that the Supreme Court “has yet to adopt a coherent framework for analyzing” alleged unconstitutional conditions); Thomas W. Merrill, *Dolan v. City of Tigard*: Constitutional Rights as Public Goods, 72 Denv. U. L. Rev. 859, 859 (1995) (“The Supreme Court has never offered a satisfactory rationale for [the unconstitutional conditions] doctrine.”); Albert J. Rosenthal, Conditional Federal Spending and the Constitution, 39 Stan. L. Rev. 1103, 1120 (1987) (describing the history of the unconstitutional conditions doctrine as “convoluted” and asserting that “the general principles that have evolved from that history are seldom useful in solving specific cases”); Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413, 1416 (1989) (characterizing the doctrine as “riven with inconsistencies”). A number of commentators have concluded that the problem is simply insoluble. See Larry Alexander, Impossible, 72 Denv. U. L. Rev. 1007, 1007 (1995); Frederick Schauer, Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency, 72 Denv. U. L. Rev. 989, 990 (1995); Cass R. Sunstein, Why the Unconstitutional Conditions Doctrine Is an Anachronism (With Particular Reference to Religion, Speech, and Abortion), 70 B.U. L. Rev. 593, 594 (1990).

<sup>40</sup> Seidman & Tushnet, *supra* note 27, at 85.

<sup>41</sup> *Id.* at 89.

<sup>42</sup> *Id.*

<sup>43</sup> See, e.g., Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* 161–95 (2008).

<sup>44</sup> Peller & Tushnet, *supra* note 4.



ple by identifying it explicitly with the rejection of constitutional welfare rights. Tushnet does not address every constitutional provision that might conceivably affect private decisionmaking. He does not appear to argue that private decisions should be made the same way federal statutes are adopted; he does not, for example, discuss the Presentment Clause, nor does he seem to think that a patent-holder's decision to license a patent needs to conform to its requirements. Instead, Tushnet focuses on a very small number of constitutional limitations, albeit the limitations that many people tend to think of as constituting the heart of constitutional law. In particular, he directs his attention to the aspects of the Constitution that concern individual freedom of action, such as the Free Speech Clause, and those that concern equality among individuals or groups, preeminently the Equal Protection Clause of the Fourteenth Amendment.

Constitutional welfare rights would be produced by constitutional rules that mandate some level of control over resources for some (or all) private individuals. A constitutional right to housing, for example, would entitle each individual to some access to specific kinds of property. It would have obvious implications for the distribution of resources. Tushnet maintains that some constitutional provisions do have implications for control over resources. In his view, the Constitution's protections for freedom of action do not simply take for granted the private rights provided for by non-constitutional law. Or at least, he argues, they would not do so but for the imposition of a state action principle that is foreign to them. He would also reject the other principle that, together with the state action principle, limits the reach of the Constitution: that general and neutral laws may be applied to bar private actions that have untoward effects on the exercise of others' constitutionally protected liberty. Taken together, these principles shape the content of free speech and other constitutional liberties. On Tushnet's account of the intellectual history of American constitutional law (the historical merits of which we will not address), there once was a justification for these principles but there no longer is. In an historical account that portrays the so-called *Lochner* era in a way similar to the understanding reflected in Sunstein's work, he maintains that the Constitution itself was understood to dictate, in substantial measure, the distribution of resources among private peo-

ple. Since the Constitution was understood to prescribe and protect private rights—of property and freedom of contract, for example—it made sense for other parts of the Constitution, such as the Free Speech Clause, to take that system of private rights for granted. Free speech then would mean the free use of one's own property, the latter identified by the Constitution itself.

But after the New Deal, following Tushnet's rather broad-brush account, the legal distribution of private rights is no longer taken as constitutionally fixed. Rather it is determined through sub-constitutional rules. Such rules, by definition, yield to constitutional rules. Thus, if constitutional rules have distributional implications (which Tushnet claims they do), those implications have now been unleashed—except that they have not been, because American judges remain opposed to constitutional welfare rights despite the fact that this is where their professed principles lead them.<sup>45</sup>

As we understand Tushnet's criticism, it has two parts. One focuses on the purpose of certain constitutional provisions, in particular the protections of liberty and the bans on discrimination. According to this criticism, the values or goals the Constitution embodies require certain distributions, and therefore override ordinary legal rules that produce other distributions. Because the state action principle is one obstacle to the Court's effectuating these constitutionally mandated distributions, it must be rejected in order to fulfill the purposes of the Constitution. The other part of the criticism focuses more on the rules that govern private rights themselves, and rejects the current distinction between state action and state inaction. Because the legislature now has very broad flexibility with respect to private rights, and may redistribute

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<sup>45</sup> Cf. *id.* at 817:

[A]n American constitutional law that transcends the public/private distinction of the late Nineteenth Century would guarantee individuals and groups affirmative rights and impose on the government correlative duties to provide the means for the enjoyment of rights . . . . It is a marker of the change in discourse that contemporary opponents of the constitutional recognition of social welfare rights even include left-of-center constitutional theorists who have adopted the institutional formalism of mainstream process-based constitutional theories and base their objections on the supposed inability of courts to enforce social welfare duties on the government.

. . . [T]he state action doctrine, and the liberal constitutional theories associated with it, stubbornly survive, despite their analytic incoherence.

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through a wide variety of legal rules (including anti-discrimination rules), its failure to do so is state action, legitimately subject to constitutional attack.

Thus, in broad outline, the critics have concluded that the state action doctrine's limits on the reach of constitutional norms are conceptually incoherent and normatively indefensible. The doctrine rests on spurious distinctions between public and private power, for example, and between state action and state inaction, and it wrongly disables courts (and legislatures acting from constitutional and not merely political imperatives) from identifying and correcting the unfortunate purposes and unjust distributional effects of private decisions.

## II. GOVERNMENT POWER AND GOVERNMENT DECISIONMAKERS

This Part responds to the criticism that the state action principle draws a distinction where there is no difference. The principle distinguishes between private choices that are governmentally enforced and choices made by the government that are not dictated by a private decision. According to the critics, that distinction is nonsensical because public power is deployed in the service of both private and public decisions. But the state action principle does not rest on the presence or absence of public power because its justification does not depend on the claim that private rights that are governmentally enforced somehow do not rest on state power. Rather, the distinction the principle draws rests on the thesis that private individuals are principals, entitled to act to pursue their own interests, whereas government decisionmakers are agents, whose function is to further the interests of the citizens. Thus the presence or absence of a decisive choice by a private person, which the state action principle uses to categorize actions as private or governmental, is normatively central and justifies the application of constitutional rules to one choice and not the other.

We begin by elaborating on the state action principle and on the critics' general objection, and then turn to discussing the central role in the principle's justification of the fact that government actors are required to be agents whereas private people are not.

*A. The State Action Principle*

The first step toward an answer is to see that there is a question. Constitutional rules are almost all addressed to the government. Article I, Section 7 sets out the process by which Congress and the President make federal statutes. Section 8 then sets out most of Congress's enumerated powers, while Section 9 imposes affirmative limitations on the national government. Section 10 then addresses state governments, providing that no state shall take a number of listed steps. The amendments, with which judicial doctrine is so heavily concerned, are also either explicitly or implicitly addressed to governments. The First Amendment begins, "Congress shall make no law," and the second sentence of Section 1 of the Fourteenth Amendment begins, "No state shall." Of course, the Constitution does not apply to private people.

That might seem to answer the question whether those rules apply to private individuals, and in some ways it does. Whatever else a private individual might do, none of them is going to make a law respecting an establishment of religion. Matters are not so easy, however, for a reason that is central to the critics' argument. Private individuals hold legal rights with respect to one another. As the critics stress, they therefore bear duties with respect to one another, as rights and duties correlate. A property owner has the right to exclude, the correlative of which is the duty of everyone else not to enter without the owner's consent. As the critics further stress, private rights are enforced by the government, so a duty-bearer who is considering violating a private right faces the coercive power of the state. Any exercise of a private right is also at least a potential exercise of public power. The owner of a copyright, a federally created property right, might refuse to grant permission for a use that the copyright-holder thinks will promote false religious views. If the copyrighted material is used anyway, the federal government will provide the right-holder a remedy. One might say under those circumstances that the copyright law has become one that prohibits the free exercise of religion. A central question for constitutional law, then, is whether the rules addressed to government apply to private decisions that are backed by state power.

The state action principle goes a long way toward answering that question. It holds that in general, when the law enables a private

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right-holder to choose among a number of options, and will enforce any of those choices, the private choice is treated as private and not governmental for constitutional purposes. That is not to say that the Constitution has nothing to do with the law that creates private rights; the decision to have the rule that gives the private person options is governmental, not private. The copyright law must comply with the Free Exercise and Establishment Clauses, but exercises of private rights under it do not count as governmental. While federal statutes are constrained in the way they take religion into account, private individuals exercising legal advantages those statutes create are not.

*B. Private Choice and Public Power*

According to the critics, the state action principle draws a line between public and private decision that is indefensible, and indeed indefensible for reasons regularly endorsed by the principle's supporters. (This is not necessarily to say that every exercise of a private right should be attributed to the government that supports it, but it does reject the generic approach taken by the state action principle.) All that is needed, the critics suggest, is to look at private legal relations from the standpoint of the duty-bearer rather than the rights-holder. A private person who uses someone else's property without permission will be sanctioned by the government, just as if the rule that had been violated was not keyed to a private right. Even when decisions are made by nongovernmental persons, if those decisions are enforced by the government, public power is in play.

The critics think this insight shows the principle's irrationality because, they say, the standard justification for distinguishing between the government and others is that "governmental power is, in general, more to be feared than nongovernmental power."<sup>46</sup> Yet that justification, they argue, does not support any distinction between governmentally enforced public decisions and governmentally enforced private decisions. "The proposition that governments systematically inflict more or different types of harm than private actors do cannot stand up to close scrutiny."<sup>47</sup> They point

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<sup>46</sup> Schauer, *supra* note 9, at 916–17.

<sup>47</sup> Tushnet, *supra* note 43, at 180.

out that when private actors exercise state-backed authority—when, that is, they do things that the state authorizes them to do and make decisions that the state enforces—they are *ipso facto* exercising government power and *ipso facto* are as powerful as government actors. Their actions carry the same potential to produce harmful effects as do those of government actors and are equally and for precisely similar reasons to be feared as the actions of government actors. In other words, as the critics portray things, private decisions that the government will enforce are in all constitutionally relevant respects the same—and should be subject to the same constitutional limitations with regard to their permissible purposes and effects—as public decisions with no private decisionmaker involved. Thus do private decisions backed by state power come within the rationale of constitutional limitations designed to hold government actors accountable to constitutional norms and to constrain the potential of government power to inflict harm.

Robert Hale, for example, sought to refute the idea that the reason government is subject to special limitations is that government possesses coercive power while private choice is free.<sup>48</sup> He observed that the exercise of private rights by some citizens constrains others' ability to exercise their own freedoms, and concluded that, because government enforces private rights, private rights are delegated public power. This way of thinking led to the conclusion that every right-holder, whether described as government or private in conventional terminology, is a government actor. In other words, when it comes to questions of power, there is no difference between government and private actors. State action's critics think that standard state action doctrine purports to rest on the premise that there is such a difference and, importantly, that the difference is one of state power *vel non*. They understand standard doctrine to define government actors as those who exercise coercive authority backed by collectively organized power and private actors as those who make purely private choices. For this reason they think that the insight that the actions of both government and private ac-

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<sup>48</sup> We are not concerned with an aspect of this issue that Hale himself emphasized, which is whether exercises of private rights by some people should be described as coercing other people. As we noted previously, the labels freedom and coercion are no doubt worth struggling over, but their proper definitions are not the principal source of our differences with the state action doctrine's critics.

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tors are backed by government power justifies the inference that the state action doctrine is conceptually incoherent.<sup>49</sup>

*C. Constitutional Law for Agents, Non-Constitutional Law for Principals*

*1. Government Power and Private Rights-Holders*

The state action principle's justification does not rest solely on the claim that governments have power that private people do not, because private people do indeed in effect command public power. Yet in stressing that fact, the critics obscure an important point that is captured by the sometimes-clumsy rhetoric of government as a uniquely dangerous threat to individual rights. From the perspective of a rights-holder there is much to that. And as all private persons are, all the time, both rights-holders and duty-bearers, both perspectives are important.

While the critics stress the burdens imposed by others' rights, rights are still advantages for those who have them. The government is in important ways less constrained by private rights than are other private people, and the Constitution regularly reflects this point. Contracts are binding, and a promisee of a lawful contract has a legal remedy if the promisor declares the contract inoperative and ignores it. But the binding force of contracts, and the rights of promisees under them, come from the law, which the government can change. Debtor relief legislation can harm creditors in ways that debtors on their own cannot. Hence, the Contracts Clause provides that no state shall make any law "impairing the obligations of contracts."<sup>50</sup> In a manner of speaking it protects creditors from defaulting debtors, but does not do so in the primary sense in which the private law of contract itself does. Rather,

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<sup>49</sup> They also seem to think that the doctrine deliberately obscures some other principle or principles that actually determine when the Constitution applies and when it does not. For example, Tushnet argues:

Americans accept the modern regulatory state, which is why we have repudiated *Lochner*, but we are not entirely comfortable with it, which is why we retain the state action doctrine. The state action problem is a difficult one in the United States because Americans have only uneasily committed themselves to a social democratic state.

