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## RETHINKING STATE ACTION

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### I. INTRODUCTION

During the 1950s and 1960s, probably no topic attracted more attention in law review articles than "state action." Literally dozens of articles were written. In 1967, Yale Law Professor Charles Black observed that state action "is the most important problem in American law. We cannot think about it too much; we ought to talk about it until we settle on a view both conceptually and functionally right."<sup>1</sup> But by the late 1970s, concern about state action seemed to fade. Scarcely an article has been written on the subject since 1980.<sup>2</sup> Why has the topic, which so preoccupied the last generation of constitutional scholars, been virtually ignored by contemporary commentators? Surely it is not that there is now agreement on the proper content of the state action doctrine. There

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<sup>1</sup> Black, *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 70 (1967).

<sup>2</sup> Only a few articles (other than casenotes) have been published in law reviews since 1980. See, e.g., Phillips, *The Inevitable Incoherence of Modern State Action Doctrine*, 28 ST. LOUIS U.L.J. 683 (1984). The only other articles since 1980 directly focusing on the state action doctrine are found in *A Symposium: The Public/Private Distinction*, 130 U. PA. L. REV. (1982). Although many of the articles in this symposium contain some discussion of state action, only one is completely devoted to this topic. See Brest, *State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks*, 130 U. PA. L. REV. 1296 (1982). A comment on Professor Brest's article also is included in the symposium. See Goodman, *Professor Brest on State Action and Liberal Theory, and a Postscript to Professor Stone*, 130 U. PA. L. REV. 1331 (1982).

still are no clear principles for determining whether state action exists.<sup>3</sup> As Judge Friendly recently observed, the statement fifteen years ago that the "state action cases were a 'conceptual disaster area' . . . would appear even more apt today."<sup>4</sup> Nor does the absence of discussion reflect diminishing importance of the concept of state action. The ability of the federal government, both through the judiciary and the legislature, to protect rights from private interference is determined, in large part, by the definition of state action.<sup>5</sup> State action doctrines remain the dividing line between the public sector, which is controlled by the Constitution, and the private sector, which is not.<sup>6</sup> Courts continually face countless cases posing the question whether the Constitution's protections should be applied to limit the conduct of nongovernmental actors.

So why has the attention focused on state action largely disappeared? I believe it is because earlier commentators were so successful in

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<sup>3</sup> See, e.g., Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221, 221 ("[T]here are no generally accepted formulas for determining when a sufficient amount of government action is present in a practice to justify subjecting it to constitutional restraints.").

<sup>4</sup> Friendly, *The Public-Private Penumbra—Fourteen Years Later*, 130 U. PA. L. REV. 1289, 1290 (1982). Judge Friendly's reference is to Professor Black's description in a 1967 article of the state action doctrine as a "conceptual disaster area." Black, *supra* note 1, at 95. Similarly, Professor Christopher Stone recently noted that "[t]he whole state action area appears now, more than ever, a shambles." Stone, *Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?*, 130 U. PA. L. REV. 1441, 1484 n.156 (1982).

<sup>5</sup> In the *Civil Rights Cases*, 109 U.S. 3 (1883), the Supreme Court held that the fourteenth amendment prevented only governmental interference with constitutional rights, and Congress could legislate to stop only state infringements of rights. See *infra* text accompanying notes 15-21. Therefore, the state action doctrine limits both federal judicial and legislative powers. Although the Court has never overruled the holding of the *Civil Rights Cases*, it has permitted Congress to protect civil rights by using other powers. For example, Congress outlawed discrimination in public accommodations and restaurants through its power to regulate commerce. See, e.g., *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). Furthermore, the Court has indicated, although never held, that it no longer believes that the state action requirement limits Congress' legislative power. See *United States v. Guest*, 383 U.S. 745, 783 (1966) (Brennan, J., concurring and dissenting) ("I do not accept—and a majority of the Court today rejects—this interpretation of [section] 5." [speaking of the view that Congress' power under section 5 of the fourteenth amendment applies only to regulating the conduct of state governments]). Although there may be doubt as to whether the state action doctrine still limits federal legislative power, the Court has never wavered from its holding that courts may protect constitutional rights from only governmental interference. See, e.g., *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 165 (1978); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 171-72 (1972) (state action as an essential requirement of the fourteenth amendment).

<sup>6</sup> Many commentators have noted that state action is the basis for the distinction between public and private activities. See, e.g., *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 359 (1974) (speaking of "the essential dichotomy . . . between deprivation by the State . . . and private conduct"); Brest, *supra* note 2, at 1301 ("The doctrine of state action is an attempt to maintain a public/private distinction by attributing some conduct to the state and some to private actors."); Note, *State Action and the Burger Court*, 60 VA. L. REV. 840, 841 (1974) (state action as dividing line between private activities and public ones).

demonstrating the incoherence of the state action doctrine.<sup>7</sup> For twenty years, scholars persuasively argued that the concept of state action never could be rationally or consistently applied.<sup>8</sup> The inability to construct principled state action doctrines led many experts to predict that the concept might completely vanish.<sup>9</sup> From its earliest days, however, the Burger Court has been hostile to any relaxation of the state action requirement.<sup>10</sup> Thus, there was seemingly no direction for scholarship about state action; making sense of the concept of state action was perceived as impossible, and arguing for its elimination was considered futile.

I suggest that it is time to begin rethinking state action. It is time to again ask why infringements of the most basic values—speech, privacy, and equality—should be tolerated just because the violator is a private entity rather than the government. Although the earlier articles thoroughly demonstrated the irrationality of current state action doctrines, they largely ignored the assumptions underlying the concept.

First, there has been little attention to the origins of the state action requirement. Limiting the Constitution's protections to government ac-

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<sup>7</sup> See, e.g., Black, *supra* note 1; Hale, *Rights Under the Fourteenth and Fifteenth Amendments Against Injuries Inflicted by Private Individuals*, 6 LAW. GUILD REV. 627 (1946); Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208 (1957); Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961).

<sup>8</sup> See P. KAUPER, *CIVIL LIBERTIES AND THE CONSTITUTION* 128-29 (1962) ("thin" distinction between public and private ensures unpredictability of state action doctrines); Black, *supra* note 1, at 91 ("As long as the 'state action' concept is looked to, even pro forma, for significant limitations, it will either remain vague and ambiguous or become arbitrary, losing correspondence to the varieties in life.").

<sup>9</sup> See Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855 (1966) (predicting that by the 1970s the state action requirement might be eliminated); Williams, *The Twilight of State Action*, 41 TEX. L. REV. 347, 382, 389 (1963) ("we have entered the time of the twilight of state action"; "the sun is setting on the concept of state action as a test for determining the constitutional protections of individuals"); Note, *The Strange Career of "State Action" Under the Fifteenth Amendment*, 74 YALE L.J. 1448, 1448-49 (1965) (speculating that the state action requirement might disappear).

<sup>10</sup> There is no doubt that the Burger Court has tightened substantially the state action requirement, showing far less willingness to apply the Constitution's protections against private conduct. Note, *supra* note 6, at 862-63 ("After decades of almost limitless expansion of the state action concept and the accompanying application of the Constitution to activities once considered private in nature, the Supreme Court, led by the Nixon appointees has called a halt."). The Burger Court has refused in almost every case presenting a state action issue to apply the Constitution to private conduct. See, e.g., *Blum v. Yaretsky*, 457 U.S. 991 (1982) (no state action in transfer of Medicaid patients when state paid ninety percent of their costs and state policy is alleged to be the true cause for the transfer); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (no state action when private school, receiving ninety to ninety-nine percent of its funding from the state, fires a teacher, allegedly for speech activities); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978) (no state action when creditor enforced its statutory warehouseman's lien by selling the goods); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (no state action when utility company, given monopoly by state, terminates service without a hearing); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (no state action when private club, possessing state liquor license, discriminates on the basis of race).

tion made sense when it was believed that the common law protected people from infringements of their rights by private actors.<sup>11</sup> Now, however, individuals are thought to possess many rights that have no common-law protection.<sup>12</sup> Thus, the state action doctrine is based on the anachronistic premise of a common law that is coextensive with individual liberties. Second, the literature on state action has completely ignored the jurisprudential question of why rights are protected. I contend that by any theory of rights—natural law, positivism, or consensus—the state action requirement makes no sense.<sup>13</sup> Third, commentators have paid insufficient attention to the assumptions underlying the contemporary justifications for the state action requirement—that state action is needed to protect a zone of private autonomy and to safeguard state sovereignty. I will argue that the state action requirement is unnecessary to achieve these goals and, in fact, is counterproductive.<sup>14</sup>

Sections II, III, and IV of this Article, respectively, address each of these three points. The conclusion which emerges is that limiting the Constitution's protections of individual rights to state action is anachronistic, harmful to the most important personal liberties, completely unnecessary, and even detrimental to the very goals that it originally intended to accomplish. The Article concludes in sections V & VI by considering what it would be like if there were no state action requirement, specifically addressing possible objections to my conclusions.

Before developing this analysis, I should clarify a few key points. First, eliminating the concept of state action would not mean that private parties always would be held to the same institutional standards as the government. No constitutional right is viewed as absolute—in each case a central issue is whether a sufficient justification exists for the challenged activity. Often there might be justifications for private behavior that would not sanction governmental conduct. For example, individuals might claim freedom of association or privacy to excuse their actions, while the government, obviously, cannot claim such rights. If the state action requirement were abolished, the courts in each instance would determine whether the infringer's freedom adequately justified permitting the alleged violation. Eliminating the concept of state action merely means that the courts would have to reach the merits and decide if a sufficient justification exists; courts could not dismiss cases based solely on the lack of government involvement. Thus, the balance might be different with nongovernmental actors than with the government, but the key is that courts would have to balance and could not dismiss cases based on the lack of state action.

Second, I recognize that to speak of private parties infringing consti-

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<sup>11</sup> See *infra* notes 32-59 and accompanying text.

<sup>12</sup> See *infra* notes 60-79 and accompanying text.

<sup>13</sup> See *infra* notes 80-172 and accompanying text.

<sup>14</sup> See *infra* notes 180-237 and accompanying text.

tutional rights begs the crucial question whether such rights exist against private infringements. Therefore, when I speak of "private infringements of constitutional rights," I simply am referring in a short-hand way to actions by private individuals that appear to deny the values which courts protect in their constitutional rulings. In section III of this Article, I seek to demonstrate that the values embodied in constitutional rights also should be recognized as rights limiting private actions, absent sufficiently compelling justifications for the behavior.