Tushnet, *supra* note 43, at 181.

<sup>50</sup> U.S. Const. art. I, § 10, cl. 1.

it addresses a problem uniquely posed by the power of the state, and leaves to the private law the regulation of creditor and debtor. It is possible that the Contracts Clause will sometimes keep the states from impairing contracts that are unjust; the Clause does not seek to fix substantive flaws in the primary law, but leaves that to the ordinary legislative process, subject to constitutional constraint. (In this case, the constraint means that changes in the law of contract must operate prospectively only.) Rather, the Constitution takes the sub-constitutional law of private rights for granted and insulates that law from one particular kind of alteration by the legislature.

Just as the Contracts Clause deals with a special threat that governmental power poses to rights-holders, so does the Fourth Amendment. Under the sub-constitutional law that protects private property, people are not free to enter another's home, or physically seize another's person, without permission. As a result, it is much easier for people to keep secrets from one another than it otherwise would be. But governments routinely authorize their agents to search for evidence of wrongdoing in ways that would be unlawful for a private person. Search warrants are a classic example; they empower officers to use physical force, if necessary, to enter private property without the owner's permission. Warrants, and other sources of special authority to search, thus present a threat to rights-holders that the private law does not deal with because it does not apply to the government as it does to others. The Fourth Amendment adds an additional layer of rules that the ordinary legislative process may not alter—rules designed specifically for the special search and seizure powers of officials. It does permit searches that a private person could never undertake, but requires that they be reasonable. It does allow the special exception to private rights created by warrants but regulates their issuance and content.

So when proponents of the state action principle say that governments and their officials have power that private people do not, they are making an important point. The existence of another perspective, that of duty-bearers, from which private and public power look the same does not undercut the importance of this one. Still, the importance of the rights-holder's perspective, and the explanation it offers for thinking of government as especially threatening,



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may not be wholly satisfying here. Granted that the rules that apply to private people do not, as such, apply to governments, why should there be any significant difference in the content of the norms? Why should the Fourth Amendment be any different from the law that protects individuals' bodily integrity and physical security of their possessions from one another?

We believe that it is possible to cut more deeply than the special powers of government, and find a more fundamental justification for the state action principle, by focusing on the special character of government decisionmakers as agents of the people who empower them.

## 2. *Private Actors, State Actors, and Agency*

We agree with the critics that the actions of both government and private rights-holders are backed by government power and that *in this respect* there is no difference between them. In addition, in common with the decisions of government actors, when “measured by [their] target and not by [their] source,”<sup>51</sup> the decisions of private actors that are backed by government coercion have the potential to result in problematic effects—to inflict harm on others, to squander social resources, or otherwise to perpetuate injustice. The state action principle does not, however, turn on the false dichotomy between government and private power that the critics emphasize. Nor does it reflect a misguided judgment either that government power is generically more to be feared or that the effects of private actors' decisions are reliably benign. It does reflect a genuine and profound difference between government and private actors that lies in this: when government officials, *qua* government officials, exercise their constitutionally conferred state power, they are always and everywhere *agents*, whereas when private citizens *qua* private citizens exercise their private rights backed by state power they are—*vis-à-vis* government actors at

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<sup>51</sup> Richard A. Epstein, *The Assault that Failed: The Progressive Critique of Laissez Faire*, 97 Mich. L. Rev. 1697, 1698 (1999) (reviewing Barbara H. Fried, *The Progressive Assault on Laissez Faire: Robert Hale and the First Law and Economics Movement* (1998)).

least—always and everywhere *principals*.<sup>52</sup> Thus, in a fundamental sense, Hale misdescribed constitutional reality when he claimed that private actors are delegates of state power. Instead, government actors are the delegates and private actors are their principals. Our claim, in other words, is that agency—that is, the fact that government actors are agents and private actors are principals—provides the generic justification for the state action principle.<sup>53</sup> The principle does not turn on the presence or absence of government power. It turns, instead, on whether a choice by a government actor *qua* government actor or a private actor *qua* private actor invokes the application of that power. In the next two subsections, we first support this claim by reference to constitutional structure and then adumbrate some of its practical implications.

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<sup>52</sup> This is the central idea that permeates Alexander Hamilton's defense of judicial review in *The Federalist No. 78*, at 492 (Alexander Hamilton) (Benjamin Wright ed., 1961):

There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

. . . [T]he Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1432–37 (1987) (tracing history and describing the Founders' embrace of the theory that government officers are mere agents—"representatives," . . . "delegates," "deputies," and "servants" of the People" exercising only the authority delegated to them by the People in the Constitution); see also James Madison, Report on the Virginia Resolution (Jan. 1800), in 6 *The Writings of James Madison* 386 (Gaillard Hunt ed., Putnam 1906) (cited in Sunstein, *supra* note 25, at 257) ("In the United States . . . [t]he People, not the Government, possess the absolute sovereignty.").

See Restatement (Third) of Agency § 1.01 (2006) (defining "principal" as party to a fiduciary relationship where an "agent" agrees to act on the principal's behalf); see also *MDM Group Assoc. v. CX Reinsurance Co.*, 165 P.3d 882, 889 (Colo. App. 2007) ("In the principal-agent context, it is the *agent* who owes a fiduciary duty to the principal as a matter of law."). Private actors may of course—and very often do—hire or agree to become agents who act on behalf of others. The important fact, however, is that when private actors establish private agency relationships, the agency is consensual rather than definitional of private power. *Id.*

<sup>53</sup> The justification is generic in that it does not respond to the interests and policies associated with particular constitutional provisions. We take up these matters *infra* Part III.

*a. Constitutional Structure*

The Constitution is dominated by rules about the selection and operation of government officers and institutions. Its affirmative limitations on government, which are the main topic of judicial constitutional doctrine and the principal concern of the state action principle and its critics, take up very little of the document and were at most secondary in the view of the Federal Convention.<sup>54</sup> The structural provisions have two central implications for the debate over state action. First, they demonstrate that the Constitution itself assumes a relationship of agent and principal between the people and the government. Second, they demonstrate that this agent-principal relationship is the leading rationale for having a rule in the Constitution itself, rather than the ordinary law. Because the function of the structural rules is to ensure that agents serve their principals, those rules themselves are created and changed only through extraordinary processes that are quite distinct from the standard lawmaking procedures of the people's agents in the government.

The agent-principal difference between government and private actors is apparent throughout our legal and political culture and manifests itself in a myriad of deeply rooted practices and settled understandings. The structural provisions of the Constitution embody the delegation of power from the people to their rulers and provide convincing evidence that the power to govern flows *from* the people—who, as principals, “ordain[ed] and establish[ed]”<sup>55</sup> the Constitution—to the government actors to whom they delegated it. The structural provisions specify what powers the government may exercise, they allocate those powers among different government institutions, and they provide the basic procedural framework for government decisionmaking.<sup>56</sup> Though to date they have played lit-

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<sup>54</sup> Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 316 (1996) (explaining that at the Federal Convention, James Madison “believed a bill of rights would prove redundant or pointless”). When Elbridge Gerry and George Mason raised the possibility of a bill of rights late in the Convention, the proposal was rejected. *Id.* at 316–18. “The omission left the framers open to the charge that they had contrived to deprive the people of their fundamental rights,” but the Framers “thought the charge absurd.” *Id.* at 318.

<sup>55</sup> U.S. Const. pmb1.

<sup>56</sup> These include the creation of separate legislative, executive, and judicial departments and provisions subjecting each department to checks by the others. Congress is

tle role in the debate about it, they are in fact central to the state action principle. It is the structural provisions' specification of the framework for government actors' exercise of state power that leads us to conclude that government actors exercise delegated power, for the structural provisions are overwhelmingly about the connection between the people and their rulers. They constrain the power of government officials and provide mechanisms for citizens to hold government actors accountable.<sup>57</sup>

That the Constitution's structural features are designed to ensure that government actors will be faithful agents of the people is sufficiently well known that we will not discuss those features in

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given, *inter alia*, the power to declare war, to structure the other branches, to conduct impeachments, to control the jurisdiction of the federal courts, and, through the Senate alone, the power to withhold consent to presidential appointments and treaties. The President is given the right to veto legislation, the sole authority to enforce federal law, and the power to nominate federal judges. The courts, meanwhile, can impede the operation of the other branches by means of judicial review. The branches are also given certain explicit protections: Congress is protected from the other branches insofar as it judges its own membership, makes its own rules, and enjoys immunity from prosecution for its legislative acts; the President is elected by a national process, independent of Congress; and the judiciary enjoys life tenure. Federal power is restrained in other respects by mechanisms within the branches, such as congressional bicameralism and the right to trial by jury. Finally, other provisions—the composition of the Senate, the electoral college, and the principle of sovereign immunity—help protect the interests of states. See generally Charles L. Black, Jr., *Structure and Relationship in Constitutional Law* (1969) (describing structural provisions of the Constitution).

<sup>57</sup> Enumerated powers and bicameralism, for example, are structural mechanisms that both grant authority to national government actors and thwart overreaching by agents of the national government *vis-à-vis* the states. Articles I, II, and III specify the powers of the officials in the three branches of the national government and separate those powers one from the other. The separation of powers, including the unitary executive as well as such mechanisms as the Presentment Clause, the Senate's power to advise and consent, and the President's veto power, thwart overreaching by officials of the branches *vis-à-vis* one another. Judicial review is the institutional mechanism by which the judiciary holds elected officials, bureaucrats, and lower court judges within constitutional boundaries, and monitors them to assure that they do not overstep the substantive and procedural constraints that the Constitution imposes on their power. See *The Federalist* No. 78 (Alexander Hamilton), *supra* note 52. Constitutionally prescribed regularly scheduled elections permit citizens to hold their elected agents to account. First Amendment guarantees of freedom of speech, press, and assembly perform a structural function as well, in that they permit incumbents and challengers to engage in robust debate. In addition, they allow citizens to participate in the political debate that sets the policy agenda, to learn about the behavior of government officials, to join with like-minded individuals in support of their preferred candidates and issues, and to communicate their preferences to their representatives while they are in office.

depth. We will draw attention to one aspect of the system that was quite important as far as the Framers were concerned and that is now second nature to Americans: this government has no hereditary principle. The longest term is good behavior. Both Congress and the states are forbidden from conferring titles of nobility and the hereditary succession that comes with them, and the United States are required to guarantee to each State a republican form of government. Whatever else it may mean, the Guarantee Clause is designed to prevent hereditary monarchy. That alone is a major step toward creating a government of the people, by the people, for the people.

Because the structural provisions embody the delegation of power from the people to their rulers, constitutional structure is in fact the mirror image of the world as conceived by state action's critics. Hale's delegation terminology is thus not merely misleading; it is inaccurate. Thus state action's critics, Hale's "disciples," conceive of government power flowing in the wrong direction—from the government to the people.<sup>58</sup> Because in their thinking about the state action principle they neglect to consider either the significance or the continuing relevance of the fact that the Constitution reflects a delegation from the people to the government, the critics fail to see that the principle turns on the difference between government and private actors—on the difference between people or entities acting in their governmental capacity and people and entities acting on their own behalf—and that the agency of government actors is central to it.

Consider what it means conceptually that agency and not power is the fulcrum on which the state action principle turns. It means

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<sup>58</sup> We do not mean to suggest that the critics conceive of power as flowing from the government to the people in describing the structural provisions of the Constitution, in which the relationship is most clearly in the opposite direction. Rather, they discuss other aspects of the Constitution when taking this approach. See, e.g., Sunstein, *supra* note 10, at 204 ("Consider . . . Robert Hale's suggestion, capturing much of my argument, to the effect that 'the power to set judicial machinery in motion for the enforcement of legal duties' should 'be recognized as a delegation of state power.' This recognition is precisely what is missing from current free speech law.") (citing Robert Hale, *Force and the State*, 36 *Colum. L. Rev.* 149, 197 (1935)). Of course the critics' focus on a limited range of constitutional provisions is understandable in light of the fact that it would be nonsensical to subject private decisions to the structural provisions of the Constitution such as enumerated powers and bicameralism. And it would be absurd to subject all private decisionmaking to constitutional rational basis review.

that government actors, acting as such, may not seek to maximize their own welfare. Instead, not only are they constrained by the limits of their delegated authority, but also they must always act on behalf of their citizen principals.<sup>59</sup> It is, indeed, the distinct role of government actors to act as faithful agents.<sup>60</sup> By contrast, when private actors exercise the private rights and perform the duties that government power underwrites—when, for example, they decide whether to make and keep promises, whether to conform their behavior to social norms or to common law duties or to statutory commands or to the requirements of any regulatory regime to which they are subject—they may legitimately act on their own behalf and in pursuit of their own ends as they conceive them.