Third, my central thesis is that rights are protected by contemporary courts in order to safeguard values regarded as fundamental. Because these values are so important, any infringement should be suspect. Protection of these values from private infringements need not necessarily be by constitutional review; protection can be provided by state statute, state common law, or federal statute. What is essential is that protection is indeed provided. The state action requirement is undesirable because it requires courts to refrain from applying constitutional values to private disputes even though there is no other form of effective redress.

Western civilization has been marked by a steady expansion of the protection of rights. The Magna Carta protected liberties from interference by the Crown. The American Constitution was novel in that it safeguarded rights from infringements by all three branches of the national government, not just the executive. The fourteenth amendment, adopted after the Civil War, expanded the Constitution by preventing state governments from depriving liberty and denying equality. In this Article, I contend that the next major expansion in the protection of rights must be to limit infringements of rights made by private entities. The Constitution's declaration of personal liberties must be viewed as a code of social morals that may not be violated without a compelling justification.

## II. THE ORIGINS OF THE STATE ACTION REQUIREMENT

It is firmly established that the Constitution applies only to governmental conduct, usually referred to as "state action."<sup>15</sup> The behavior of private citizens and corporations is not controlled by the Constitution. In 1879, not long after the ratification of the fourteenth amendment, the Supreme Court declared that "the provisions of the Fourteenth Amendment of the Constitution . . . all have reference to State action exclusively, and not to any action of private individuals."<sup>16</sup> Similarly, in the *Civil Rights Cases*, in 1883, the Court held that "[i]t is state action of a

<sup>15</sup> The term "state action" refers to action by government at any level—federal, state, or local. *Franz v. United States*, 707 F.2d 582, 591 n.33 (D.C. Cir.), *modified*, 712 F.2d 1428 (D.C. Cir. 1983); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1148 n.2 (1978).

<sup>16</sup> *Virginia v. Rives*, 100 U.S. 313, 318 (1879). In fact, four years before *Rives*, the Supreme Court, in *United States v. Cruikshank*, 92 U.S. 542, 554-55 (1875), declared that "[t]he fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection

particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment."<sup>17</sup>

These holdings remain undisturbed: the Constitution does not prohibit private deprivations of constitutional rights.<sup>18</sup> Private behavior need comply with the Constitution only if the state is so intimately involved in the conduct—that is, if the nexus to the state is so great—that the state can be held responsible for the activity.<sup>19</sup> Therefore, courts are powerless to halt private infringements of even the most basic constitutional values.<sup>20</sup> The Supreme Court repeatedly has stated that the Con-

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of the laws; but the provision does not . . . add anything to the rights which one citizen has under the Constitution against another."

<sup>17</sup> 109 U.S. 3, 11 (1883). The *Civil Rights Cases* are frequently credited with being the origin of the state action requirement. See, e.g., Brest, *supra* note 2, at 1300; Silard, *supra* note 9, at 855. Prior to the *Civil Rights Cases*, however, the Supreme Court already had announced the state action doctrine. See *Virginia v. Rives*, 100 U.S. 313, 318 (1879); *United States v. Cruikshank*, 92 U.S. 542, 554-55 (1875).

The *Civil Rights Cases* are thought to reflect a validation of the Compromise of 1877, which ended Reconstruction. See R. HARRIS, *THE QUEST FOR EQUALITY* 56, 81-89 (1960); C. WOODWARD, *REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION* 245 (1951); Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131, 167 (1950); Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1336-40 (1952). See also *infra* notes 105-15 and accompanying text.

<sup>18</sup> W. LOCKHART, Y. KAMISAR & J. CHOPER, *CONSTITUTIONAL LAW* 1514 (5th ed. 1980) ("The basic doctrine of the *Civil Rights Cases*—that it is 'state action' that is prohibited by the fourteenth amendment—has remained undisturbed."). The continual application of the state action doctrine by the Burger Court, see *supra* note 10, and by the lower courts, see *infra* notes 22-27, reflects the current validity of the doctrine.

<sup>19</sup> The *Civil Rights Cases*, 109 U.S. 3, 17 (1883), announced the circumstances under which private activity could be considered state action. In most cases, individual action is not prohibited by the fourteenth amendment "if not sanctioned in some way by the State, or not done under State authority," or "unless protected . . . by some shield of State law or State authority." *Id.* The Supreme Court continues to hold that "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974). Although there are many separate tests for determining whether there is sufficient state involvement to justify a finding that state action exists, the Court has made clear that the overall inquiry is whether there is an adequate nexus between the private behavior and the state. Glennon & Nowak, *supra* note 3, at 224. For example, the Supreme Court has held that private behavior is state action if the state has delegated to the private entity a function "traditionally exclusively reserved to the State." *Jackson*, 419 U.S. at 352. Private management of a company town, see *Marsh v. Alabama*, 326 U.S. 501 (1946), and private management of elections for public office, see *Terry v. Adams*, 345 U.S. 461, *reh'g denied*, 345 U.S. 1003 (1953); *Smith v. Allwright*, 321 U.S. 649, *modified*, 322 U.S. 718, *reh'g denied*, 322 U.S. 769 (1944), were held to be private performance of public functions. In addition, substantial state entanglement, such as court enforcement of private decisions, see *Shelley v. Kraemer*, 334 U.S. 1 (1948), activities on government property, see *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961), and government encouragement, see *Reitman v. Mulkey*, 387 U.S. 369 (1967), constitutes state action. The common theme in all these cases is that private conduct needs to comply with the Constitution only if the state can be held responsible, in some way, for the activities.

<sup>20</sup> J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 501-02 (2d ed. 1983) ("If the Court finds that the alleged wrongdoer is not involved with state action, it will afford no remedy to

stitution offers no shield against "private conduct, 'however discriminatory or wrongful.'" <sup>21</sup>

Thus, in situations when no statute prohibits discrimination, courts have used the state action doctrine to dismiss suits alleging private racial discrimination by employers, restaurants, cemeteries, and deliverers of services such as child care.<sup>22</sup> Similarly, in situations when there was no applicable statute, the courts have refused to review alleged sex discrimination by private employers and insurance companies, holding that there was no state action.<sup>23</sup> Claims of discrimination on the basis of age, religion, and alienage likewise have been dismissed for want of state action.<sup>24</sup> Courts consistently have held that landlords need not comply with the Constitution and may evict tenants because of their race, their religion, or the content of their speech.<sup>25</sup> Private hospitals have been allowed to

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the aggrieved party, who must continue to suffer whatever discrimination he has complained of."); Nerken, *A New Deal for the Protection of Fourteenth Amendment Rights: Challenging the Doctrinal Bases of the Civil Rights Cases and State Action Theory*, 12 HARV. C.R.-C.L. L. REV. 297, 363 (1977) ("problems of the irresponsible use of private power escape constitutional scrutiny"); Quinn, *State Action: A Pathology and A Proposed Cure*, 64 CALIF. L. REV. 146, 152 (1976) ("[T]he state action doctrine is a substantial barrier to judicial review of alleged infringements of most constitutional rights.").

<sup>21</sup> Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349 (1974) (quoting Shelley v. Kraemer, 334 U.S. 1, 13 (1948)).

<sup>22</sup> See, e.g., Minnick v. California Dep't of Corrections, 452 U.S. 105, 128 (1981) (Stewart, J., dissenting) ("So far as the Constitution goes, a private person may engage in any racial discrimination he wants."); Save Our Cemeteries, Inc. v. Archdiocese of New Orleans, Inc., 568 F.2d 1074 (5th Cir.) (discrimination by private cemeteries is not state action), cert. denied, 439 U.S. 836 (1978); Bethel v. Jendoco Constr. Corp., 570 F.2d 1168 (3rd Cir. 1978) (discrimination by construction companies against black carpenters is not state action); Williams v. Howard Johnson's Restaurant, 268 F.2d 845 (4th Cir. 1959) (racial discrimination by a private restaurant is not state action); Nicholson v. Quaker Oats Co., 574 F. Supp. 1209 (D. Tenn. 1983) (racial discrimination by private employer is not state action); Player v. Alabama Dep't of Pensions and Sec., 400 F. Supp. 249 (D. Ala.), aff'd, 536 F.2d 1385 (5th Cir. 1975) (racial discrimination by childcare center operated by sheriff's office does not constitute state action); Cook v. Advertiser Co., 323 F. Supp. 1212 (D. Ala. 1971), aff'd, 458 F.2d 1119 (5th Cir. 1972) (refusal of newspaper to publish wedding announcements of blacks does not constitute state action).

Although federal civil rights statutes prohibit many forms of racial discrimination, see, e.g., Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000h (1982) (prohibiting discrimination in public accommodations, education, and employment), there are forms of discrimination not prohibited by statute. For example, in the cases cited in the above paragraph, the plaintiffs turned to the Constitution because there was no statutory protection. In such instances, the absence of state action means that the court will not halt the racial discrimination.

<sup>23</sup> See, e.g., Life Ins. Co. of N. Am. v. Reichardt, 591 F.2d 499 (9th Cir. 1979) (discrimination against women in awarding disability insurance dismissed for lack of state action); Cohen v. Illinois Inst. of Technology, 524 F.2d 818 (7th Cir. 1975) (discrimination by private university against woman professor dismissed for lack of state action), cert. denied, 425 U.S. 943 (1976); Weise v. Syracuse Univ., 522 F.2d 397 (2d Cir. 1975) (sex discrimination by private university is not state action).

<sup>24</sup> See, e.g., De Malherbe v. International Union of Elevator Constructors, 476 F. Supp. 649 (N.D. Cal. 1979) (discrimination by union against aliens dismissed because of lack of state action); Weiss v. Willow Tree Civic Ass'n, 467 F. Supp. 803 (E.D.N.Y. 1979) (claim of discrimination against Hasidic Jews dismissed for lack of state action).

<sup>25</sup> See, e.g., Edward v. Habib, 397 F.2d 687 (D.C. Cir. 1968) (landlord may evict a tenant for any

deny constitutionally protected abortions and sterilizations, and even to fire doctors performing these operations.<sup>26</sup> Private employers repeatedly have been told by the courts that they may fire their employees because of their speech or political activities.<sup>27</sup> In short, the courts have tolerated the violation of virtually every constitutional value, dismissing challenges to alleged infringements because of the absence of state action.

These injuries are hardly trivial. Freedom of speech, privacy, and equality—this society's most cherished values—are trampled without any redress in the courts. Certainly, such private infringements of basic freedoms can be just as harmful as governmental infringements.<sup>28</sup> Speech can be chilled and lost just as much through private sanctions as through public ones. Private discrimination causes and perpetuates social inequalities at least as pernicious as those caused by government action.