Thus, what is most important about identifying agency as state action's fulcrum is that it brings coherence to the distinction between, on the one hand, the exercise by private actors of the private choices that are enabled and enforced by government power and, on the other hand, the judge-made and statutory rules that enforce those choices. The exercise by a private actor of power created by common law or by statute is not state action, even when

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<sup>59</sup> Consider the extensive body of ethical rules regulating the activities of government officials. Federal conflict of interest statutes “reflect a commitment to a government that operates in the interests of the general public, as defined by independent and impartial officials, rather than in the interests of private persons, or at the direction of persons with private benefit or gain in mind.” Beth Nolan, *Public Interest, Private Income: Conflicts and Control Limits on the Outside Income of Government Officials*, 87 *Nw. U. L. Rev.* 57, 71 (1992). The existing system of rules relating to conflicts of interest at the federal level is “highly detailed and complicated.” Kathleen Clark, *Do We Have Enough Ethics in Government Yet? An Answer from Fiduciary Theory*, 1996 *U. Ill. L. Rev.* 57, 66 (1996). The Federal Ethics in Government Act of 1978, for instance, requires certain national policymakers and employees to publicly disclose their financial interests on an annual basis. 5 U.S.C. app. §§ 101(d), 102(a) (2006). Other provisions, *inter alia*, prohibit bribery and gratuities, see 18 U.S.C. § 201 (2006), restrict post-employment activities by former officials, 18 U.S.C. § 207 (2006), bar officials from participating in matters in which they have a financial interest, 18 U.S.C. § 208 (2006), and prohibit officials from receiving outside salaries, 18 U.S.C. § 209 (2006). For an overview, see Ashley Kircher et al., *Public Corruption*, 45 *Am. Crim. L. Rev.* 825 (2008); see also Zephyr Teachout, *The Anti-Corruption Principle*, 94 *Cornell L. Rev.* 341, 373–74 (2009) (defining corruption as the “self-serving use of public power for private ends”).

<sup>60</sup> See *The Federalist* No. 46 (James Madison), *supra* note 52, at 330 (“The federal and state governments are in fact but different agents and trustees of the people.”); see also Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 *N.Y.U. L. Rev.* 1239, 1239 (1989) (“The Constitution is premised on the belief that government should act as the agent of the people.”).

supported by government enforcement. It turns on a private choice made by a private actor acting on his own behalf, and the government's role is to make that choice effective, not to revise it. The common law rules and statutes that enforce that choice are state action. They turn on choices made by the government actors who produced them, choices that are not simply supportive of particular private decisions. The common law rules and statutes that the government actors produce are subject to the Constitution. The choices made by the private actors are not.

Collective coercion backs the exercise of power by the government actors who enact the statutes, adopt the regulations, and enforce the common law. It also backs the decisions of the private actors who exercise the rights created and perform the duties enjoined thereby. But, again, the state action principle's conceptual and doctrinal coherence does not depend on the ability to distinguish between government and private *power*. It depends, rather, on the ability to distinguish between agents and principals—that is, between public and private *actors*—and on the ability to determine whether a public or a private actor has made a decision. We think it is possible to make such distinctions in principle and that there are a great many polar cases in which it is quite easy to apply them. Borderline cases will remain, but their existence does not undermine the general stability or usefulness of the distinction any more than borderline cases undermine the usefulness of any legal concept.

The state action problems that actually come before the courts overwhelmingly fall into a fairly narrow range in which the issue is whether the relationship between a private person or entity and the government is sufficient to justify attributing the private entity's behavior to the state and thereby hold the private entity accountable to constitutional norms. In some of the cases, it is difficult to determine whether a corporate actor is the government or not. In others, the identity of the actors is reasonably clear and the question is whether a government actor went beyond simply supporting whatever decision the private person made.<sup>61</sup> They are hard

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<sup>61</sup> The Supreme Court describes itself as applying three, or possibly four, distinct tests for determining whether the actions of the government or the relationship between a private entity and the government is sufficient to justify attributing the private entity's behavior to the state. See *Blum v. Yaretsky*, 457 U.S. 991, 1004–05 (1982).

cases, and the way that courts resolve and explain them creates the impression that state action doctrine is arbitrary and that it has no defensible core of principle. In fact, however, it is only the hard cases that are litigated, and hard cases are decided “arbitrarily” all the time.

The most famous state action case of all, *Shelley v. Kraemer*, does not fall into either category of case that the litigated state action cases typically fall into.<sup>62</sup> No one doubted that the parties in *Shelley* were private and the courts part of the government, and no one maintained that the courts that enforced the discriminatory private decision would not just as readily have enforced a non-discriminatory decision.

One way to understand *Shelley* is as a repudiation of the state action principle altogether, albeit one that soon turned out to apply only to racially restrictive covenants governing real estate. It is

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Those tests are (1) the “exclusive government function” test, see *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157–62 (1978); *Nixon v. Condon*, 286 U.S. 73, 88–89 (1932); (2) the “nexus” or “regulation” test, see *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974); (3) the “symbiotic relationship test,” see *Burton v. Wilmington Pkg. Auth.*, 365 U.S. 715, 725 (1961); and, possibly, (4) the “entwinement” test, see *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 302–03 (2001). When the Court finds “state action,” its finding amounts to a determination that the particular circumstances of the relationship between the supposedly private actor and the state are such as to render the private actor an agent of the state. No less than with common law principles of agency and vicarious liability, the state action doctrine presents the courts with difficult issues in borderline cases. For example, in *Burton*, the Court found state action in a private restaurant’s discriminatory refusal of service. In doing so, it relied on the specific circumstances of the restaurant’s involvement with the state, such as the facts that the restaurant leased space in a building owned by the city parking authority, that the parking authority had been created and given broad powers by the state legislature, that it had determined that it needed to lease space in order to generate income, and that the restaurant benefited from the tax exempt status of the parking authority. *Burton*, 365 U.S. at 717–20. This combination of facts led the Court to conclude that, for purposes of the restaurant’s operation in the space leased from the parking authority, the restaurant was a government actor. *Id.* at 724–26. In *Moose Lodge v. Irvis*, 407 U.S. 163 (1972), however, the Court found that a private club’s discriminatory refusal of service was not state action because the specific circumstances of the club’s involvement with the state were insufficient to transform the club from a private to a government actor for purposes of subjecting its behavior to constitutional standards. *Id.* at 177.

<sup>62</sup> 334 U.S. 1 (1948). The other contender for most famous state action case, *The Civil Rights Cases*, 109 U.S. 3 (1883), is about the power of Congress under § 5 of the Fourteenth Amendment, rather than the self-executing effect of the Constitution, *id.* at 19, so its holding does not directly concern the issue we address, though of course it has implications for that issue.



worth pausing here, then, to consider how—or whether—*Shelley* fits with our analysis. We think that reading *Shelley* to repudiate the state action principle altogether is unsatisfying, in large part because such a reading posits first that the Vinson Court determined to remake American constitutional law and second that the Court immediately abandoned that radical program while retaining one feature of it. We think it likely that the Justices thought they were doing something considerably more modest than launching a revolution.

One strong indicator that the Court did not intend to overthrow the state action principle completely is the Court's statement that although restrictive covenants were not enforceable in a suit like *Shelley*, the parties to them could adhere voluntarily.<sup>63</sup> That is to say, a party could decide not to sell to someone whom the covenant excluded on the basis of race. The power of sale is created by law, just as much as the right to exclude and the right to contract about possible sales, yet the Court affirmed that a private person could exercise that power on the basis of race. The courts apparently would continue to support and enforce that decision; there is no indication in *Shelley* that an injunction could issue against an individual owner, not bound by contract, who refused to sell for reasons of race. Moreover, the natural implication of retaining the power of sale even when it is exercised on the basis of someone's race is that the right to exclude is similarly retained. It is thus very, very difficult to read *Shelley* as holding that any governmentally supported exercise of a private right was to be attributed to the government for purposes of the Equal Protection Clause.

Another reason to think that the Justices understood *Shelley* in relatively modest terms comes from the way the case was presented and reasoned. The Court's treatment of the merits begins, "That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court."<sup>64</sup> One might have thought that point as clear as the Court did, but "[t]he respondents urge[d] that judicial enforcement of private agreements [did] not

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<sup>63</sup> 334 U.S. at 13.

<sup>64</sup> *Id.* at 14.

amount to state action; or, in any event, the participation of the State [was] so attenuated in character as not to amount to state action within the meaning of the Fourteenth Amendment.”<sup>65</sup> Understood so baldly, respondents’ argument was indeed contrary to well-established precedent and the natural reading of the text, according to which courts are as much arms of the state as legislatures.

The real question in *Shelley* may have been not whether a judicial decree is state action, but whether a judicial decree is racially discriminatory state action when the race-based decision was made in the first instance by private parties. Perhaps because of its construction of the respondents’ argument, the Court spent little time on that question, and its brief statements cast little light on how it understood the problem. One possibility is that the case represents one episode in the Court’s long wavering between what are now called intent and effects tests: “[W]hen the effect of that [judicial] action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands.”<sup>66</sup> While it is certainly true that a general endorsement of effects tests under the Constitution’s equal protection rules would have consequences quite similar to those of a general rejection of the state action principle, it is also true that when it finally confronted the issue four-square the Court denied that effects are central.<sup>67</sup>

It is also possible that the Court concluded that racial discrimination, and not just action, was properly attributable to the state courts because in order to enforce the restrictive covenant they had to take into account the Shelleys’ race.

We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States [*Shelley* had a companion case from Michigan] have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand. We have noted that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the

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<sup>65</sup> Id.

<sup>66</sup> Id. at 20.

<sup>67</sup> *Washington v. Davis*, 426 U.S. 229, 242 (1976).

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Fourteenth Amendment. That such discrimination has occurred in these cases is clear.<sup>68</sup>

By contrast to the facts of *Shelley*, if a property owner refuses to allow an individual access to the property because of the individual's race, a court can enforce that refusal through an injunction without itself having to inquire into race. If that is what *Shelley* was about and if that is why the Court was able to distinguish private race-based decisions that constituted "voluntary" compliance with the covenants, then the case turns on a particular reading of the substance of the equal protection principle, one that requires a form of race-blindness by government actors. As long as such actors need not know the evil that lurks in the hearts of private decisionmakers, that evil is not attributed to them for constitutional purposes. That reading of equal protection would impose some limits on the racially discriminatory use of private rights but would stop far short of treating all private power as governmental.<sup>69</sup>

Whatever the Justices who decided *Shelley* were thinking, the case has come to stand for an important, virtually unquestioned, but limited principle: racially restrictive covenants governing transfer of real estate may not be judicially enforced. Perhaps that must be regarded as an exception to the state action principle, but it is a small one. It has shown no signs of expanding in more than sixty years, and cannot be regarded as having repudiated the principle. Thus we are warranted in resuming our analysis at the point where

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<sup>68</sup> *Shelley*, 334 U.S. at 20 (emphasis added).

<sup>69</sup> The author of *Shelley*, Chief Justice Vinson, may well have believed that the problem was judicial race-consciousness in an even narrower sense. In *Barrows v. Jackson*, 346 U.S. 249 (1953), he dissented when the Court applied *Shelley* to block a damages judgment against a white property owner who violated a restrictive covenant by selling to a black buyer. The Chief Justice believed that *Barrows* was different because of the absence from the case of any party against whom the covenant would be enforced on the basis of race.

Thus, in the *Shelley* case, it was not the covenants which were struck down but judicial enforcement of them against Negro vendees. The question which we decided was simply whether a state court could decree the ouster of Negroes from property which they had purchased and which they were enjoying. We held that it could not. We held that such judicial action, which operated directly against the Negro petitioners and deprived them of their right to enjoy their property solely because of their race, was state action and constituted a denial of "equal protection."

Id. at 261 (Vinson, C.J., dissenting).

we have drawn the crucial distinction in principle between public and private actors.

It appears to us that the existence of this distinction is common ground between us and the critics. They might resist this conclusion because they suppose that Hale's insights so fundamentally undermine the state action concept. But to speak as Hale did of delegated state power is to assume that there is such a thing as state power and that it can be delegated, which means that it can be granted to someone who is not the state. All participants in the debate over state action appear to assume that there are institutions for collectively organized coercion, such as police forces and armies, and institutions that make primary decisions about how that force is to be used, such as legislatures, courts, and the core agencies of the executive branch of government. All also seem to assume that there are unproblematically private persons to whom state power can in a sense be delegated through the creation of private rights that will be coercively enforced. Core examples of the latter include individuals as well as artificial persons with legal personality, such as corporations.