Moreover, the concentration of wealth and power in private hands, for example, in large corporations, makes the effect of private actions in

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legal reason or no legal reason, but not in retaliation for reporting housing code violations to the authorities), *cert. denied*, 393 U.S. 1016 (1969); *Hill v. Miller*, 64 Cal. 2d 757, 415 P.2d 33, 51 Cal. Rptr. 689 (1966) (in absence of statute, landlord free to discriminate against blacks); *Abstract Inv. Co. v. Hutchinson*, 204 Cal. App. 2d 242, 22 Cal. Rptr. 309 (1962) (landlord may discriminate but court-ordered eviction constitutes "state action" and thus is impermissible if reason for eviction is tenant's race); *Aluli v. Trusdell*, 54 Haw. 417, 508 P.2d 1217 (landlord's termination of a month-to-month tenancy does not infringe tenant's first amendment rights), *cert. denied*, 414 U.S. 1040 (1973).

<sup>26</sup> See, e.g., *Taylor v. St. Vincent's Hosp.*, 523 F.2d 75 (9th Cir. 1975) (refusal of only hospital in city to provide operation for sterilization dismissed because of lack of state action), *cert. denied*, 428 U.S. 948 (1976); *Watkins v. Mercy Medical Center*, 520 F.2d 894 (9th Cir. 1975) (dismissing claim by doctor who was denied renewal of staff privileges by private hospital because he performed legal abortions); *Spencer v. Southeast Mo. Hosp.*, 452 F. Supp. 597 (E.D. Mo. 1978) (refusal by private hospital to perform sterilization without spouse's consent dismissed for lack of state action); *Jones v. Eastern Me. Medical Center*, 448 F. Supp. 1156 (D. Me. 1978) (suit against private hospital for refusing to permit abortions dismissed for lack of state action).

<sup>27</sup> In *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), the plaintiffs claimed that they were fired, by a school supported almost entirely by state funds, because of their speech activities. The Supreme Court said that the violation of speech rights is irrelevant unless state action is shown:

The core issue presented in this case is not whether petitioners were discharged because of their speech or without adequate procedural protections, but whether the school's action in discharging them can fairly be seen as state action. If the action of the respondent school is not state action, our inquiry ends.

*Id.* at 830. See also *Black v. Cutter Laboratories*, 352 U.S. 292 (affirming state court's denial of relief to private employees who were fired for being members of the Communist party), *reh'g denied*, 352 U.S. 859 (1956); *Pavolini v. Bard-Air Corp.*, 645 F.2d 144 (2d Cir. 1981) (dismissing claim of employee who allegedly was fired for speech activities because of lack of state action); *Blouin v. Loyola Univ.*, 506 F.2d 20 (5th Cir. 1975) (dismissing claim of employee who allegedly was fired for speech activities because of lack of state action); *Barrett v. United Hosp.*, 376 F. Supp. 791 (S.D.N.Y.) (dismissing claim of doctor that he was denied hospital privileges because of speech), *aff'd mem.*, 506 F.2d 1395 (2d Cir. 1974).

<sup>28</sup> See Bazelon, *Civil Liberties—Protecting Old Values in the New Century*, 51 N.Y.U. L. REV. 505, 512-13 (1976) (increased power of private groups can "invade liberty on a massive scale"); Nerken, *supra* note 20, at 353 (private infringements of rights have "effects no less devastating than those resulting from direct action by the state").



certain cases virtually indistinguishable from the impact of governmental conduct.<sup>29</sup> Just as people may need protection from government because its power can inflict great injuries, so must there be some shield against infringements of basic rights by private power. In fact, the need for court protection from private actions arguably is greater because democratic processes, no matter how imprecise a check, impose some accountability and limits on the government. Ultimately, of course, the point is that private parties can inflict great injuries upon constitutional values; how this compares to other sources of injury is of secondary concern.<sup>30</sup>

Therefore, the crucial question to be asked is why should such invasions of liberty be tolerated? In answering this inquiry, a useful starting place is historical: Why did the Constitution fail to explicitly safeguard rights from private interference in addition to governmental action?<sup>31</sup> Although the answer to this question reveals a great deal about the purposes of the state action requirement, it is an inquiry that thus far has been ignored.

The historical answer is straightforward: The Constitution did not apply to private conduct because it was thought that the common law protected individual rights from private interference. At the time the Constitution was written, there was a widespread belief that individuals possessed natural rights.<sup>32</sup> For example, the Declaration of Independence spoke of “inalienable rights” to “life, liberty and the pursuit of happiness.”<sup>33</sup> The common law was believed to embody these natural

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<sup>29</sup> R. UNGER, *LAW IN MODERN SOCIETY* 201-02 (1976) (“[T]he increasing recognition of the power these [corporate] organizations exercise, in a quasi-public manner . . . makes it even harder to maintain the distinction between state action and private conduct.”); Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PA. L. REV. 933 (1952) (corporate power can inflict injuries to rights as severely as can government power and thus should be remedied through application of the Constitution).

<sup>30</sup> To argue that constitutional rights should apply to limit only the government because the government’s infringements are worse than private violations requires demonstrating either that private violations always are trivial—a position that seems indefensible—or that although both private violations and government violations are bad, resources do not exist to deal with both and given limited resources, attention should be focused on the government’s conduct. There is, however, no inherent reason why sufficient resources could not be provided or why resources could not be shifted from other types of cases to those protecting rights. This latter argument is considered in detail *infra* text accompanying notes 238-48.

<sup>31</sup> I do not contend that this historical description says anything normative about how the Constitution should be interpreted. As I have argued elsewhere, it is not useful or desirable to try to interpret the Constitution based on the “framers’ intent.” See Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207 (1984) [hereinafter Chemerinsky, *The Price of Asking*]; Chemerinsky, *Empty History*, 81 MICH. L. REV. 828, 833-35 (1983) [hereinafter Chemerinsky, *Empty History*]. Rather, my point is just that in analyzing state action, it is good to know its origins.

<sup>32</sup> J. ELY, *DEMOCRACY AND DISTRUST* 48 (1980) (“At the time the original Constitution was ratified, and during the period leading up to the fourteenth amendment as well, a number of people espoused the existence of a system of natural law principles.”).

<sup>33</sup> See Z. CHAFFEE, *HOW HUMAN RIGHTS GOT INTO THE CONSTITUTION* 12 (1952) (“[T]he

rights.<sup>34</sup> As Professor Mullett explains, “[l]aw . . . has nothing more than the rules laid down in Holy Writ. It came from God, and since ‘it is given to all in common it is called common law.’”<sup>35</sup> All rights that an individual possessed were protected by common-law principles—civil rights, natural rights, and the common law were coextensive.<sup>36</sup> Because the common law was thought to incorporate the natural law, even statutes could be invalidated if contrary to common-law principles.<sup>37</sup>

Blackstone’s famous commentaries on the common law repeatedly expressed the view that individuals possess natural rights that the common law protects from private invasions.<sup>38</sup> Professor Duncan Kennedy noted that Blackstone “affirmed the congruence of the natural law and the law of England, so that there never was a need for the judge to choose between the two.”<sup>39</sup> Similarly, Professor Robert Cover observed that Blackstone “almost uniformly . . . [found] coincidence of common law and natural law.”<sup>40</sup> The maxim “for every right there is a remedy”<sup>41</sup>

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two opening paragraphs of the Declaration [of Independence] relied on the natural rights of all men everywhere.”); P. SIGMUND, *NATURAL LAW IN POLITICAL THOUGHT* 98 (1971) (“It is well known that the Declaration of Independence was based on the natural rights philosophy of John Locke.”). *But see* C. ROSSITER, *SEEDTIME OF THE REPUBLIC* 358 (1953) (the Declaration of Independence appealed to natural rights simply because positive law obviously could not be used to justify revolution); Dunn, *The Politics of Locke in England and America in the Eighteenth Century*, in JOHN LOCKE, *PROBLEMS AND PERSPECTIVES* 45-81 (J. Yatton ed. 1969).

<sup>34</sup> See, e.g., B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 77-78 (1968); C. MULLETT, *FUNDAMENTAL LAW AND THE AMERICAN REVOLUTION, 1760-1776*, at 17 (1933).

<sup>35</sup> C. MULLETT, *supra* note 34, at 35 (citations omitted). See also B. BAILYN, *supra* note 34, at 78 (“The great corpus of common law decisions and the pronouncements of King and Commons were but expressions of ‘God and nature . . . . The natural absolute personal rights of individuals are . . . the very basis of all municipal laws of any great value.’”).

<sup>36</sup> See C. MULLETT, *supra* note 34, at 43 (describing the philosophy of Edmund Plowden, referred to by colonial writers as the “Great Lawyer and Sage of the Law”: “There was, Plowden further taught, nothing ordained in our law contrary to reason, God, or nature. In fact for him the common law was the chief vehicle of the law of nature and what was not countenanced by the latter could not find any justification in the former.”). See also C. LEBOUTILLIER, *AMERICAN DEMOCRACY AND NATURAL LAW* 126-27 (1950) (civil rights and natural rights were identical in the minds of the Constitution’s drafters).

<sup>37</sup> The most famous expression of the ability of common law to be the basis for overruling a statute is Lord Coke’s opinion in *Bonham’s Case*, C. P. (1610):

And it appears in our books, that in many cases the common law will control acts of parliament, and sometimes adjudge them to be utterly void; for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void.

*Id.*, quoted in R. POUND, *READINGS IN THE THEORY AND SYSTEM OF THE COMMON LAW* 33 (3d ed. 1927). See also *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) (“It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power.”); C. MULLETT, *supra* note 34, at 48 (because common law is divinely inspired, it controls over statutes).

<sup>38</sup> W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 41, 111, 116-17, 122, 219, 226 (1979); 2 *id.* at 472.

<sup>39</sup> Kennedy, *The Structure of Blackstone’s Commentaries*, 28 *BUFF. L. REV.* 205, 241 (1979).

<sup>40</sup> R. COVER, *JUSTICE ACCUSED* 15 (1975). Professor Cover wrote that “[i]t is impossible to

reflected the belief that all individual rights were included in the doctrines of the common law: any injury to a right could be fully redressed.