These polar examples include enough easy cases to make the distinction between state and private actors usable. In fact, the distinction between them is so deeply embedded in, implicit in, and intrinsic to our legal culture that lawyers, judges, legislators, and even legal academics usually take it for granted. If this were not so, there would be incessant litigation concerning the application of constitutional norms to the routine decisions of the kind of quintessentially private actors we have just described, but there is not.<sup>70</sup>

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<sup>70</sup> See, e.g., *Dallas v. Holmes*, 137 F. App'x 746, 752 (6th Cir. 2005) (stating allegations against opposing counsel are "frivolous" in light of "well-settled" principle that a lawyer representing a client is not state action); *Strickland v. Linahan*, 72 F.3d 1531, 1533 (11th Cir. 1996) (holding conduct of habeas corpus petitioner's daughter in voluntarily revealing documents to family members and to law enforcement officials was "indisputably private, not in any sense state action"); *Seay v. Wallace*, No. 2:08cv868-TMH, 2009 WL 101961, at \*1 (M.D. Ala. 2009) (stating claim by prisoner that fellow inmate is a state actor is "frivolous"); *Havens v. Victoria of Tex. Ltd. P'ship*, No. V-06-119, 2008 WL 1858924, at \*9 (S.D. Tex. 2008) (holding private hospital where plaintiff was employed was "clearly not a state actor"); *Menefee v. U.P.S.*, No. 05-CV-74892DT, 2006 WL 373046, at \*1 (E.D. Mich. 2006) (calling a claim by prisoner that damage to goods during shipment constituted a civil rights violation "frivolous" since shipping company was "not a state actor"); *Miner v. Commerce Oil Ref. Corp.*, 198 F. Supp. 887, 891 (D.R.I. 1961) (holding private oil refining company not a state actor since it is "obvi-

Nor is there routine dispute about the applicability of the Constitution to statutes, common law rules, administrative agency regulations, or any number of other decisions made by quintessentially public actors.<sup>71</sup> Any competent lawyer can predict these outcomes, as indeed can any reasonably sophisticated layperson. In fact, we do not understand any state action critic to deny the existence of such regularities.<sup>72</sup>

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ous” that the company “is not an agent or instrumentality of the State of Rhode Island”).

Not only is the text of the Constitution incompatible with the notion that its restrictions generally apply to private citizens, but so is the conceptual structure of many of its protections. The First Amendment, for example, provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. Const. amend. I. If private citizens were forbidden to endorse and support particular religions, it is hard to see how there would be any possibility of free exercise left to them. Even where specific guarantees of the Bill of Rights are not concerned, the Constitution has been held to require that all government action be supported by a rational basis. See, e.g., *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 487–88 (1955) (“[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 147 (1938) (“Congress is free to exclude from interstate commerce articles whose use in the states for which they are destined it may reasonably conceive to be injurious of the public health, morals or welfare . . .”). Yet even with the robust practice of civil litigation in America today, no competent lawyer would think that her client could bring a claim for damages simply because another private person acted irrationally.

<sup>71</sup> See, e.g., *Peng v. Mei Chin Penghu*, 335 F.3d 970, 980 (9th Cir. 2003) (stating arrest by police officer is “[c]learly” state action); *Harvey v. Horan*, 278 F.3d 370, 383 (4th Cir. 2002) (stating it is “indisputable” that state prosecuting attorney is state actor); *Hay v. Evins*, No. 97-5286, 1999 WL 96755, at \*7 (6th Cir. 1999) (stating a police officer providing evidence to the FBI is “obviously” a state actor); *California v. FCC*, 75 F.3d 1350, 1361 (9th Cir. 1996) (holding a claim that California Public Utility Commission is not a state actor is “clearly frivolous”); *Washington v. Hall*, No. 92-6258, 1993 WL 55948, at \*3 (10th Cir. 1993) (holding a state juvenile court judge is “clearly a state actor”).

<sup>72</sup> It is possible, of course, that this predictability in outcomes is actually generated by some hidden principle, and not by the surface, intuitive distinction between government and private people. Sunstein’s “baseline” argument suggests that the real work is done by the familiarity or unfamiliarity of the underlying government decision, so that the exercises of familiar property rights are not treated as state action whereas more recently developed legal rules like anti-discrimination laws are state action. See Cass R. Sunstein, *Democracy and the Problem of Free Speech* 45 (1993) (“Clearly state action underlies the grant and deployment of property rights . . .”). Yet Sunstein’s description does not seem accurate to us. On one hand, racially discriminatory rules about property and contract, the most familiar of private law categories, are historically the central exemplars of state action to which § 1 of the Fourteenth Amendment

*b. Agents and Principals: Real Differences*

We pause here to make an important point about the critics' argument with regard to the state action principle's limits on the reach of constitutional norms, which is that the argument does not take aim at any constitutional provisions other than the protections of liberty, property, and equality. Moreover, the critics turn out to be unhappier about substantive results than they claim to be with the doctrine's supposed conceptual incoherence. The real problem for the critics is that the limits the doctrine sets on constitutional rules do not make sense from the standpoint of their normative distributive and non-discrimination goals because the limits do not require courts to undo the distributive effects that the exercise of private rights, most often of property rights, have on the ability of non-owners to exercise their own constitutional liberties. In this connection, though, we think it is significant that the proposition for which the state action principle stands—that in general when the law enables a private right holder to choose among a number of options, and will enforce any of those choices, the private choice is treated as private and not governmental for constitutional purposes—is a quite modest constraint on the efforts of those who seek to limit or otherwise affect the exercise of government power by private actors.<sup>73</sup> The state action principle does not stand for the

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applies. U.S. Const. amend. XIV, § 1. On the other hand, an individual's decision to bring a lawsuit under an anti-discrimination statute is not subject to constitutional objection on the grounds that the individual acted on the basis of racial animus. For other criticisms of Sunstein's baseline argument, see, for example, David E. Bernstein, *Lochner's Legacy's Legacy*, 82 Tex. L. Rev. 1, 2 (2003) (criticizing Sunstein's "baseline" theory of *Lochner v. New York*, 198 U.S. 45 (1905)); David B. Rivkin, Jr., *The Partial Constitution or the Sunstein Constitution?*, 18 Harv. J.L. & Pub. Pol'y 293, 312 n.62 (1994) (arguing that Sunstein's support for the constitutional requirement that rights be distributed equally requires an "external yardstick" by which to measure such equality and that the Framers themselves believed in natural rights).

<sup>73</sup> In this connection too, it is important to distinguish the general state action requirement from related but distinct concepts. First, the requirement of state action is not the same as the more substantive principle that the Constitution itself does not create or mandate any rules that govern the relations of private people (first-order rules). That principle means that the Constitution contains no independent requirement that certain private rights exist, not that there are no situations under which some other constitutional limitation may entail the extension (or perhaps even creation) of a first-order entitlement. For example, Congress is under no obligation to provide a subsidy for parents of children, because it is under no obligation to provide any cash subsidies. But under current doctrine if Congress were to enact a racially

proposition that government is without authority to enact or enforce sub-constitutional norms to discipline private actors. Thus it is inaccurate to say that the principle embodies “the supposition

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specific subsidy that would have been extended to everyone but for the racial consideration, then almost certainly the Constitution would require that the subsidy be available to all parents, regardless of race. As we will discuss, the normative justifications for the state action requirement are related to the principle that the Constitution mandates hardly any first-order legal entitlements, but the two are distinct conceptually and in their applications.

Second, a general requirement of state action must be distinguished from similar features of particular constitutional norms. The Contracts Clause, for example, is about changes in legal entitlements. It therefore cannot be violated when there has been no change in legal entitlements, which is to say when there has been no state action. That is a substantive aspect of the Contracts Clause: it bans certain alterations in vested legal rights. A corollary is that the requirement of action as opposed to inaction has room to operate only with respect to constitutional rules that are not themselves limited to the invalidation of identifiable norms. It is thus no accident that examples of the requirement at work involve constitutional doctrines that can operate on decisions of individual government actors, like legislators, rather than just on formal legal rules. Indeed, this aspect of the state action principle may have come into focus only with the embrace of inquiry into subjective intent; the classic case that seems to embrace the principle, *Palmer v. Thompson*, also rejects any concern about subjective discriminatory purposes. 403 U.S. 217, 224 (1970) (noting the “hazards of declaring a law unconstitutional because of the motivations of its sponsors”).

Third, the state action requirement is separate from the rights-privilege distinction. Pursuant to the latter, certain constitutional limitations forbid adverse government decisions with respect to some interests but not others. Procedural requirements under the Due Process Clause, for example, are triggered only by deprivations of life, liberty, or property, and not all interests constitute property. U.S. Const. amend. V. Some form of the distinction operates in constitutional liberty doctrine. The Court’s right of privacy cases hold that the limits on criminal punishment for abortion are quite different from the limits on the use of government funds as incentives; Congress and the states may discourage through differential funding abortions that they may not discourage through criminal sanctions. Similar principles apply with respect to free expression, where differential subsidy is permitted to create speech-related incentives that other sanctions could not. Whether the liberty-related doctrines should be called the rights-privilege distinction is a difficult question. Perhaps they should not be, because those cases do not seem to hold that the government may freely create incentives with respect to benefit programs but not with respect to old property. It is hard to believe, for example, that social security payments could be conditioned on the expression of certain views (and equally hard to believe that, as a political matter, they ever would be—though that is beside our point). More likely, the courts are seeking to identify permissible and impermissible purposes with respect to government influence over private speech. With respect to the right of reproductive privacy, the underlying principle probably is that the government may take limited, but only limited, measures to discourage abortion, and the distinction between old property and government benefits is a way of drawing that limit. We consider this point further *infra* Part III.

that . . . there are wrongs that are immune from governmental sanction despite their wrongness.”<sup>74</sup> The state action principle neither ordains nor endorses any particular exercise of private power; nor does it ordain or endorse the particular distributions that from time to time result from private power’s exercise. The state action principle is not about the reach of the legal system or the power of legislatures. It is about the reach of the Constitution.

State action’s critics think that the decisions of state and private actors carry the same potential to be abused, as both are underwritten by government power. They conclude, therefore, that the decisions of both state and private actors should be constrained by *constitutional* norms whose purpose is to prevent the abuse of government power. Insofar as the state action doctrine stands in the way of expanding the application of constitutional norms to the decisions of private actors exercising government power, they think the doctrine should be abandoned.

This conclusion does not follow if, as we argue, the state action doctrine does not rest on the mistaken assumption that either exercises of government power are uniquely to be feared or that there is no potential for abuse when private actors exercise their private rights backed by government coercion. We argue that the doctrine rests on the real distinction between government and private *actors* and not on the spurious one between public and private *power*. If we are correct, then it becomes apparent that the doctrine leaves in place not a legal order in which constitutional rules insufficiently constrain the decisions of private actors but rather a legal order that disciplines the decisions of private actors in different ways and with different accountability mechanisms than it does the decisions of government actors, and that gives the institutions that make sub-constitutional law the ability to change the ways in which private people are controlled. In other words, with the state action doctrine in place, both private and public actors can exercise their government-backed power in ways that can cause harm, but the challenge of constraining the potentially harm-creating decisions of government actors differs in kind from the challenge of constraining private actors.

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<sup>74</sup> Schauer, *supra* note 9, at 916–17.



The decisions and activities of both government and private actors often have external effects. Both can use their power—power backed by government coercion that the Constitution enables, legitimizes, and limits—to produce untoward effects on others' choices. In addition, private rights and public power perform similar functions within their respective spheres of operation: they allocate decisionmaking authority and provide a framework for organizing, coordinating, and regulating individual and collective action. Our point is that the organizational framework within which actors exercise private rights as principals holds them accountable by mechanisms that are fundamentally different from the mechanisms of accountability to which government actors are subject.<sup>75</sup>

The Constitution both confers and limits the power of government actors, each of whom must operate within his own institution's particular decision-making framework. None may exceed the bounds of the authority the Constitution grants his institution; all are subject to the peculiar mechanisms of accountability that define the branch of government they occupy. Government actors' compliance with the constitutionally prescribed organizational framework and conformity to the particular constraints it imposes upon them is definitional of the legitimate exercise of their public power. As we have suggested above, it is fruitful to think about constitutional structure as embodying the Framers' efforts to at once establish the government, deter the abuse of power by government agents, and facilitate citizens' efforts to hold their agents accountable.<sup>76</sup> Describing the complexities entailed in effectively monitoring government actors is well beyond the scope of this paper. It is our view, however, that the obligation of government actors to act on behalf and for the benefit of their citizen principals does not guarantee that government actors are inherently more altruistic or less likely to act in self-serving ways than their counterparts in the private sector. Indeed, we think it a near certainty that they are susceptible to the temptations to which agents often succumb. In

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<sup>75</sup> See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 *U. Chi. L. Rev.* 345, 348 (2000) (summarizing differences between market actors and political actors and questioning the "prevailing justifications for mandatory compensation of takings or constitutional torts").

<sup>76</sup> See *supra* text accompanying notes 55–60.

other words, we think they are individuals whose self-interest often inclines them to act in ways that diverge from the interests of their principals.<sup>77</sup> The agency-cost problems that this tendency creates pose a daunting challenge for designers of public institutions.<sup>78</sup> The task is somehow to align government agents' incentives with their citizen principals' interests and to secure their faithful agency by finding ways to hold them accountable to those in whose collective interests they supposedly act. Agency-cost problems are of course not unique to the public sphere, and they have evoked systematic scholarly attention mostly from scholars of corporate law.<sup>79</sup> Still we think it useful to recognize both that there are agency-cost challenges inherent in monitoring government actors and that these challenges are not the same as those that plague the principal-agent relationship of private actors. Just one example perhaps helps to make our point. Consider that when common law mechanisms of accountability such as tort law are deployed to constrain government actors, the very fact that they apply to *government* and not to private actors creates issues different in kind from those presented by private tort litigation. Among the many reasons for this fact is the difficulty of harnessing the private interest of potential government actor defendants in avoiding liability to the public interests such actors are supposed to be serving.<sup>80</sup>

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<sup>77</sup> See The Federalist No. 51 (James Madison), *supra* note 52, at 118 ("In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself. A dependence on the people is no doubt the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.")

<sup>78</sup> See Steven G. Calabresi, Political Parties as Mediating Institutions, 61 U. Chi. L. Rev. 1479, 1525 (1994) ("[T]he separation between the sovereign people and their managers (and their managers' agents) mimics many of the problems that arise in corporate law because of the separation of ownership and control."); Jonathan R. Macey, Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory, 74 Va. L. Rev. 471, 472-73 (1988) (discussing the relationship of the agency-cost problem to American constitutional structure).

<sup>79</sup> See Eugene F. Fama, Agency Problems and the Theory of the Firm, 88 J. Pol. Econ. 288, 288 (1980); Eugene F. Fama & Michael C. Jensen, Separation of Ownership and Control, 26 J.L. & Econ. 301, 301-02 (1983); Michael C. Jensen & William H. Meckling, Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure, 3 J. Fin. Econ. 305, 305 (1976).

<sup>80</sup> See, e.g., Peter Schuck, Suing Government: Citizen Remedies for Official Wrongs 68-69 (1983) ("Most private actors would decide to incur any cost if the expected value of the correlative benefit were great enough, but officials tend to reject any

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The task of rules that govern public decisionmakers, and hence the task of nearly all constitutional rules, is to ensure that public decisions will be made in the interests of the government's principals. The task of the rules that govern the relations of private people to one another is extremely different. Those rules reflect the assumption not only that people pursue their own interests, but also that the point of the law is to enable them to do so. Private people are not doing anything wrong, even in principle, when they use their legal rights to pursue their own ends and not those of anyone else. The critics of the state action principle do not deny this; their objections to the content of the sub-constitutional law, and in particular the distributional consequences of that law as it currently exists, do not rest on the premise that people should not have rights and should not pursue their own welfare. They may favor a different system of rights, one they believe will be better overall, but they embrace the assumption that people use their rights to pursue their own ends.

The legal system that governs private interactions does resemble the rules that govern official decisionmakers in that in many ways it causes private right-holders, in the legitimate pursuit of their own ends, to take into account the consequences of their actions for other people. This effect of private law rules is not often recognized. Of course, in any system of private rights, no one will be able to accomplish everything he wants to, and to some extent, the private rights of others will have adverse consequences for those whose plans are blocked by those rights. In a world of virtually unlimited desires and scarce resources with which to achieve them, that outcome is inevitable. The critics of the state action doctrine stress the frustrations that will result from private rights, but they do not acknowledge the inevitability of such frustration. Nor do they focus on the ways in which the law that governs private people requires them to take one another's interests into account or gives them incentives to do so.

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course of action that would drive their personal costs above some minimum level . . . ."); John C. Jeffries, Jr., In Praise of the Eleventh Amendment and Section 1983, 84 Va. L. Rev. 47, 75 (1998) (arguing that "the incentives of government officers are skewed, as compared to actors in the private sector, toward inaction, passivity, and defensive behavior").

Even a brief and incomplete sketch of the mechanisms that lead actors exercising government-backed private rights to take the interests of other private people into account reminds us that the private law pursues that goal in its own fashion, and that it is not necessary to expand the reach of constitutional norms to make that happen. (The way in which and the extent to which the law achieves that goal are questions about its content, not about whether constitutional rules are needed, or would be desirable, in pursuit of that end.) Consider first common law rules. The rules of private property, for example, give owners exclusive rights and supply them with doctrines that facilitate their transactions and enforce their decisions.<sup>81</sup> They thus permit owners to appropriate the gains from their wealth-enhancing or otherwise prudent decisions concerning the use, possession, and disposition of their assets *and* require them to absorb the losses from their unwise decisions. Appropriability of gains and losses is axiomatic to a property rights regime. It enables rights-holders to pursue their own goals on the assumption that they are entitled to do so. It also tends to serve a powerful, self-enforcing accountability function because it means that private decisionmakers who exercise their state-backed private rights must themselves bear the consequences of their decisions rather than requiring them to share the benefits or permitting them to fob off the costs. Similarly, the enforceability of contracts permits parties to engage in mutually beneficial exchange. Default rules that mirror the expectations of both parties, or that force the disclosure of information, economize on contracting costs. At the same time, because parties can contract around the default rules, they can devise contractual structures to minimize their respective incentives to engage in strategic behavior and can craft bonding and monitoring mechanisms to ameliorate the agency problems which that they anticipate will arise. Finally, tort law enforces ac-

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<sup>81</sup> See, e.g., Bruce A. Ackerman & Richard B. Stewart, Reforming Environmental Law, 37 *Stan. L. Rev.* 1333, 1334–39 (1985) (describing direct technology-based, command-and-control standards as inefficient); Ian Ayres & Robert Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 *Yale L.J.* 87, 91 (1989) (providing a model for creating default rules); Louis Kaplow & Steven Shavell, Do Liability Rules Facilitate Bargaining? A Reply to Ayres and Talley, 105 *Yale L.J.* 221, 232–33 (1995) (analyzing property rules versus liability rules); Alan Schwartz, The Case for Specific Performance, 89 *Yale L.J.* 271, 271 (1979) (explaining why specific performance is preferable to liability remedies in contract).

countability for harm by imposing liability on private actors who through negligence, force, nuisance, or fraud inflict injury upon others.<sup>82</sup>

The competitive market, upon which the critics focus much censure, can in fact be seen in a more favorable light, namely as an important non-legal source of accountability for actors exercising private rights.<sup>83</sup> In this connection, we emphasize not the capacity of the market to generate gain but rather its capacity to constrain the infliction of harm on others by market actors. We emphasize that the opportunities for private gain that the market has historically afforded are disciplined by the punishments it metes out for performance that consumers, trading partners, or business associates found unacceptable. Actors in competitive markets have exit rights, which powerfully constrain the behavior of all market participants.<sup>84</sup> When entry and exit are relatively free and buyers and sellers of goods, labor, and services can choose among alternative trading partners who offer alternative terms of trade, then behavior that is opportunistic, irresponsible, or uncooperative does not promise rewards. In other words, when market actors know that their failure to meet demand—by “offering adequate goods and services, delivering a quality work product to employers and competitive working conditions for employees—[will cause] the people

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<sup>82</sup> Government actors, of course, have access to common law rules too. The government can own property, make contracts, and sue or be sued for tortious behavior. The common law does not serve the same accountability function with regard to government actors, however, because they may not personally appropriate the gains of, nor—with only a few exceptions—will they personally have to suffer the harms their decisions generate. The exceptions arise in the context of § 1983 litigation, and as a practical matter they arise infrequently even there. Cf. John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 *Yale L.J.* 87, 92 (1999) (noting that “states and localities routinely defend their employees” in civil rights litigation and “indemnify them against adverse judgments”).

<sup>83</sup> At least one state action critic has acknowledged that the incentives created by the market are an important engine of economic productivity. Sunstein, *supra* note 25, at 266 (“In general, a market system . . . promotes both liberty and prosperity . . .”).

<sup>84</sup> But cf. Tushnet, *supra* note 43, at 178, which suggests that “[t]he exit option for those who object does not distinguish private actors from government ones” because “people can ‘vote with their feet’ to avoid harms inflicted by local and even state governments, and . . . the threat of such exit constrains governments from acting oppressively.” Perhaps, indeed, the exit option works to constrain state and local governments from acting oppressively, but it surely cannot be thought to act as an effective constraint on oppressive federal action.

with whom [they] deal [to] exercise their exit rights,” they will be inclined to suppress their tendencies to shirk or exploit.<sup>85</sup>

It is obvious that neither common law rules nor competitive markets achieve all the goals that a reasonable legal system might pursue. Many systematic defects in the incentives that confront private actors exist. To mention just a few: external effects often distort decisionmaking by private rights-holders; market prices sometimes lie, and more or less severe market failures generate more or less severe lapses in the market’s ability to hold market actors accountable for charging too much or offering too little; the information embedded in prices may be incomplete, inaccurate, or otherwise suspect; transaction costs may be exorbitant; some markets may simply fail to develop because of information asymmetries or public goods problems; monopolies may emerge; cognitive lapses by private decisionmakers may drastically impair their judgment and their capacity to assess alternatives; discrimination may limit opportunities. Moreover, adherence to traditional rules of property and contract has distributional consequences that many people find undesirable. Our point is that those shortcomings do not imply that the way to address them is to revamp *constitutional* law, in particular by applying constitutional norms to governmentally supported exercises of private rights. Especially since the New Deal, and even more so in recent years, Congress has adopted regulatory strategies and established administrative agencies with the avowed purpose of internalizing external effects, correcting market failures, and regulating the financial system. Congress and the states have also adopted extensive programs of redistribution through taxation and programs of public benefit.<sup>86</sup> The administra-

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<sup>85</sup> Stephen Williams, *The More Law, the Less Rule of Law*, 2 *The Green Bag* 2d 403, 404–05 (1999). Note what the sentence in the text does not claim. It does not claim that “they will suppress their tendencies to shirk or exploit.” It does claim that they “will be inclined to suppress their tendencies to shirk or exploit.”

<sup>86</sup> See, e.g., Tax Reduction Act of 1975, Pub. L. No. 94-12, 89 Stat. 26 (codified as amended at I.R.C. § 32 (2006)) (creating the Earned Income Tax Credit); Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531–1544 (2006)); Consumer Product Safety Act, Pub. L. No. 92-573, § 11(c), 86 Stat. 1207 (1972) (codified as amended at 15 U.S.C. §§ 2051–2085 (2006)); Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. § 1251 et seq. (2006)); Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, § 6(f), 84 Stat. 1590 (codified as amended at 5 U.S.C. § 7902 (2006)); National Environmental Policy Act of 1969 (“NEPA”), Pub. L. No. 91-

tive state's regulatory efforts subject private actors to more active government supervision and control than they experienced before the regulations were enacted, and private actors are now more accountable to government officials and governmentally prescribed standards of behavior than they previously were. For our purposes, the noteworthy point is that these regulatory and redistributive efforts, though they have been enacted in large part to deter and prevent infliction of harm by private actors exercising government-backed private rights, have not been the product of expanding constitutional norms. In other words, they have proceeded unhindered by the state action doctrine.<sup>87</sup>

Having argued in the abstract, we will now offer a more concrete illustration. Although most private rights of property and contract are governed by state law, Congress has express power to create intellectual property. Under those statutes, copyright holders have the standard rights of ownership, including the intellectual property equivalent of the right to exclude: they may use state power to prevent and redress unauthorized copying. The exclusive control of their work that creators enjoy is in large measure designed to further their interests, and copyright holders do no wrong when they consult those interests in making decisions about their rights. To some extent, they, like other principals, are accountable to themselves and no one else. Some creators believe that this control is a matter of important moral principle and that a grievous injustice is done to them when they do not have the final say about how their work is to be used.

But the design of the copyright system as well as the larger system of private rights into which it fits takes account of other interests too. The right to exclude is limited by the privilege of fair use, which draws the line between rights-holders and duty-bearers in a way designed at least to balance the competing interests of the two

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190, 83 Stat. 852 (codified as amended at 42 U.S.C. §§ 4321–4370f (2006)); Health Insurance for the Aged Act (“Medicare”), Pub. L. No. 89-97, § 101, 79 Stat. 290, 290 (1965) (codified at 42 U.S.C. §§ 1395–1395hhh (2006)); Social Security Amendments of 1965 (“Medicaid”), Pub.L. No. 89-97, § 121, 79 Stat. 290, 343 (1965) (codified at 42 U.S.C. §§ 1396–1396v (2006)); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 2000a–2000h (2006)).

<sup>87</sup> Indeed, to the extent that constitutional impediments thwart redistributive efforts, their source has not been the state action doctrine. See text accompanying *supra* note 73.

groups. Rights-holders have the power to exclude, but they do not have a put of their works to potential purchasers. Rather, non-rights-holders may choose whether or not to purchase a work, and the state will enforce that choice. The result is a largely competitive market for copyrighted works. If Congress judges that the market is not producing desirable results, it can change the rules, as by providing for compulsory licensing, which would give buyers a call on works at a legally determined price. Moreover, unlike most systems of property, those created pursuant to this constitutional power wear their incentive effects for producers on their sleeves: the Constitution says that it allows Congress to give exclusive control over works to private people so that those people will have greater inducement to create works in the first place. Those creative acts will be in both their own interests and those of others.

Whether the law of intellectual property as it stands at any point properly reconciles the competing interests of all those affected by it is an important question of policy that Congress can and does address. To preview the main theme of the next Section, we will point out that it would be very unwise for the Constitution itself to prescribe those rules and thereby make them far less flexible. Here, our point is that it would be quite unnatural to apply rules designed for government decisionmakers to private people whose choices will be enforced by the government. Whatever else the Speech and Press Clauses of the First Amendment are designed to do, they are an important part of the agency structure of the Constitution because they keep the people's delegates from interfering with the people's assessment of their work.

Applied to private actors exercising state-enforced private rights, the free expression clauses would frequently produce nonsensical results. A copyright holder might well wish to refuse permission for use, and thereby invoke government power, to someone who wanted to use a copyrighted work to criticize a public official whom the rights-holder supported. That decision is properly made by a private person, not by a government actor, and the two cases are drastically different even though in both the power of the state is deployed against a duty-bearer.