Therefore, at the time the Constitution was written, it was thought that the common law completely safeguarded personal liberties from private infringements. It was unnecessary for the Constitution to discuss that which already was thoroughly protected. The primary concern in creating a national government was that it would be unconstrained by common-law principles and could infringe liberties in ways that private entities could not.<sup>42</sup> It was feared that the federal government could invoke sovereign immunity and thereby violate individual rights. Although many influential leaders, such as James Madison, argued that the government lacked such powers under the Constitution,<sup>43</sup> during the ratification process many states insisted that individual rights be enumerated and explicitly protected from federal interference.<sup>44</sup>

Thus, the Bill of Rights was added to ensure that the new government would be constrained by the same natural law principles that already limited private actors.<sup>45</sup> For example, the fourth amendment's protection against unreasonable searches and seizures was identical to the protection that the common-law actions of trespass and false arrest provided against private invasions of liberty. Similarly, the fifth amendment's prohibition against government takings of property without just compensation applied common-law principles of conversion to federal actions. Basic common-law assurances redressing deprivations of life, liberty, and property were applied to the national government via the

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overemphasize the impact of Blackstone on legal education in America. After 1770 every American lawyer and many other 'gentleman' began his study of legal and political institutions with the *Commentaries*. Blackstone's work was not only the primer, it was the organizing matrix for learning law." *Id.* at 16.

Blackstone's theory is not unambiguous and some commentators forcefully have argued that part of it, especially as regards property, is "founded in positive rather than natural law." F. WHELAN, *PROPERTY AS ARTIFICE: HUME AND BLACKSTONE, XXII NOMOS: PROPERTY* 101, 126 (J. Pennock & R. Chapman eds. 1980).

<sup>41</sup> See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162-63 (1803). The maxim is derived from Blackstone, who wrote that

[i]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded. . . . [I]t is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy and every injury its proper redress.

3 W. BLACKSTONE, *supra* note 38, at 23, 109.

<sup>42</sup> See, e.g., C. MULLETT, *supra* note 34, at 25-26 ("If the sovereign, however, violated those natural rights, there was actually no power capable of calling the violator to account.")

<sup>43</sup> See Z. CHAFFEE, *supra* note 33, at 3; P. CONKIN, *SELF-EVIDENT TRUTHS* 133 (1974); J. GOEBEL, 1 *OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, at 248-49, 425 (1971) (Bill of Rights thought of as unnecessary by drafters).

<sup>44</sup> Z. CHAFFEE, *supra* note 33, at 3-4.

<sup>45</sup> See, e.g., P. CONKIN, *supra* note 43, at 132; C. MULLETT, *supra* note 34, at 25-26, 58; Corwin, *The "Higher" Law Background of American Constitutional Law*, 42 *HARV. L. REV.* 149, 170 (1928) (Bill of Rights meant to ensure that government could not violate natural law rights).

fifth amendment's due process clause. Most dramatically, legal historian Leonard Levy has demonstrated that the first amendment's protection of freedom of speech was meant solely to incorporate well-established common-law principles. Professor Levy wrote that "[m]ost of the scraps of evidence that can be gathered on the subject tend to show that it was not the intention in America to modify the common law by incorporating these provisions within the meaning of free press guarantees."<sup>46</sup> In fact, Professor Levy concluded that the entire Bill of Rights was intended to apply common-law rules to limit governmental actions:

The mere fact that a common-law right, such as the liberty of the press, had been elevated to constitutional status in America did not argue that its meaning had changed. . . . In the national Bill of Rights, for example, the guarantee of the right against self-incrimination simply declared the common law, *as indeed was the case as to almost every provision of the Bill of Rights*.<sup>47</sup>

Of course, the Bill of Rights also included protections against actions that only the government could take, such as quartering soldiers in a person's home<sup>48</sup> and applying the sanctions of the criminal law.<sup>49</sup>

The Constitution and the Bill of Rights thus were thought to complete a scheme that provided complete protection of individual liberties from all sources of infringement.<sup>50</sup> State governments were viewed as sufficiently close to their citizens so that state invasions of liberty were highly unlikely.<sup>51</sup> Accordingly, in the landmark case of *Barron v. Mayor of Baltimore*,<sup>52</sup> Chief Justice John Marshall, writing for the Court, held that the Bill of Rights applies only to the federal government. Although state governments were checked by their own bills of rights and by highly

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<sup>46</sup> L. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICA* ix (1960). Levy reviews the common law and provides additional evidence for this conclusion at 281-82.

<sup>47</sup> *Id.* at 281-82 (emphasis supplied).

<sup>48</sup> U.S. CONST. amend. III. A more subtle example of a provision that, by definition, can apply against only the government is the establishment clause of the first amendment. It makes no sense to speak of forbidding private individuals from establishing religion because that is exactly what the free exercise clause allows them to do.

<sup>49</sup> Numerous provisions of the Bill of Rights restrict the government when it applies its criminal laws. *See, e.g.*, U.S. CONST. amend. V (requiring grand jury indictments and creating the privilege against self-incrimination); amend. VI (creating the right to a speedy trial by jury).

<sup>50</sup> In fact, the word "constitution" was used contemporaneously to mean the protections of the natural law, and not just a charter of government. *See* P. CONKIN, *supra* note 43, at 45 ("Other Americans used the word *constitution* for fundamental natural rights and for reserved rights of citizens that they believed a birthright of Englishmen. If written, this form of constitution referred to bills of rights, not compacts of government.") (emphasis in original).

<sup>51</sup> *See, e.g.*, E. BAUER, *COMMENTARIES ON THE CONSTITUTION 1790-1860*, at 270 (1965); Peters, *Civil Rights and State Non-Action*, 34 *NOTRE DAME LAW.* 303, 305 (1959). The Constitution does contain a few provisions limiting state power. *See, e.g.*, U.S. CONST. art. I, § 10 (prohibiting states from enacting ex post facto laws and bills of attainder and from impairing the obligations of contracts).

<sup>52</sup> 32 U.S. (7 Pet.) 243 (1833).

accountable political processes,<sup>53</sup> and private violations of rights were deterred and remedied through the common law, the United States Constitution provided the needed protection from federal invasions of individual rights.

The Civil War and its aftermath made clear that states could not be trusted to protect rights, especially the rights of racial minorities. The fourteenth amendment was adopted to ensure that the states did not deprive individuals of their inalienable rights.<sup>54</sup> Professor Tribe has pointed out that "at the time of the adoption of the fourteenth amendment, 'civil rights' were understood to be rights pre-existing the amendment, and that, in contemporary view, the function of the fourteenth amendment, and specifically of the equal protection clause, was to guarantee racially equal access to those rights."<sup>55</sup>

At the time the fourteenth amendment was ratified, it still was believed that the common law provided protection against private interference with individual rights. In fact, in the *Civil Rights Cases*, the Supreme Court held that private discrimination in accommodations, restaurants, and transportation was not controlled by the Constitution, but rather prohibited by the common law. Justice Bradley, writing for the majority, concluded that

[t]he wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party . . . ; but if not sanctioned in some way by the State, or not done under State authority, *his rights remain in full force, and may presumably be vindicated by resort to the laws of the state for redress.*<sup>56</sup>

Justice Bradley further explained his view of the common law's protection against discrimination: "Innkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodations to all unobjectionable persons who in good faith apply for them."<sup>57</sup>

Thus, in announcing the state action doctrine, the Court assumed that the common law protected against private discrimination and private violations of rights.<sup>58</sup> Moreover, the Court, in the *Civil Rights*

<sup>53</sup> See, e.g., Peters, *supra* note 51, at 305, 322 (state declarations of rights and the people of the states could check state power).

<sup>54</sup> See, e.g., H. FLACK, ADOPTION OF THE FOURTEENTH AMENDMENT 262-63 (1908); L. TRIBE, *supra* note 15, at 256.

<sup>55</sup> L. TRIBE, *supra* note 15, at 1152 n.14. See also J. TENBROEK, THE ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 221-22 (1951) (purpose was to give "the protection of the laws to men in their natural rights").

<sup>56</sup> The Civil Rights Cases, 109 U.S. 3, 17 (1883) (emphasis added).

<sup>57</sup> *Id.* at 25.

<sup>58</sup> See L. TRIBE, *supra* note 15, at 1152 ("The Supreme Court assumed, in other words, that the right to nondiscriminatory treatment was an aspect of an individual's common law liberty."); Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149, 185 (1935) ("[T]he court's assumption [was] that arbitrary exclusion of the negroes was contrary to state law."); Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387,

*Cases*, made it clear that if a state did not provide adequate protection through its common law, then there was state action sufficient to justify federal intervention.<sup>59</sup> It is quite likely that Justice Bradley overstated the degree of common-law protection against discrimination, and whatever law did exist applied solely to common carriers, enterprises traditionally subject to stringent common-law regulation. Nonetheless, the key point is that in the *Civil Rights Cases*, which are viewed as the source of the state action requirement, the Court's decision relies in large part on an assumption of effective common-law protection against private discrimination.

Therefore, limiting the Constitution's protections to state action originally made sense because rights already were safeguarded from private infringements by the common law. Now, however, individuals are thought to possess many constitutional rights that have no common-law protection.<sup>60</sup> For example, the common law provides little remedy to victims of racial or gender discrimination.<sup>61</sup> It offers no protection against private infringement of speech rights, such as by an employer or a landlord. There is no safeguard against private violations of rights to reproductive autonomy: a private employer can fire an employee for having an abortion and a hospital may terminate the staff privileges of a doctor for performing one.<sup>62</sup>

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400 (1967) ("They were simply the 'ordinary' civil rights every citizen enjoyed—rights he derived from his status as a citizen of a separate state, rights which antedated the formation of the federal union, rights which flowed essentially from the sources of the common law.").

<sup>59</sup> See, e.g., Hale, *supra* note 58, at 185; Kinoy, *supra* note 58, at 416 ("In an interesting series of letters written prior to the 1883 opinion, Bradley made it quite clear that he meant that if a state failed to enact laws to provide for equal accommodations, power resided in the national government to pass such direct legislation.") (emphasis in original).

<sup>60</sup> There are exceptions, of course, where constitutional principles have crept into private law adjudication. For example, limitations on the ability of employers to fire "at will" employees reflect the incorporation of public law doctrines into the private law. See Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1362-63 (1982); Stone, *supra* note 4, at 1481 n.143 (citing to cases limiting retaliatory discharges). Although common-law protections have expanded, they still are not nearly as great as those offered to public employees. Professor Stone notes "[A]lthough the common law has provided some review for employees fired in the private sector . . . they certainly lack the degree of protection required in the public sector." *Id.* at 1483 n.149.