Private actors exercise government power when the government enforces their rights against other private actors, but the state action principle does not turn on the absence of government power,



nor does its justification. Rather, it turns on whether a public or a private actor is exercising that power. Moreover, constitutional norms are not the only means to prevent private actors from using their government power abusively. Indeed, the potential for private actors to abuse their government power when they are acting as principals on their own behalf is subject to the discipline of common law rules, the competitive market, and a wide range of statutorily imposed regulatory mandates. Critics of the state action principle, and of the fact that it places limits on the reach of constitutional norms, have been inadequately attentive to the implications of these realities.

#### *D. Action, Inaction, and Causation*

As we have described it, the state action principle entails what might be called a distinction between state action and inaction, though those terms must be used with great care. The principle treats the establishment and content of legal rules that empower choice by private actors as state action and the exercise of those choices as private action. Thus the legal rules establishing contractual capacity are state action, subject to constitutional norms, but the contractual choices that private people may but need not make are private. The result is to distinguish legal permissions from both prohibitions and requirements. A law forbidding action *X* is a government decision that *X* shall not happen; a law requiring action *X* is a government decision that *X* shall happen; but where *X* is one choice among many made by a private person, any of which will be supported by government power, then the government has not chosen *X*, the private actor has.

Critics of the state action principle may respond that the permission and the mandate should be treated the same for constitutional purposes, and see in our failure to do so a spurious distinction between state actions and omissions.<sup>88</sup> In both cases, goes the criticism, the government has caused the action because the permission is a failure to prohibit. Omitting the prohibition and imposing the mandate have the same consequences and so should be treated the same. In a standard example, private race discrimination permitted

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<sup>88</sup> If the conduct is forbidden, then its non-performance by a private actor will be treated as state action.

by the government is just as much a public action as private race discrimination required by the government because the permitted discrimination could have been prevented by a prohibition that was not imposed. Critics argue that just as a person who could have put out a fire but failed to do so is as much a cause of the fire's effects as the person who set it, so the government is just as much a cause of conduct it permits as of conduct it requires.

So it is. The state action principle does not determine the applicability of constitutional rules on the basis of government causation.<sup>89</sup> In seeking to justify it, we are not denying that the government has a causal role when it enforces a private choice it could have prevented. Rather, we are arguing that it is important whether that causation operates by supporting one of many possible private decisions.<sup>90</sup> Suppose that the parents of a college-aged child have decided to pay for the child's college education. The parents are both graduates of Duke University and the child has been admitted to both that school and the University of North Carolina. The parents decide that, because of their strong feelings about Duke, not to mention North Carolina, they will leave the decision to the child, and pay for either one. They have the legal authority to refuse to pay, and possibly the legal authority to require their child to attend one school rather than the other, but to avoid making a decision with a conflict of motives, they do not exercise that power. The higher-order rule they are applying, that people should not make important decisions on the basis of their sentiments as alumni, distinguishes between the case in which they defer to their child and the case in which they choose a school themselves. Like the state action principle, that rule distinguishes between decisionmakers: the parents have a conflict of motivations that the child does not. None of this is incompatible with the parents' causal role in the child's attendance of whichever school is selected.

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<sup>89</sup> Nor does it rest on the claim that the government is not in some moral sense responsible for any action it could have prohibited but did not. The question is whether the government is to be legally responsible, and if so how.

<sup>90</sup> An acute discussion of the important difference between government mandates and permissions in the context of the state action problem appears in Larry Alexander & Paul Horton, *Whom Does the Constitution Command? A Conceptual Analysis with Practical Implications* 73–79 (1988).

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For the parents to comply with the principle about conflicts of motivation, they must be capable of adopting and complying with a rule that keeps them from taking an action that they could take: determining the choice of school. They must be able to resolve to support their child's choice, and then do so, not because it is the choice they would have made, but because it is the child's. In similar fashion, for the state action principle to make sense, governments must be capable of formulating and following rules like that. Courts must be willing to enforce private contracts of which they disapprove. Legislatures must be able to avoid interfering with private investment decisions that they would never have made with the taxpayers' money. Although the state action principle's critics sometimes hint at a rule-skepticism so strong as to make such behavior impossible, without it government would be impossible in general. For example, effective government is possible only if enforcement officials like police carry out the judgments of courts, not because they believe those judgments to have been legally correct, much less morally admirable, but because they carry out all judgments and leave their correctness to the judges.

Institutional cooperation requires that some actors be able to follow a rule of deferring to other actors; military command works that way. If governments were unable to follow such rules, it would frequently make no sense to distinguish between individual and collective choice, and hence it would be impossible to prefer the former to the latter. The difference between a collective decision and an individual decision is fundamental to policy making and constitutional law. From the standpoint of policy, there is a large difference between a system in which individuals select their physicians in the market, and hence exercise their private rights, and one in which people are assigned to doctors by a government agency. The idea of constitutionally protected liberty, central to both the state action principle and its critics, assumes that there is a difference between individual and social choice.

Taking that important difference seriously for legal purposes does not mean assuming, as Seidman and Tushnet sometimes suggest that it does, that it is possible to have some private realm from which government is wholly excluded. They argue that there is no such realm, or at least there has been no such realm since the 1930s, because the possibility that the government could have

made a choice makes it erroneous to think of that choice as private.<sup>91</sup> What matters, however, is not what the government could do, but what it has done. When the law will support one of many private decisions, the selection of one is meaningfully private. Otherwise there could be no private rights, constitutional or otherwise.<sup>92</sup>

### III. PRIVATE ACTION, GOVERNMENT INACTION, AND SUBSTANTIVE CONSTITUTIONAL NORMS

When government enforces private decisions but leaves the substance of those decisions to private people, the choice to support the decision is the government's but the decision itself is not. When those private decisions are made in a way that would violate a constitutional rule if made by the government, it is possible to argue that the state action principle is in conflict with that constitutional rule. For example, when private rights are used in a racially discriminatory fashion, the state action principle can be seen as in conflict with the Constitution's anti-discrimination norm. The terms "state action" and "state inaction" are used to draw a line that can also, it is alleged, interfere with the otherwise natural operation of constitutional norms. A law banning poetry would be unconstitutional, for example, but the absence of government support for poetry may be constitutional even if the reason no support

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<sup>91</sup> See Seidman & Tushnet, *supra* note 27, at 66 ("A central element of the New Deal revolution was the systematic dismantling of the public-private distinction. . . . The Court came to understand that inaction was a kind of action: The government was always confronted with the option of reallocating burdens and benefits or leaving them undisturbed.").

<sup>92</sup> Their view may be driven by an extreme form of rule-skepticism, according to which it is impossible actually to follow a rule as such. Whenever a rule is applied, Seidman and Tushnet seem to think, the fact that the government official applying it could do otherwise means that every time the official is choosing (or rejecting) the action supported by the rule. But when the official's reason for following the rule is the rule's existence, and not the result it produces, then the official is choosing to follow the rule, but not in an important sense, choosing to produce the result. Seidman and Tushnet may think that individual and not collective choice is possible only in some magical realm in which the government is constrained from outside. For example, in indicating that constitutional rights create such a realm, they neglect that they too are made by a political process. We do not believe in magic, but we do believe in rules.

is forthcoming is legislators' belief that poetry is inherently subversive of good morals.

We defend both aspects of the state action principle from the criticism that they represent unjustifiable limitations on constitutional values and that in particular they represent an insupportable preference for common law style private rights. While it is true that they give special treatment to existing legal rules, though not to common law rights as such, they do so for good reason, and without overturning the normative imperative of other aspects of the Constitution.

Because of the constitutional distinction between government decisions and private decisions, constitutional norms of liberty and equality do not themselves dictate the distribution of resources but take as given the distribution produced by the non-constitutional law (which includes but is not limited to the law of property and contract). Mark Tushnet is thus correct in saying that the state action principle blocks the derivation of constitutional welfare rights from provisions like the First Amendment or the Equal Protection Clause, but he is incorrect in suggesting that the principle thereby arbitrarily limits the substantive logic of those provisions.<sup>93</sup> Rather, the principle leads to particular versions of the constitutional protection of liberty and equality that while normatively debatable, are reasonable.

As for the distinction between government action and inaction, it is often used to express a fundamental feature of the way in which the Constitution's supremacy over non-constitutional law is implemented. Because the Constitution constrains the sub-constitutional law but does so quite loosely, leaving a great many choices to the ordinary political process, when it is violated the remedy is to replace one set of legal rules that do not come from the Constitution with another, as for example by invalidating a single statute and leaving the law otherwise intact. In unusual circumstances it may be possible to say that the Constitution has been violated in some sense but impossible to say what the legal system would look like in the absence of that violation. In those circumstances, there is nothing a court, and sometimes anyone, can do about the violation. That problem is sometimes described by saying

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<sup>93</sup> See Tushnet, *supra* note 43, at 189–94.

that the Constitution does not remedy government inaction. When that happens, the substantive constitutional provision that has been violated has run up against a limitation built into the basic structure of the system, which is one in which the vast bulk of legal questions are resolved by sub-constitutional law.

*A. Private Action, Negative Liberty, and Formal Equality*

The state action principle as we define it means that the exercise of a coercively enforced legal advantage by a private person is not a sufficient condition for the application to that person of constitutional norms against the government. The principle that constitutional limitations apply to the decisions of government actors but not those of private actors exercising state power means that the limitations take for granted the distribution of control over resources that is given by non-constitutional law. In other words, the constitutional limitations do not have distributional consequences.

Consider the rules of private property, a prime example of coercively enforced legal advantages. The state action principle means that the exercise by an owner of his government-backed right to exclude non-owners may, and often will, impede the exercise by non-owners of the latter's right to express their views. A private owner, for example, may invoke the law of trespass to exclude socialists or Republicans from using his property to express their views. The owner may have no particular objection to the access-seekers' views. He may just prefer not to have his property be used by others for their expressive purposes. Despite its being coercively enforced by government power, and despite the fact that its enforcement would have the obvious effect of interfering with the expression of those who are excluded by it, the owner's decision would not be state action. Constitutional norms that apply to and constrain the government would not apply to it. What this means systematically, of course, is that the coercively enforced distributions of property that obtain from time to time, and the private decisions of owners whether to make their property available for the speech of others, will end up determining in large part the extent to which those others are able to exercise their First Amendment rights when, where, and in the manner that they wish. That the state action principle permits this to happen greatly troubles the critics. Their substantive normative commitment is to the idea that

constitutional liberty norms, at the very least, should make it possible for people actually to engage in the activity that the norms protect from government interference.<sup>94</sup> The Constitution achieves this goal only indirectly and imperfectly because, on account of the state action principle, the coercive enforcement of private legal advantages proceeds without regard to the needs of constitutional liberty. Take First Amendment rights, for example. The critics think that constitutional norms should—and that rules and standards can be crafted that could—constrain the exercise by private actors of their government-backed rights of private property whenever such exercise would interfere with First Amendment rights by depriving “people . . . of a chance to present their views to significant parts of the public.”<sup>95</sup>

Mark Tushnet’s claim that the state action principle is the denial of constitutional welfare rights<sup>96</sup> makes the substantive content of the critics’ position even more apparent. A constitutional rule, unlike the state action principle, that did have distributional consequences, could reasonably be described as creating constitutional welfare rights; thus the state action principle is one of the elements of current law that keeps such rights from arising.<sup>97</sup> Tushnet maintains that the Constitution’s protections for liberty and its mandates of equality, understood in light of their purposes, do have distributional implications: they require that people have a certain amount of control over resources. As constitutional claims on resources, they *are* constitutional welfare rights. According to the critics, the state action principle keeps those constitutional norms

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<sup>94</sup> See, e.g., Sunstein, *supra* note 25, at 268–69 (“[C]ommon law rules are themselves subject to constitutional objection if and when such rules ‘abridge the freedom of speech’ by preventing people from speaking at certain times and in certain places.”); see also Tushnet, *supra* note 43, at 168–72; Peller & Tushnet, *supra* note 4, at 789–91.

<sup>95</sup> Sunstein, *supra* note 25, at 294.

<sup>96</sup> See *supra* notes 43–45.

<sup>97</sup> As we understand it, the state action principle is a necessary but not sufficient condition for this result: were it negated, then norms of liberty and equality would have distributional implications, but other changes in constitutional law could also produce that effect. In particular, sufficiently strong effects tests for the liberty and equality norms would also cause them to have strong distributional consequences. The rejection of effects tests is thus another necessary condition for the current structure regarding the distributional implications of liberty and equality norms, and negating it also would be sufficient to overturn that structure.

from being fully implemented because it sharply limits the Constitution's distributional consequences.

We maintain that one large justification of the state action principle (and the other principles that the critics reject) is precisely that it *avoids* constitutionalizing claims over resources, and instead leaves questions of distribution and redistribution to non-constitutional law. Perhaps that feature of the constitutional system requires that other imperatives be compromised; it certainly does block some versions of other constitutional norms. Our main normative claim here is that the goal of keeping distributional rules out of the Constitution is sufficiently important that a reasonable lawmaker who valued both that goal and the goals normally attributed to the liberty and equality norms could strike the balance the way it is mainly struck in familiar doctrine. The state action principle is not a conceptual error, nor is it a way of hiding a preference for a distributional pattern that cannot otherwise stand the light of day. We argue that its rejection has powerful consequences that could reasonably be seen to be highly undesirable. Whether one ultimately finds them so is a question for individual normative judgment. We share with the critics a belief that bringing such judgments out into the open is very important, though we do differ from them in describing the judgment.<sup>98</sup>

A standard illustration of the perverse results of the state action principle for constitutional liberty, and of a rare instance in which those results were avoided by arguably departing from the principle, is *Marsh v. Alabama*.<sup>99</sup> Marsh was prosecuted for trespass after she distributed literature on the streets of a privately owned town contrary to the wishes of the owner.<sup>100</sup> In an unusual departure from ordinary state action principles, the Court held that this exercise of state-backed private power presented a serious question under, and indeed violated, constitutional free speech principles.<sup>101</sup> The case is important and suggestive for the critics because, on one view of it, it adopts the view they propose: from the standpoint of

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<sup>98</sup> They think that the state action principle must rest on an endorsement of the distributional principles themselves; we think that it is justified by the judgment that those principles, whatever they are, should not be attributed to the Constitution.

<sup>99</sup> 326 U.S. 501 (1946).

<sup>100</sup> *Id.* at 503–04.

<sup>101</sup> *Id.* at 508.



freedom of speech, the private owner's role in the decision process was irrelevant. The important fact was that government authority kept Marsh from expressing herself. It did not matter in *Marsh*, nor should it matter in other cases, that the government was neutrally enforcing a choice made by a private owner and that it would just as readily have supported the owner's choice to allow Marsh to pass out her leaflets.<sup>102</sup>

The more one thinks about what would follow from *Marsh*, the more the virtues of the state action principle become apparent. Suppose that private decisions like the company's in *Marsh* were subject to strict scrutiny as government decisions are when they limit speech on the basis of its viewpoint.<sup>103</sup> The company's decision would be impermissible unless supported by a compelling interest. One might think that Marsh then would be able to speak. But allowing Marsh to use the streets in that fashion might well interfere with the company's intended, expression-related use of that resource, so that if the government were to back Marsh's choice, that too would be subject to strict scrutiny. Either of the proposed uses would be compelling, and the problem of which should be permitted could not be resolved no matter how passionately the Court intoned a First Amendment principle that private property should not be used to deprive "people . . . of a chance to present their views to significant parts of the public."<sup>104</sup> Perhaps the result would be that neither proposed use would be permitted and that the streets could not be used at all. Given that the company's proposed way of using the streets for expression was not to allow expression on them, the streets might have to be turned into an anti-commons, as to which any objector could block access. In this way, their use would interfere with everyone's expressive plans equally.

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<sup>102</sup> Another way of characterizing the holding in *Marsh* is to regard it as an example of the "public function" test. On this view, the Court attributed the private owner's decision to the state because the company-owned town was performing an exclusively public function, inasmuch as "the town of Chickasaw [did] not function differently from any other town." *Id.* at 508.

<sup>103</sup> See, e.g., *Texas v. Johnson*, 491 U.S. 397, 412 (1989) (stating that viewpoint-based regulation of expressive conduct based on the conduct's communicative content is subject to "the most exacting scrutiny" (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988))).

<sup>104</sup> Sunstein, *supra* note 25, at 294.

The possibility that the First Amendment would require that a resource be made unavailable for expression may seem outlandish, but it arises naturally from an irreconcilable conflict among individuals concerning the expression-related use to which the resource might be put. The conflict between the company and Marsh was a standard dispute about control over resources, the kind of dispute that the rules of private property resolve. If free speech principles are to replace ordinary rules of property when expression is at stake, they must resolve those questions because the questions cannot be avoided. Maybe all resources that could be used for expression should be treated as public commons, with all citizens equally entitled to access. Some public administrator, like the administrator of a park, would then be given the task of allocating the resources among conflicting uses without somehow running afoul of the Constitution.<sup>105</sup>

First come, first served might be the answer, though the state action principle's critics might object that the apparent neutrality of such a rule would mask practical inequality: some people are in position to get in line before others. We doubt matters would get that far, as many people would find it objectionable that their homes, for example, had become commons that strangers could use for political meetings provided they gave appropriate notice. Soon people might even begin to modify their homes to make them inhospitable for that purpose.<sup>106</sup> Again, that suggestion may seem bizarre, but it reflects the issues that must be addressed if the Constitution is to provide the rules governing access to resources. Besides re-

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<sup>105</sup> The cases concerning administration of public resources for purposes of expression can present administrators with difficult problems, for example whether by providing access to a forum that is not actually a place will run afoul of the anti-establishment principle. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830, 843–44 (1995) (finding that funding program supporting university student groups is a public forum in a metaphysical sense and that support for the publication of a religiously oriented student magazine did not violate Establishment Clause principles).

<sup>106</sup> As the analysis of the economics of theft and theft prevention shows, people who are in possession of property often have strong incentives to take steps, such as physical theft-prevention measures, that make the property less appealing to potential takers. See, e.g., Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. Rev. 1719, 1785–88 (2004) (discussing investment in anti-theft measures). Faced with a more limited but still unwelcome use of their property required by the Constitution, owners would have similar incentives to make it unattractive for that use.

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solving competing claims to resources, any reasonable set of norms about property ought to create incentives to produce and maintain them, if only because resources are scarce and should not be wasted. If people who own property cannot capture the benefits of their productive activities, they will have a powerful incentive to do something else. If they can capture benefits under some circumstances, such as when they produce a resource that cannot be used for speech, but not others, such as when they produce a resource that can be so used, they will have a powerful incentive to favor the former over the latter.

It is doubtful whether anyone who wanted to achieve greater practical capacity to engage in expression would actually follow through on the lines suggested by *Marsh*, turning private property into speech commons. A more plausible approach to guaranteeing that individuals could effectively exercise their constitutionally guaranteed freedom of speech would be the creation of speech-welfare rights through a program of public expenditure. This would represent a leveling-up strategy, and it could be implemented by a voucher-type system.<sup>107</sup> The Constitution, however, gives no hint about the design of such a program, and in particular no hint of the appropriate minimum level of resources that should be available to everyone to enable them to exercise their speech rights effectively.<sup>108</sup> Not everyone can have the resources of George Soros, of course, but how much less than that would be enough? Because the Constitution gives no indication of an answer to that question, no useful criteria exist by which to judge whether a voucher program complies with the constitutional mandate that supposedly required it to be implemented. In the absence of a constitutionally supplied measure of private entitlement, the measure supplied by the non-

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<sup>107</sup> Two leading academics have presented a quite detailed proposal along these lines in the closely related area of political contribution and expenditure. Bruce Ackerman & Ian Ayres, *Voting With Dollars: A New Paradigm for Campaign Finance* 66–92 (2002) (proposing that citizens be given “Patriot dollars,” usable only as campaign contributions, so that everyone would have some ability to determine the resources available for political campaigns (and, in their plan, the same ability as everyone else, as Patriot dollars would be the exclusive source of campaign funding)).

<sup>108</sup> Another more practical problem with speech stamps would be guaranteeing that speech buyers could find an adequate supply of speech sellers. The problem of finding willing sellers does not plague the food stamp program because there is a vigorous, well-established, and impersonal market of food buyers.

constitutional law and by the distributions of resources that materialize thereunder from time to time suggests itself as a practical alternative. Indeed, it is conceivably the only viable option.

The important point is that if the critics are right, the Constitution prescribes some answer to the kinds of questions we have posed. At the very least, the Constitution prescribes ascertainable standards that quite narrowly constrain what the government must do, leaving non-constitutional policy makers with some discretion perhaps, but nevertheless with a mandate to achieve the distributional goal of the Constitution by whatever means necessary. There is also an interesting question of federalism hidden here: as both the national and state governments are subject to constitutional provisions that entail distributional mandates, which level of government must do what? Perhaps Congress, with its huge tax base, is required to create the necessary programs.

Understanding the implications of the claim that liberty-protecting norms have their own distributional demands also casts new light on the important issues raised by *Miami Herald Publishing Co. v. Tornillo*.<sup>109</sup> In *Tornillo*, the Court held that Florida's right-of-reply statute was unconstitutional because it interfered with the *Miami Herald's* editorial discretion.<sup>110</sup> That result is subject to the objection that the Court allowed the existing distribution of property rights to defeat the purposes of the Constitution because constitutional protection of existing property holdings used for expression kept the government from rearranging those holdings in a way that would further the actual goals of the Constitution by enabling *Tornillo* to speak.

Situations like *Tornillo*, in which the government can be said simultaneously to be restricting speech and redistributing resources, do pose a problem for First Amendment doctrine. Perhaps that doctrine should be modified so that regulations that limit one person's speech-related use of a resource in order to enhance another's are found to serve a compelling state interest. That would give the government substantially more discretion to change and equalize (or unequalize) property holdings that affect expression. But that is not where the rejection of the state action principle

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<sup>109</sup> 418 U.S. 241 (1974).

<sup>110</sup> *Id.* at 258.

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would lead. If constitutional liberty-protecting norms have distributional implications, those implications are mandatory, not optional, and do not expand the discretion of the government but confine it. If the Constitution gives people like Tornillo a claim to resources, it gives them that claim, and does not simply authorize the legislature to do so if it thinks wise. Once again, the Constitution gives no indication of the correct answer to these distributional questions.

We think it a desirable feature of a Constitution, and certainly a plausibly desirable feature, that it not lock the law of private entitlement strongly into place. To constitutionalize a rule is either to decide it in a fashion very difficult to change or to grant the judiciary, and ultimately the Supreme Court of the United States, substantial authority over the subject it addresses. Neither approach is desirable. The law of private entitlement can and should change much more easily than the Constitution. The decision whether to have a prescription drug benefit for older Americans should be relatively easy to make and easy to change, and it should not be made through the process of judicial selection, which it would be if the Constitution were seen strongly to constrain these decisions.

The distinction between decisions by government actors and government-backed private decisions is important not only for protections of liberty like the First Amendment but also for protections against discrimination like the Equal Protection Clause. As a result, the distributional implications of the constitutional rule are substantially less than they otherwise might be. Here too it is possible to argue that the state action principle is obscuring the real meaning of the Constitution, or is being used to defeat that meaning.

*Shelley v. Kraemer* routinely provides the starting point for debate here,<sup>111</sup> and as with *Marsh*, the critics' formulation of the issues raises the question of why the Court has not followed through on the case's implications. Private power is state-backed power and can be used in a racially discriminatory fashion, so why should it not be subject to equal protection limitations just as similar government decisions would be? The Constitution would not allow a

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<sup>111</sup> 334 U.S. 1, 1 (1948).

government housing project to choose its renters on the basis of race, so it should not allow private people to do so either.

Both problem and solution may seem simple here, but neither is. To see why, it is necessary to pull back from specific contexts and think about the justification for a constitutional system that largely rejects *Shelley* and instead permits the creation and enforcement of private rights that may then be used in a racially discriminatory fashion. Under the state action principle, the law itself must be racially neutral. It may not allow people of one race to discriminate while forbidding people of another race to do so. Standard rules of property and contract are neutral in that sense. They give individuals of all races the same legal capacities, and if those capacities include private race discrimination, then everyone is allowed to engage in it. The government will support both discriminatory and non-discriminatory private choices, and it leaves those choices to the individuals involved.<sup>112</sup> With respect to race, people have formal legal equality under those circumstances. Nor does the state action

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<sup>112</sup> The line drawn by the state action principle can be seen in the history of the first federal ban on state race discrimination, the Civil Rights Act of 1866. The act provided that all citizens “of every race and color” were to have the same rights “to make and enforce contracts” and “to inherit, purchase, lease, sell, hold, and convey real and personal property” as was enjoyed by white citizens. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (its current statutory descendants are 42 U.S.C. §§ 1981–1982 (2006)). In *Runyon v. McCrary*, 427 U.S. 160, 167 (1976), and *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 412–13 (1968), the question before the Court was whether those statutory descendants forbade discrimination by private people as well as requiring that the laws of property and contract themselves not discriminate on the basis of race. That they did the latter, and therefore required that the private law itself be racially neutral, was common ground between the majority in both cases, which found that the statutes applied to private conduct, and the dissenters, who maintained that they did not. The state action principle was central to those cases, because the Court found that the statutes, and the Civil Rights Act from which they derived, were founded on the Thirteenth Amendment, which does not have a state action requirement, and not (or not only) the Fourteenth Amendment, which does. *Runyon*, 427 U.S. at 179; *Jones*, 392 U.S. at 438–39. The Court in *Jones* stressed that the statute at issue in that case, 42 U.S.C. § 1982, rested on the Thirteenth Amendment, which enables Congress to act directly on private parties. *Jones*, 392 U.S. at 438–39. Justice White, dissenting in *Runyon*, maintained that the statute at issue in that case, 42 U.S.C. § 1981, rested only on the Fourteenth Amendment, which applies only to state action, and that the statute therefore could not apply to private people. *Runyon*, 427 U.S. at 205–11 (White, J., dissenting). Because § 1982 was based only on the Fourteenth Amendment, he said, it was limited to requiring that “‘all persons’ . . . be treated ‘the same’ or ‘equally’ under the law and was not designed to require equal treatment at the hands of private individuals.” *Id.* at 202.

principle obscure anything here, as its association with equality of legal rights and not equality in some other respect is well known and has been for many decades.