My point in this discussion is simply to demonstrate that rights which exist against the government are not applied to private actors. This description, of course, does not prove that rights normatively should be regarded as existing against private conduct. The normative argument is discussed in sections III and IV of this Article.

<sup>61</sup> There are, however, detailed statutory provisions applying constitutional concepts of equality to prevent private discrimination. See, e.g., Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000h (1982) (prohibiting discrimination in public accommodations, education, and employment).

<sup>62</sup> I recognize that showing federal courts have dismissed cases for lack of state action does not establish that the states fail to provide effective protection of these rights. It is difficult directly to demonstrate that states do not protect certain categories of rights because it is hard to prove a negative. Because principles establishing protection do not exist, litigants do not bring cases and state courts are thus denied the ability to announce the lack of protection. The most that can be said is that prominent surveys of tort law indicate little protection for constitutional rights such as repro-

Since 1937, the Supreme Court dramatically has expanded the constitutional rights of individuals.<sup>63</sup> The common law, however, has not kept pace. The result is that private parties can violate the basic values of speech, privacy, and equality in exactly the manner that the government cannot.<sup>64</sup> The damage can be great, but no remedy exists.<sup>65</sup>

Why expand constitutional rights, but not the common law? In part, I believe it is because the distinction between public law and private law prevents the appearance of constitutional rights in common-law doctrines. Since the nineteenth century, there has been thought to be “a clear separation between constitutional, criminal, and regulatory law—public law—and the law of private transactions—torts, contracts, property, and commercial law.”<sup>66</sup> Because these spheres of law are viewed as distinct,<sup>67</sup> courts applying the common law do not look to public law cases in defining common-law rights.

This explanation is only partial; it accounts merely for why constitutional decisions do not strongly influence the development of common-law doctrines. It does not explain why common-law courts have not, on their own, simultaneously protected the rights now embodied in the Constitution. I believe that the shift from an American jurisprudence based, in large part, on natural law, to one founded primarily on positivism, greatly has limited the willingness of common-law courts to recognize and protect new rights. It is no longer widely believed that rights are derived from the natural law;<sup>68</sup> now it is more commonly thought that rights, especially in private law areas such as contracts, torts, and property, are found in the positive laws of the states.<sup>69</sup> The codification movement of the late nineteenth century was an explicit, early recognition of the emerging view that rights are those found in the written law.<sup>70</sup>

Common-law courts protected new rights by appealing to natural

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ductive autonomy and the right not to be discriminated against. *See, e.g.,* W. PROSSER & P. KEETON, *THE LAW OF TORTS* (5th ed. 1984).

<sup>63</sup> *See* Nerken, *supra* note 20, at 347; Rosenfeld & Tannen, *Civil Liberties Under the Roosevelt Administration*, 5 *LAW GUILD REV.* 182, 182-83 (1945).

<sup>64</sup> *See supra* notes 22-30 and accompanying text.

<sup>65</sup> J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 20, at 502 (no remedy exists if state action is not found).

<sup>66</sup> Horwitz, *The History of the Public/Private Distinction*, 130 *U. PA. L. REV.* 1423, 1424 (1982).

<sup>67</sup> The Supreme Court, for example, has spoken of the “essential dichotomy . . . between public and private acts.” *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 165 (1978) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 359 (1974)).

<sup>68</sup> *See, e.g.,* J. ELY, *supra* note 32, at 52 (“The concept [of natural law] has consequently all but disappeared in American discourse.”).

<sup>69</sup> *See, e.g.,* *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) (“The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified.”); J. ELY, *supra* note 32, at 54; C. LEBOUTILLIER, *supra* note 36, at 137.

<sup>70</sup> *See, e.g.,* C. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM* (1979); R. COVER, *supra* note 40, at 131.

law. Early in this century, for example, courts began protecting the right of privacy by holding that privacy is a right "derive[d] from natural law."<sup>71</sup> But if natural law no longer is a basis for decisions, courts have fewer grounds for protecting new rights through the common law. If all rights come from positive law, then courts should apply only those rights recognized by the legislature.

By contrast, positivism has not dominated the public law realm. Since 1937, the Supreme Court openly has recognized new rights that are neither stated nor implied in the written Constitution.<sup>72</sup> The Supreme Court has protected privacy,<sup>73</sup> desegregated the schools,<sup>74</sup> upheld the rights of women,<sup>75</sup> and safeguarded the right to travel,<sup>76</sup> to give just a few examples, even though nothing in the Constitution or its history indicates an intent to safeguard these rights.<sup>77</sup>

Therefore, constitutional rights have evolved and increased, while common-law rights have remained comparatively static. This is not to deny that the private law changes; rather, the common law largely has failed to provide protection of values now deemed to be constitutional rights. Nor has legislation kept pace with the development of individual liberties. Although many statutes protect civil rights, many important values remain completely unprotected from private interference.<sup>78</sup> The

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<sup>71</sup> *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 195, 50 S.E. 68, 70 (1905); see also *McGovern v. Van Riper*, 137 N.J. Eq. 24, 33, 43 A.2d 514, 519 (1945), *aff'd*, 137 N.J. Eq. 548, 45 A.2d 842 (1946) ("[T]he right of privacy having its origin in natural law, is immutable and absolute, and transcends the power of any authority to change or abolish it.").

<sup>72</sup> Dean Ely has termed this theory of judicial review "non-interpretivism." J. ELY, *supra* note 32, at 1. For a discussion of how noninterpretivism has long dominated Supreme Court constitutional decisionmaking, see Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 707-08, 713 (1975); Shaman, *The Constitution, the Supreme Court, and Creativity*, 9 HASTINGS CONST. L.Q. 257, 258-66 (1982).

<sup>73</sup> Notable decisions protecting privacy include *Roe v. Wade*, 410 U.S. 113, *reh'g denied*, 410 U.S. 959 (1973); *Doe v. Bolton*, 410 U.S. 179, *reh'g denied*, 410 U.S. 959 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965). See also Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8-9 (1971) (claiming that privacy cannot be justified under an interpretivist theory).

<sup>74</sup> See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483 (1954), *reh'g on relief*, 349 U.S. 294 (1955); see also M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 2* (1982) (claiming that the school desegregation decisions cannot be defended under an interpretivist theory).

<sup>75</sup> See *Trimble v. Gordon*, 430 U.S. 762, 777-86 (1977) (Rehnquist, J., dissenting) (arguing that the fourteenth amendment was intended to protect only racial minorities). Notable decisions dealing with gender discrimination under the fourteenth amendment include *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Craig v. Boren*, 429 U.S. 190 (1976), *reh'g denied*, 429 U.S. 1124 (1977); *Reed v. Reed*, 404 U.S. 71 (1971).

<sup>76</sup> See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969) ("We have no occasion to ascribe the source of this right to travel."); *United States v. Guest*, 363 U.S. 745, 758 (1966) ("[T]hat right [to travel] finds no explicit mention in the Constitution.").

<sup>77</sup> Professor Perry concluded that virtually none of the post-World War II decisions protecting individual liberty could be justified under an interpretivist approach. M. PERRY, *supra* note 74, at 1-2.

<sup>78</sup> For example, no statute protects the rights of speech or reproductive privacy from private



absence of general statutory protection from private interference can be traced, at least in part, to the fact that most nonlawyers are unaware a state action doctrine exists. I think that most people assume the Constitution does protect them from private infringements of their liberties.<sup>79</sup> Thus, legislation exists only in areas in which systematic, highly publicized private violations occur, such as racial discrimination. In other areas, when violations are less systematic and less publicized, the lack of public awareness results in inadequate pressure for legislative protection.

As a result, personal liberties may be infringed by individuals and corporations; in most areas, the Constitution, the common law, and even statutes offer comparatively little protection from private infringements. The original assumption behind the state action doctrine, that rights are fully protected from private invasions by other sources of law, obviously is no longer true. Thus, in terms of its original purpose, the state action requirement is an anachronism. Nonetheless, it continues to be strictly applied by the courts.

### III. STATE ACTION AND THEORIES OF RIGHTS

In determining who should be prevented from infringing rights, we must consider the nature of the rights themselves—from where they are derived, why they are protected, and what this says about those whose actions are limited by these rights. Yet the literature on state action virtually ignores these questions and fails to consider the source of constitutional rights and what this inquiry reveals about the proper content of the state action doctrine.<sup>80</sup> It is my position that under any theory of rights—positivism, natural law, or consensus—the requirement for state action makes no sense.<sup>81</sup>

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infringements. *See supra* notes 26-27 and accompanying text. Even private discrimination on the basis of race and gender is not completely outlawed. *See supra* notes 22-25 and accompanying text.

<sup>79</sup> I know of no empirical studies measuring the general public's knowledge of the state action doctrine. But judging by the surprise of first-year law students when they realize that the Constitution limits only the government and the surprise of nonlawyers when I have described the subject of this Article, I believe that most people are simply unaware that, for example, the first amendment protects their speech from only governmental interference.

<sup>80</sup> For example, none of the state action literature during the 1950s and 1960s, the time of greatest attention to the doctrine, addressed this topic. The only discussion of it that I could find is contained in the two most recent articles on state action. *See Brest, supra* note 2; Goodman, *supra* note 2.

<sup>81</sup> It is possible to argue that the Court in interpreting the Constitution follows none of these theories, but rather simply protects those values that the majority of the Justices deem to be fundamental. The inappropriateness of state action under this system is discussed in section III.D.

To be specific, two different claims are made in this section. One is that the state action doctrine does not necessarily flow from any theory of rights—that no theory of rights commands the existence of the state action requirement. The second is that the state action doctrine is inconsistent with the underlying theories of rights. If only the former is established by my analysis, the effect is that the state action doctrine must be justified, not by theories of rights, but by the policy arguments considered in section IV. Alternatively, if it is successfully demonstrated that the underlying theory

A. *Positivism*

Under positivism, the only rights individuals possess are those explicitly granted by the government.<sup>82</sup> Rights are not inherent, but rather provided. A positivist would argue that the source of all constitutional rights is the written Constitution, and that the language of the document protects rights only from interference by the state.<sup>83</sup> As such, rights exist against only the government; it is meaningless to speak of private infringements because there is no such right against nongovernmental actors.<sup>84</sup> This is exactly the position taken in recent Supreme Court cases, especially by Justice William Rehnquist.<sup>85</sup>

I believe that this positivist argument for state action misinterprets the language and history of the fourteenth amendment. A careful examination demonstrates that the Constitution does not impose a requirement of state action. Furthermore, arguments from positivism are self-defeating: carried to its logical conclusion, the requirement for state action makes no sense under positivist jurisprudence.