Formal legal equality is of course a contestable conception of equality with respect to race or any other characteristic but it is one with many adherents, and in particular one that had much support when the Fourteenth Amendment was adopted.<sup>113</sup> One reason to adhere to formal legal equality is precisely that it can be implemented in a relatively straightforward way and does not require a long series of adjustments of legal rules the way other versions of equality would. Indeed, following through with *Shelley* would entail the resolution of questions that we think rational constitutional designers might very much want to keep out of the Constitution (or away from the courts).

Designing anti-discrimination law requires many delicate policy judgments, and current constitutional anti-discrimination norms may not be suited for simple extension to private people. One fundamental and delicate question involves the treatment of two leading bases for anti-discrimination rules, race and sex. Current Supreme Court doctrine subjects those forms of discrimination to similar but nevertheless distinct levels of review.<sup>114</sup> That distinction may be reasonably well adapted to the kind of decisions governments make, but it may be less well adapted to the kind of decisions private people make. It is not the approach taken in the main federal anti-discrimination statute concerning employment, Title

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<sup>113</sup> The debates on the Fourteenth Amendment and the Civil Rights Act of 1866, which it was designed to constitutionalize, were overwhelmingly cast in terms of equality of legal rights. See, e.g., William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 114–17 (1988) (noting that Republican proponents of the Fourteenth Amendment stressed that it was limited to requiring equality of legal rights and did not give Congress general legislative authority).

<sup>114</sup> Racial classifications are subject to strict scrutiny. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (“It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.”). The level of scrutiny for discrimination based on sex is different and at least somewhat less demanding. *United States v. Virginia*, 518 U.S. 515, 532 & n.6 (1996) (stating that race and sex classifications are not equated for all purposes and the most stringent scrutiny is reserved for classifications based on race and national origin).

VII of the Civil Rights Act of 1964.<sup>115</sup> Instead, the statute in the main equates the two, while having a limited and more precise permission for some discrimination based on sex.

Another central and difficult question in the design of any anti-discrimination rule concerns its scope: to which decisions does it apply? Constitutional anti-discrimination principles apply to all government decisions. Simply eliminating the state action principle would cause them to apply to all private decisions that are backed by state power. Existing non-constitutional anti-discrimination rules, however, do not take that approach. Title II of the Civil Rights Act of 1964 applies to public accommodations; it does not apply to private homes.<sup>116</sup> But decisions about whom to admit to and whom to exclude from one's home involve the exercise of private rights supported by the government. Whether any particular private decision should be subject to an anti-discrimination rule is another serious question of policy, the resolution of which does not flow easily from basic principles of equality. Formal legal equality has much to be said for it, not least of which is that it moves questions like these from the Constitution to ordinary politics.

*B. State Action, State Inaction, and Constitutional Enforcement*

Another way in which the state action principle may be said to be problematic from the standpoint of other constitutional norms involves not so much the distinction between public and private choice as the distinction between state action and inaction. As we discussed above, all private conduct that the government could forbid but instead permits can be said to be the result of state inaction. Hence the absence or limits of a statutory ban on race discrimination, for example, can be identified as a government decision, not the decision of private parties, and so is subject to constitutional constraint even if one accepts that the Constitution

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<sup>115</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 2000e (2006)). Title VII subjects both race- and sex-based classification to its general ban on discrimination in employment, 42 U.S.C. § 2000e-2(a) (2006), but provides an exception when sex (along with national origin and religion), but not race, is a bona fide occupational qualification for a job, 42 U.S.C. § 2000e-2(e) (2006).

<sup>116</sup> 42 U.S.C. § 2000a (2006) (forbidding race discrimination in places of public accommodation).



applies only to public and not private decisions.<sup>117</sup> It is natural to respond, however, that while the absence of a legal requirement is in a sense a decision of the state, it is inaction rather than action, and hence not subject to constitutional restrictions.

A critic can respond in turn that there is nothing in the relevant substantive constitutional norm, such as that of equal protection, that respects a distinction between action and inaction. While it is true that the Constitution contains no affirmative requirement of legislation against private race discrimination, that fact by itself does not rule out the possibility that the absence of such legislation violates constitutional principles.<sup>118</sup> Under current doctrine, the most plausible argument along these lines involves impermissible legislative intent.<sup>119</sup> If it is impermissible to adopt a rule on the basis of discriminatory purpose, it should be impermissible not to adopt a rule on the basis of discriminatory purpose. It is thus possible to argue that some state inaction violates equal protection principles. If limited financial support for failing urban schools reflects the racial attitudes of legislators, then it may be based on discriminatory intent. If anti-discrimination laws are not enacted or are limited in their scope because legislators endorse discrimination against some racial group, then that absence also may be unconstitutional. The proper response, goes the reasoning, is to require that the legal system have the content it would have in the absence of race-based

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<sup>117</sup> A similar argument can be made with respect to constitutionally protected liberty, like freedom of expression. An individual who lacks the resources to engage in some act of expression could be subsidized by the government, so the decision not to provide that subsidy can reasonably be described as that of the government. We will use constitutional anti-discrimination principles for purposes of illustration, but the argument we will develop applies similarly to constitutional liberty.

<sup>118</sup> An early and influential discussion of the possibility that the Equal Protection Clause in effect requires the states to forbid race discrimination to some extent, despite the state action principle, is Kenneth L. Karst & Harold W. Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 Sup. Ct. Rev. 39, 65–78 (1967).

<sup>119</sup> According to the Supreme Court, the Equal Protection Clause and the equal protection component of the Fifth Amendment restrict intentional discrimination, including of course discrimination that appears on the face of a legal rule, but do not generally forbid actions that have effects that are disparate with respect to race or some other suspect ground of classification. *Washington v. Davis*, 426 U.S. 229, 239 (1976). Constitutional effects tests would broaden the scope of arguments that government inaction is impermissible, but such arguments are possible even when only intentional discrimination is forbidden.

preferences on the part of lawmakers, but the state action principle, perhaps reflecting unthinking deference to one particular version of the legal system, blocks the proper implementation of equal protection principles.<sup>120</sup>

We agree that the distinction between state action and inaction in some instances could have that effect, though not because of an unreasoning assumption that property and contract are the baseline. If the distinction between state action and inaction simply meant that no failure to deviate from common law private rights could be unconstitutional because it could never be state action, then no restriction on a program of public benefit could be unconstitutional. But, for example, the First Amendment does impose restrictions on the ways in which Congress can limit the availability of government-subsidized legal services, a right unknown to the common law.<sup>121</sup>

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<sup>120</sup> For an in-depth exploration of the expansive possibilities of the rule forbidding discriminatory intent, see David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. Chi. L. Rev. 935, 983–90 (1989). Strauss discusses these possibilities, not by way of endorsing them as applications of the discriminatory intent principle, but by way of showing that the principle is not a normatively plausible interpretation of equal protection. *Id.* He might well endorse a reading of the equal protection principle that requires major changes in non-constitutional law, but would not reach those results by reasoning from a ban on discriminatory intent.

<sup>121</sup> *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548–49 (2001) (holding that the restriction on the arguments that could be made by Legal Services Corporation attorneys violates the First Amendment). As *Velazquez* demonstrates, the application of constitutional protections of liberty to programs of public benefit can present conundrums. Some cases presenting such issues, especially the abortion-funding cases, may seem to rest on an undefended distinction between common law rights and rights under programs of public assistance. Confronted on restrictions on Medicaid funding for abortion, the Court found that the government could seek to influence women's choices between abortion and childbirth by offering and withholding means-tested medical benefits, even where it could not seek to influence that choice through the criminal law. *Harris v. McRae*, 448 U.S. 297, 315–17 (1980); *Maher v. Roe*, 432 U.S. 464, 474 (1977). While it is possible that some of the Justices who participated in those cases did have unanalyzed assumptions that treated public assistance less favorably than common law property, the difficulty the Court faced came from an aspect of its right of privacy doctrine. That doctrine permits the government to establish some inducements, but only some, in favor of childbirth over abortion. *Harris*, 448 U.S. at 314–17 (finding that the right of privacy permits states and Congress to make a value judgment in favor of childbirth over abortion). With that assumption in place, the courts must find some way to identify inducements that are unacceptably strong. Drawing the line so that the criminal law defines what is too strong may or may not be correct, but it is one plausible way to resolve the difficulty built into the substantive doctrine.

There nevertheless is a real limitation here, and we think that its justification is ultimately the same as the justification for the differential treatment of government decisions and private decisions backed by the government. Suppose it is true that racial bias among legislators is the reason a legislature does not adopt anti-poverty programs that would disproportionately assist members of racial minorities. It will rarely, if ever, be possible to identify the specific content of the laws that would have been passed in the absence of race-based attitudes. Which programs would receive how much more funding? In all but the most unusual cases, only a general description of the steps not taken could be given.<sup>122</sup> Similar questions arise with respect to anti-discrimination statutes the legislature has not adopted because of an impermissible purpose. Would the hypothetical law apply to employment, or housing, or all contracts? Would it have exemptions for small employers or certain personal decisions, like choosing a physician?

Under those circumstances, the rule against race-conscious official decisionmaking would run up against the principle that constitutional limitations operate by restoring the legal system to an identifiable state that does not contain the feature that rendered the law in question unconstitutional. Frequently, this principle is so basic that it is easy to overlook. *Fletcher v. Peck*, one of the Supreme Court's earliest decisions holding a state law invalid, is an example.<sup>123</sup> The Georgia legislature had made a (possibly corrupt) land grant and then had purported to rescind it.<sup>124</sup> The Court found that the later act violated the Contracts Clause and was therefore itself invalid.<sup>125</sup> As a result, the earlier grant was left standing. That grant was of course not required by the federal Constitution; it was just part of the ordinary law of Georgia. Once the unconstitutional feature of the law had been identified, it was easy to know what was left. A more recent example, noteworthy for our purposes because it involves a form of property created by statute and not by the common law, is *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, in which the Court held that

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<sup>122</sup> Strauss discusses these difficulties in his argument against the discriminatory intent standard. Strauss, *supra* note 120, at 975–83.

<sup>123</sup> 10 U.S. 87 (1810).

<sup>124</sup> *Id.* at 88–90.

<sup>125</sup> *Id.* at 136–39.

Congress could not give private people a damages remedy against states under the patent statutes.<sup>126</sup> Again, once it was established that the damages remedy was unavailable, the parties operated under the non-constitutional law, in that case largely statutory, minus the unconstitutional component.

This principle comes to the surface only in those unusual situations where it is not immediately obvious what the law would be absent the impermissible feature. Severability presents the best-known example. In the statute at issue in *Alaska Airlines v. Brock*, Congress granted the Secretary of Labor regulatory authority, subject to a legislative veto.<sup>127</sup> Once the Court had held in *INS v. Chadha* that legislative vetoes of that kind are unconstitutional,<sup>128</sup> it was not clear what the applicable law in *Alaska Airlines* was. Congress may have regarded the grant of authority and the attached veto as inseparable, in the sense that it would not have adopted one without the other. If so, then the legal system minus the veto was also minus the authority. The Court attributed to Congress the opposite hypothetical choice, concluding that it would have granted the agency power even without a legislative veto.<sup>129</sup> The important point for our purposes is that the Constitution itself could not answer that question. Rather, the Court had to draw on the existing non-constitutional law in order to identify how it would stand without the constitutional defect. Indeed, standard severability doctrine holds that courts in resolving those questions must be careful to avoid creating statutes that the legislature never would have adopted.<sup>130</sup>

The system of constitutional limitation thus is closely tied to the content of the existing non-constitutional law, and there are substantial limits on how far it can move the legal system. In particular, the Constitution does not supply the resources to produce significant new bodies of private rights or public benefits. Once again,

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<sup>126</sup> 527 U.S. 627, 647–48 (1999).

<sup>127</sup> 480 U.S. 678, 680–82 (1987).

<sup>128</sup> 462 U.S. 919, 958–59 (1983).

<sup>129</sup> *Alaska Airlines*, 480 U.S. at 697.

<sup>130</sup> “Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning independently.” *Id.* at 684 (citation omitted). In conducting the severability inquiry, the judiciary must avoid “legislative work beyond the power and function of the court.” *Hill v. Wallace*, 259 U.S. 44, 70 (1922).

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we think there is a reasonable argument in support of this result. Legislatures are the appropriate bodies to make important decisions about the law, whether it be the private law of contract, anti-discrimination statutes, or public benefit programs. It is thus desirable that the Constitution neither displace nor tightly constrain those decisions. A constitution designed along those lines may be said to have a remedial gap in certain situations, in that it may be possible to identify some unconstitutional element in the composition of the legal system but not do anything about it. But the gap is not arbitrary. Rather, it reflects a decision to have a Constitution that leaves a great deal open, and thus allows the ordinary political process to adapt to changing circumstances. Fitting substantive principles like free expression and anti-discrimination into that structure may on occasion curtail what otherwise might be their reach, but the structure places decisions about many basic questions where we think they belong, which is not in the Constitution.