The key language of the fourteenth amendment provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."<sup>86</sup> A simplistic positivist position would argue that the fourteenth amendment speaks only of "State" activities, and, there-

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of rights is incompatible with the state action doctrine, then adherents to that theory are compelled to no longer limit the Constitution to state action.

<sup>82</sup> See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* xi-xii (1977). Professor Dworkin describes positivism as follows:

Legal positivism rejects the idea that legal rights can pre-exist any form of legislation; it rejects the idea, that is, that individuals or groups can have rights in adjudication other than the rights explicitly provided in the collection of explicit rules that comprise the whole of a community's laws . . . . Legal positivism . . . is the theory that individuals have legal rights only insofar as these have been created by explicit political decisions or explicit social practice.

*Id.* at xi-xii. See also Perelman, *Can the Rights of Man Be Found?*, in *THE PHILOSOPHY OF HUMAN RIGHTS* 47 (A. Rosenbaum ed. 1980).

<sup>83</sup> See, e.g., McCoy, *Current State Action Theories, the Jackson Nexus Requirements, and Employee Discharges by Semi-Public and State Aided Institutions*, 31 *VAND. L. REV.* 785 (1978) (it is "axiomatic" that the fourteenth amendment applies only to state action).

<sup>84</sup> See, e.g., Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 *HARV. L. REV.* 91 (1966). Professor Cox writes that

[t]o speak of "Fourteenth Amendment rights" that *simpliciter* suggests that they are rights in rem, good against all the world regardless of the limited nature of the duties from which they are derived. The only rights exactly correlative to the duties imposed by the fourteenth amendment are rights against the state, not against private individuals.

*Id.* at 110. See also P. KAUPER, *supra* note 8. Professor Kauper argues that

[t]he Constitution is concerned with constitutional liberties in the classic sense of the Western world, i.e., as liberties of the individual to be safeguarded against the power of the state. . . . The Constitution, accordingly, is not concerned with direct restraints on the individual in the interest of defining his duties and the reciprocal rights of his neighbors.

*Id.* at 129.

<sup>85</sup> See, e.g., *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 160 n.10 (1978) (Justice Rehnquist, for the Court, clearly relying on a positivist definition of rights and state action).

<sup>86</sup> U.S. CONST. amend. XIV.

fore, the Constitution applies only to state action.<sup>87</sup> This argument ignores the language of the fourteenth amendment, which prohibits state *deprivations* and *denials* of rights and equality.<sup>88</sup> In other words, the fourteenth amendment “does not require the judiciary to determine whether the state has ‘acted,’ but whether a state has ‘deprived someone’ of a guaranteed right.”<sup>89</sup> In a positivist analysis the key question is under what circumstances does a state deprive or deny liberty and equality.

Obviously, a state denies a right if it enacts a statute directly infringing it. No one would doubt that state action exists if a state adopts a law discriminating against blacks or prohibiting freedom of speech. Nor, under a positivist analysis, can it be denied that the common law stems from the state: a positivist, by definition, believes that all law comes from the sovereign.<sup>90</sup> Accordingly, if a common-law principle violates rights, there also clearly is state action.<sup>91</sup>

Moreover, it always has been accepted that the state, through its statutes and common law, has the power to prohibit private violations of individual rights. As was demonstrated earlier, the Supreme Court, in articulating the state action doctrine, assumed that the state would prohibit private discrimination.<sup>92</sup> Because the state has the power to stop the private infringement of individual rights, its failure to do so constitutes a state decision to permit the violations. Thus, under a positivist analysis, “the state can be said to authorize all conduct that it does not prohibit.”<sup>93</sup> That is, the state’s common law implicitly gives an individual the right to do that which is not forbidden.<sup>94</sup> Under positivism, “all

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<sup>87</sup> See P. KAUPER, *supra* note 8, at 129; W. LOCKHART, Y. KAMISAR & J. CHOPER, *supra* note 18, at 1511; McCoy, *supra* note 83, at 785. The approach of limiting the Constitution’s meaning to those norms clearly stated or intended has been termed “interpretivism.” See, e.g., J. ELY, *supra* note 32, at 1. The similarity to positivism, a more general jurisprudential theory, is not coincidental. Dean Ely remarked that “[i]nterpretivism is about the same thing as positivism. . . .” (emphasis in original). *Id.* at n.1.

<sup>88</sup> See, e.g., Glennon and Nowak, *supra* note 3, at 228.

<sup>89</sup> *Id.* at 229.

<sup>90</sup> See, e.g., R. DWORKIN, *supra* note 82, at xi, xii.

<sup>91</sup> See, e.g., B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 171 (1921) (“The chief lawmakers in our country may be, and often are, the judges, because they are the final seat of authority. Every time they interpret contract, property, vested rights, due process of law, liberty, they necessarily enact into law parts of a system of social philosophy.”) (quoting President Theodore Roosevelt’s message to Congress on December 8, 1908); Williams, *Mulkey v. Reitman and State Action*, 14 *UCLA L. REV.* 26 (1966) (“[S]tate action inheres in the common law just as it does in statutory law.”); Williams, *supra* note 9, at 367, 383-84 (“Indeed, all rights of private property and of contract are based upon state law. So the enforcement of these laws is state action.”); “Certainly it has been well accepted and established for many years that state common law is just as much state action for purposes of the fourteenth amendment as is state statutory law.”).

<sup>92</sup> See *supra* notes 56-59 and accompanying text.

<sup>93</sup> Karst & Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 *SUP. CT. REV.* 39, 55.

<sup>94</sup> Horowitz & Karst, *The Proposition Fourteen Cases: Justice in Search of a Justification*, 14 *UCLA L. REV.* 37, 41 (1966) (“[T]here always exists some state law (statutory, decisional, or declar-

individual action is permitted or forbidden by *some kind of law*, common law if not statute law."<sup>95</sup>

If all private infringements of rights are implicitly sanctioned by state common law, then the state ultimately is responsible for all private violations of liberty and equality.<sup>96</sup> In short, a state *denies* and *deprives* rights and equality if it fails to stop private invasions or denies redress for violations.<sup>97</sup> This conclusion hardly should be surprising because "[i]naction, rather obviously, is the classic and often the most efficient way of 'denying protection.'"<sup>98</sup> In fact, in the *Civil Rights Cases*, the Supreme Court indicated that if the state failed to outlaw private discrimination, then there was sufficient state action to justify congressional legislation under the fourteenth amendment.<sup>99</sup> Similarly, in other cases, the Supreme Court has recognized that states act by permitting and failing to halt private discrimination.<sup>100</sup> In *Terry v. Adams*, for example, the Court invalidated private, racially discriminatory political primaries:

For a state to permit such a duplication of its election processes is to permit a flagrant abuse of those processes to defeat the purposes of the Fifteenth Amendment . . . . It violates the Fifteenth Amendment for a state, by such circumvention, to permit within its borders the use of any device that produces an equivalent of the prohibited election.<sup>101</sup>

Thus, the state denies equal protection and deprives rights if it fails to provide remedies for violations of the Constitution.<sup>102</sup> As such, under positivism *all* private infringements of rights involve state action.<sup>103</sup> As Professors Horowitz and Karst noted, "state action, in the form of state law, is present in all legal relationships among private persons."<sup>104</sup>

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able by a court in a case of first instance) determining the legal characteristics of any private discriminatory conduct (e.g., compelling, encouraging, permitting, or forbidding it.)" (emphasis in original).

<sup>95</sup> Barnett, *What is "State" Action Under the Fourteenth, Fifteenth, and Nineteenth Amendments of the Constitution?*, 25 OR. L. REV. 227, 228 (1945) (emphasis in original).

<sup>96</sup> See Glennon and Nowak, *supra* note 3, at 229 (state tolerance constitutes state action).

<sup>97</sup> See, e.g., Hyman, *Segregation and the Fourteenth Amendment*, 4 VAND. L. REV. 555, 570 (1951) ("[A] state denied equal protection to the extent that, in the face of actual discrimination, it failed to exercise available legislative power to correct it."); Peters, *supra* note 51, at 320 (state non-action violates rights).

<sup>98</sup> Black, *supra* note 1, at 73.

<sup>99</sup> 109 U.S. 3, 17 (1883). See Kinoy, *supra* note 58, at 416. I recognize that finding state inaction to be a basis for congressional action does not necessarily mean that there is a basis for federal judicial action. I address this argument, contending that there is no basis for a distinction at *infra* text accompanying notes 232-36.

<sup>100</sup> See, e.g., *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

<sup>101</sup> 345 U.S. 461, 469 (1953).

<sup>102</sup> See Black, *supra* note 1, at 73; Karst and Horowitz, *supra* note 93, at 51; Peters, *supra* note 51, at 328.

<sup>103</sup> See, e.g., Nerken, *supra* note 20, at 298 ("Thus, logically, the state action prohibited by the fourteenth amendment is always there.").

<sup>104</sup> Horowitz & Karst, *supra* note 94, at 45; see also H. FRIENDLY, *THE DARTMOUTH COLLEGE CASE AND THE PUBLIC-PRIVATE PENUMBRA* 17 (1969) (no logical stopping point before conclusion

This argument, based on the language of the fourteenth amendment, finds even stronger support from the history of its ratification.<sup>105</sup> The legislative history of the fourteenth amendment indicates that the failure of a state to prohibit private infringements of individual rights was thought to constitute state action.<sup>106</sup> For example, Representative William Lawrence stated, "Now, there are two ways in which a State may undertake to deprive citizens of these absolute, inherent, and inalienable rights: either by prohibitory laws, or by a failure to protect any one of them."<sup>107</sup> Earlier, he had argued that

[t]he object of this provision [the equal protection clause] is to make all men equal before the law. If a State permits inequality in rights to be created or meted out by citizens or corporations enjoying its protection it denies the equal protection of the laws. What the State permits by its sanction, having the power to prohibit, it does in effect itself.<sup>108</sup>

Similarly, Senator Frelinghuysen stated, "A state denies equal protection whenever it fails to give it. Denying includes inaction as well as action."<sup>109</sup> All indications are that a majority of Congress believed that a state denies equal protection of the laws and deprives rights if it tolerates private discrimination and infringements.<sup>110</sup> In fact, the first court to interpret the fourteenth amendment, thirteen years before the *Civil Rights Cases*, declared, "Denying includes inaction as well as action, . . . the omission to protect, as well as the omission to pass laws for protection."<sup>111</sup>

Thus, from a positivist analysis, the protections of the fourteenth amendment are not limited to the affirmative actions of state govern-

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that everything is state action); Williams, *supra* note 9, at 367 ("It is difficult to conceive of situations where state action is not present.").

<sup>105</sup> Traditionally, scholars simply have assumed that the intent behind the fourteenth amendment was to limit its protections to state action. See, e.g., H. FRIENDLY, *supra* note 104, at 17 ("[I]t still cannot be doubted that the Fourteenth Amendment was designed to protect the citizen against government and not against other citizens.").

I recognize the impossibility of ever determining the true intent behind a constitutional provision. See, e.g., J. ELY, *supra* note 32, at 17; Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); Chemerinsky, *Empty History*, *supra* note 31; Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502, 508-09 (1964). My point is simply that if the framers' intent is to be given any weight, it does not support limiting the Constitution's protections to state action.

<sup>106</sup> See, e.g., H. FLACK, *supra* note 54, at 277; Williams, *supra* note 9, at 348.

<sup>107</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1833 (1866).

<sup>108</sup> 2 CONG. REC. 412 (1874).

<sup>109</sup> CONG. GLOBE, 42nd Cong., 1st Sess. 501 (1871).

<sup>110</sup> See, e.g., Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 1972 WASH. U.L.Q. 421. In this article, the authors conclude that

[b]y their words and votes, a decided majority of the members of Congress in 1871 recorded their opinion that a state denied equal protection of the laws when it tolerated widespread abuses against a class of citizens because of their color without seriously attempting to protect them by enforcing the law.

*Id.* at 470.

<sup>111</sup> *United States v. Hall*, 26 F. Cas. 79, 81 (C.C.D. Ala. 1871) (No. 15,282).

ments.<sup>112</sup> All violations of liberty occur because they are permitted by state law. To the extent that the *Civil Rights Cases* hold to the contrary, they should be given relatively little weight in interpreting the meaning of the fourteenth amendment. The *Civil Rights Cases*, decided soon after the Compromise of 1877 ended Reconstruction, reflected a desire to minimize federal enforcement of the fourteenth amendment.<sup>113</sup> Justice Bradley, the author of the majority opinion, even had participated in arriving at the compromise whereby Southern Democrats agreed to break a deadlock and support the election of Republican presidential candidate Rutherford Hayes, in exchange for the withdrawal of Northern troops from the South and the end of Reconstruction.<sup>114</sup> The *Civil Rights Cases* have been widely recognized as implementing this political choice.<sup>115</sup>

In fact, Supreme Court precedents, taken to their logical conclusion, demonstrate that under a positivist analysis, state action is present in all private violations of constitutional rights. For example, in *Shelley v. Kraemer*,<sup>116</sup> the Supreme Court held that court enforcement of private racially restrictive covenants constitutes state action. Previously, courts repeatedly had held that enforcement of purely private agreements did not involve state action.<sup>117</sup> In *Shelley*, however, the Court concluded that action by state courts was a form of state action.<sup>118</sup> When courts uphold agreements such as those challenged in *Shelley*, they do so because the common law of contracts does not forbid racially restrictive covenants. The state's law that permits enforcement of such contracts is hardly value neutral; it makes a choice to favor discrimination over equality.<sup>119</sup>

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<sup>112</sup> See, e.g., R. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS 36 (1947); Watt & Orlikoff, *The Coming Vindication of Mr. Justice Harlan*, 44 ILL. L. REV. 13 (1949); Williams, *supra* note 9, at 348-49 (arguing that the language and history of the fourteenth amendment do not impose a state action requirement).

<sup>113</sup> See, e.g., A. BLAUSTEIN & R. ZANGRADO, CIVIL RIGHTS AND THE AMERICAN NEGRO 283 (1968); R. HARRIS, THE QUEST FOR EQUALITY 56, 82-89 (1960); C. WOODWARD, THE STRANGE CAREER OF JIM CROW 70-71 (3d ed. 1974) (the *Civil Rights Cases* reflect hostility to the aims of Reconstruction).

<sup>114</sup> See Scott, *Justice Bradley's Evolving Concept of the Fourteenth Amendment from the Slaughterhouse Cases to the Civil Rights Cases*, 25 RUTGERS L. REV. 552, 566-67 (1971) (Bradley had cast the deciding vote in favor of the compromise electing Hayes over Tilden in exchange for the end of Reconstruction).

<sup>115</sup> See C. WOODWARD, *supra* note 17, at 245 (*Civil Rights Cases* represent political choice validating Compromise of 1877).

<sup>116</sup> 334 U.S. 1 (1948).

<sup>117</sup> See, e.g., Note, *Racial Discrimination in Housing*, 57 YALE L.J. 426, 446-47 (1948) (in all but one of twenty-one jurisdictions where the issue had been before the courts, racially restrictive covenants were upheld, the general rationale being that "the law should enforce private agreements").

<sup>118</sup> Cf. Frank, *The United States Supreme Court: 1947-48*, 16 U. CHI. L. REV. 1, 23-24 (1948); Note, *Constitutionality of Racially Restrictive Covenants*, 17 U. CIN. L. REV. 277, 280 (1948) (contemporaneous articles describing the effect of *Shelley* in declaring that all court action is state action).

<sup>119</sup> See L. TRIBE, *supra* note 15, at 1170 (law not neutral in allowing race-based restraints on

All state court enforcement of common-law principles constitutes state action because in each case “the state must choose whom to vindicate and the vindication of either party is ‘state action.’”<sup>120</sup> Although this holding in *Shelley* was controversial,<sup>121</sup> the Court was not announcing a new principle in concluding that court enforcement of the private law constitutes state action.<sup>122</sup> Nor was it controversial when the Supreme Court held in *New York Times Co. v. Sullivan*, fifteen years after *Shelley*, that the common law of libel is state action that must comply with the first amendment.<sup>123</sup>

Stated somewhat differently, whenever a court decides a matter, it must rely either on preexisting rules of law or on rules that it is creating in that case. If the law already exists and is just being applied by the court, then that law constitutes state action, regardless of whether its initial source is the legislature or judiciary. On the other hand, if no law exists to govern the disposition of the case, then the court, in the common-law tradition, is creating the rules of law upon which it is relying. In that event, the act of establishing new rules constitutes state action. Either way, as *Shelley* holds, court action always is state action.

If any decision by a state court represents state action, then ultimately all private actions must comply with the Constitution. Anyone whose rights are violated can file suit in state court. If the court dismisses the case because the state law does not forbid the violation, there is state action sustaining the infringement of the right.<sup>124</sup> For example, if a private employer fires an employee for his or her speech, the employee may sue for redress. If the court denies relief because there is no common-law protection against such discharges, then the state common law

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alienation while disallowing other forms of restraints on alienation); Van Alstyne & Karst, *State Action*, *supra* note 7, at 46 (“The state is *not* neutral in preferring control over private property ahead of full racial equality . . .”).

<sup>120</sup> Quinn, *supra* note 20, at 160. See also Williams, *supra* note 9, at 383-84; Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 665 (1974).

<sup>121</sup> See, e.g., Wechsler, *Towards Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 29 (1959) (criticizing the holding in *Shelley*).

<sup>122</sup> See Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Williams, *supra* note 9, at 364 (not new that court action constitutes state action).

<sup>123</sup> 376 U.S. 254 (1964). The Court wrote,

We may dispose at the outset of . . . the proposition relied on by the State Supreme Court—that “the Fourteenth Amendment is directed against State action and not private action.” That proposition has no application to this case. Although this is a civil law suit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms. . . . It matters not that the law has been applied in a civil action and that it is common law only. . . . The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.

*Id.* at 265.

<sup>124</sup> See, e.g., Huber, *Revolution in Private Law?*, 6 S.C.L.Q. 8, 26 (1953); Quinn, *supra* note 20, at 161 (court’s dismissing suit would constitute state action supporting the activity).

is denying first amendment freedoms.<sup>125</sup> Another example makes this even clearer. Imagine an employee who steals money from an employer. The employer wants the money back and sues to recover it under the tort of conversion. For contrast, consider the plight of an employee who is fired for getting an abortion. The employee wants her job back and sues. But under existing law, although the court can help the employer recover the money, the court is powerless to aid the fired employee. What is the difference? Both individuals invoke the power of the state for redress. The only distinction is that the *state's law* provides protection in the former instance, but not the latter. There is equal state action in both situations. Thus, if *Shelley* is followed, all private infringements of rights not outlawed by the state involve state action—a conclusion widely recognized at the time of the decision.<sup>126</sup>

The Supreme Court, however, has recoiled from this conclusion and largely has refused to apply *Shelley*.<sup>127</sup> The result is a set of precedents that cannot possibly be reconciled.<sup>128</sup> The critical point here is that under a positivist analysis, *Shelley* is correct—the common law is state law and court enforcement is state action. Under positivism, the concept of state action makes no sense because state action always is present.

Consider another Supreme Court precedent embodying positivism, which if followed would eliminate the state action requirement. In *Burton v. Wilmington Parking Authority*,<sup>129</sup> the Supreme Court found state action when a private restaurant, which leased its premises from the state, discriminated against blacks. The Court concluded that

in its lease with Eagle [the private restaurant] the Authority could have affirmatively required Eagle to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. . . . By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property, and prestige behind the admitted discrimination.<sup>130</sup>

Again, under this principle, state action always is present because the

<sup>125</sup> See, e.g., McCoy, *supra* note 83, at 792 (firing employee becomes state action).

<sup>126</sup> See, e.g., Huber, *supra* note 124, at 14-15; Ming, *Racial Restrictions and the Fifth Amendment: The Restrictive Covenant Cases*, 16 U. CHI. L. REV. 203, 234 (1949); Comment, *The Impact of Shelley v. Kraemer on the State Action Concept*, 44 CALIF. L. REV. 718, 733 (1956) (*Shelley* makes all private conduct state action).

<sup>127</sup> See, e.g., Gordon v. Gordon, 382 Mass. 197, 124 N.E.2d 280 (refusal to apply *Shelley* to invalidate a will revoking any bequest if recipient married a "person not born in the Hebrew faith"), *cert. denied*, 349 U.S. 947 (1955); R. KLUGER, SIMPLE JUSTICE 528 (1976) (*Shelley* "had no lasting impact"); Nerken, *supra* note 20, at 359 (Court has failed to follow *Shelley*).

<sup>128</sup> There simply is no basis for distinguishing those situations in which court action constitutes state action from those in which court action does not represent state action.

<sup>129</sup> 365 U.S. 715 (1961).

<sup>130</sup> *Id.* at 725.



state always can outlaw discrimination and violations of liberty.<sup>131</sup> For example, states could be required in chartering corporations or granting licenses to insist that the private entity refrain from infringing constitutional liberties.<sup>132</sup> But again, the Court has retreated from the principle announced in *Burton*, adhering to the concept of state action and creating a hopelessly incoherent doctrine.<sup>133</sup>

In sum, under a theory of positivism there is no basis for limiting the Constitution's protections to state action. Under positivism, all rights are derived from the government. There is no inherently private realm of individual behavior.<sup>134</sup> Everything that is allowed occurs because of the state's decision not to prohibit the activity. Thus, all private violations of liberty occur because they are sanctioned by the state's common law, and hence by state action. If a state's positive law, either through common law or by statute, protects these rights, then, of course, there is no state action denying liberty or depriving equality.

As such, because a state violates the fourteenth amendment by allowing private infringements of rights, the state common law must prohibit such abridgments. Accordingly, in every case challenging a private violation of rights, courts can halt the infringement by requiring that the state common law prohibit private denials of constitutional liberties.

As explained earlier, finding state action does not necessarily mean that the private conduct is an impermissible violation of rights. Rather, it simply implies that the courts cannot dismiss cases for want of state action, but instead must reach the merits. From the perspective of positivism, the Constitution contains no state action requirement.

### B. Natural Law

Since the time of Aristotle, natural law has been the primary alter-

<sup>131</sup> See, e.g., N. VIERRA, CIVIL RIGHTS 180 (1978) (dependence on state laws arguably makes everything state action); Alexander, *Cutting the Gordian Knot: State Action and Self-Help Repossession*, 2 HASTINGS CONST. L.Q. 893, 893-95 (1975) ("[T]he search for state action is a fundamentally misguided quest. State action is present in every lawsuit because the laws of a state are applied.").

<sup>132</sup> See Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PA. L. REV. 933, 943, 952 (1952) ("Implicitly, it would seem, state action in granting a corporate charter assumes that the corporation will not exercise its power . . . in a manner forbidden the state itself.").

<sup>133</sup> For example, if *Burton* is correct that states have the obligation to prohibit discrimination when they have the opportunity, such as by inserting such clauses in leases, then it follows that all licenses granted by the state also must forbid discrimination. Yet, this position was explicitly rejected by the Court in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 171-72 (1972).

<sup>134</sup> See Brest, *supra* note 2. Professor Brest argues that

[t]he positivist cannot invoke the inherently private realm entailed by the very concept of natural rights. More fundamentally, since any private action acquiesced in by the state can be seen to derive in power from the state, which is free to withdraw its authorization at will, positivism potentially implicates the state in every "private" action not prohibited by law.

*Id.* at 1301-02.

native and rival to positivism as a theory of rights.<sup>135</sup> Under contemporary views of natural law, it is believed that individuals inherently possess certain basic freedoms.<sup>136</sup> That is, rights do not come from the government; they inhere in the person. Unlike positivism, which denies the existence of moral truth, relying instead on the political process to determine rights, natural law is based on the assumption of a "moral reality"—that there are correct values which courts must discover and protect.<sup>137</sup> Although natural law theories seldom are expressed in contemporary court decisions,<sup>138</sup> natural law dominated jurisprudence at the times when both the Constitution and the fourteenth amendment were adopted.<sup>139</sup> I contend that the concept of state action is incompatible with a theory of natural rights.

A belief in natural law is premised on the view that individual rights predate the creation of the state.<sup>140</sup> Rights, therefore, are derived independent of constitutions, statutes, and judicial decisions.<sup>141</sup> Unlike

<sup>135</sup> See Aristotle, *Rhetoric 1375a*, in BASIC WORKS OF ARISTOTLE 1374 (R. McKeon ed. 1941) (distinction between positive law and natural law). For a history of the concept of natural law, see A. D'ENTREVES, NATURAL LAW (1951); B. WRIGHT, THE AMERICAN INTERPRETATION OF NATURAL LAW (1931).

<sup>136</sup> Earlier natural law theories, especially theories before Hobbes and Locke, are quite different in that they emphasize duties rather than rights. See, e.g., L. STRAUSS, NATURAL RIGHTS AND HISTORY (1953). The notion is that when a duty is owed, corresponding rights exist. For example, if the government has a duty to protect freedom of speech, a right to speak free from governmental interference exists. The argument would be that the state action doctrine is appropriate if rights are seen not as having an independent existence, but rather as arising merely as corollaries of duties that are owed only by the government. First, this argument begs the key question: What duties are owed by private entities? The state action doctrine is justified under this theory of natural rights only if there is a basis for believing that the government has a duty to respect certain values and private parties do not have such an obligation. Unless this premise is justified, a state action requirement is unjustified under duty-based theories of natural law. Second, if duties are defined relative to the value of the activity, then there is no basis for not creating duties for private entities to refrain from action infringing those values. For example, the concern for social equality creates a duty on the part of the government not to discriminate. Likewise, the same concern for social equality should create a duty on the part of private entities not to discriminate. Third, my discussion of natural law will focus on rights-based theories, rather than those emphasizing duties, because these are the ones that dominate current discussion of natural law. *Id.* at 182-83.

<sup>137</sup> See generally Moore, *Moral Reality*, 1982 WIS. L. REV. 1061 (describing and defending a theory of moral reality—that there are discoverable, objectively true values).

<sup>138</sup> See, e.g., J. ELY, *supra* note 32, at 52 ("The concept [of natural law] has . . . all but disappeared in American discourse."). Cf. R. UNGER, KNOWLEDGE AND POLITICS 78 (1975) ("[P]roponents of objective value must restrict themselves to a few abstract ideals whose vagueness allows almost any interpretation.").

<sup>139</sup> See *supra* notes 32-49 and accompanying text.

<sup>140</sup> See, e.g., L. STRAUSS, *supra* note 136, at 183; Patterson, *A Pragmatist Looks at Natural Rights and Natural Law*, in NATURAL LAW AND NATURAL RIGHTS 48, 62 (Gutler, Scott-Craig, Patterson & Harding eds. 1955) ("The basic rights of the citizen in our political society are regarded as continuing from a prepolitical condition or as arising in society independently of positive constitutions, statutes, and judicial decisions, which merely seek to 'secure' or 'safeguard' rights already possessed.").

<sup>141</sup> Patterson, *supra* note 140, at 62.

positivism, which assumes that these documents are the sole source of rights, natural law theory assumes that rights are an inherent part of personhood. Positive law simply codifies natural law principles.<sup>142</sup> For example, John Locke, a preeminent natural rights advocate, believed that individuals possess an inherent moral right to life, liberty, and property.<sup>143</sup> Any denial of these rights, regardless of the source, violated the natural law. For this reason, the common law, which was said to embody the natural law, prevented private infringements of individual liberties.<sup>144</sup>

Accordingly, the concept of state action makes no sense under a regime of natural law. The state action doctrines provide that private interferences with rights are permissible and may not be halted by courts. But if constitutional rights are an embodiment of the natural law—a part of personhood—then private invasions of liberty are just as intolerable as governmental violations because both deprive a person of inherent rights.<sup>145</sup> For example, if individuals have a natural right not to be discriminated against on the basis of their race or gender, then private racial discrimination is a denial of natural rights. Similarly, if there is a natural right to free speech, an employer's firing an employee for speaking out denies that person his or her natural rights.<sup>146</sup> Thus, typically, the victim of a rights violation claims that his or her natural rights have been violated, while the perpetrator tries to make a positivist argument that the language of the Constitution protects liberty from only state action.<sup>147</sup>

It is possible to argue that the natural law establishes rights against the government, but not against private actors. Such an argument, however, must be premised either on a difference in the content of the rights or on a difference in the nature of the infringement. As to the former, if rights such as privacy, speech, and equality are inherent to personhood, then there is no basis for defining them differently depending on the iden-

<sup>142</sup> See, e.g., J.G. FICHTE, *THE SCIENCE OF RIGHTS* 151 (1889, 1970 eds.) ("All positive laws are, in a greater or less degree, deduced from the Conception of Rights.")

<sup>143</sup> See J. LOCKE, *SECOND TREATISE ON GOVERNMENT* § 190 (Macpherson ed. 1980) ("Every man is born with . . . a right of freedom to his person which no other man has a power over . . .") (emphasis omitted).

<sup>144</sup> See *supra* notes 32-41 and accompanying text.

<sup>145</sup> See, e.g., Goodman, *supra* note 2. Professor Goodman concludes that the relationship between the state action and natural rights doctrines becomes one of mutual tension rather than mutual sympathy. The former reserves to the politically accountable branches of government, while the latter entrusts to the courts, decisions as to whether the restrictions imposed by the fourteenth amendment on state government should be brought to bear on private conduct as well . . . .

*Id.* at 1333.

<sup>146</sup> *Id.* at 1334-35.

<sup>147</sup> Of course, it can be argued that constitutional rights do not reflect natural rights. This subsection, however, is based on the assumption that rights are derived from the natural law. If this premise is disputed, then constitutional rights must be justified on some other basis, such as positivism or consensus. Under these theories as well, the concept of state action makes no sense. See *supra* text accompanying notes 82-135.

tity of the violator. In other words, the definition of the right is found in the individual possessing the right, not in the public or private status of the infringer.<sup>148</sup> The natural rights of an individual should be a shield against all invasions, government or private. Alternatively, if the argument is based on a difference in the degree of infringement, there is no reason to believe that all private violations of rights are trivial, while all government infringements are significant. Any alleged deprivation should be scrutinized to ensure that an unjustified infringement has not occurred.

Furthermore, under natural rights theories, the very purpose of government is to prevent private violations of rights.<sup>149</sup> Such theorists believe that people create governments to safeguard rights they inherently possess. John Locke spoke of people entering into a social contract "to preserve their lives, liberties, and fortunes."<sup>150</sup> The Declaration of Independence states that people are "endowed . . . with . . . inalienable rights" and "[t]hat to secure these rights Governments are instituted among men."<sup>151</sup> In short, under a natural law theory, "the main purpose of government [is] to protect citizens against wrongs perpetrated by others."<sup>152</sup> As Professor Sigmund explained, "The role of government is to provide a common judge to enforce and protect the natural rights of the individual to life, liberty, and property, which are recognized before, during, and after the contract or agreement to form or enter into government."<sup>153</sup> An individual's natural rights survive the creation of the state, except for those few that must be sacrificed in order to establish a viable government capable of safeguarding everyone's liberty.<sup>154</sup>

As such, under natural law theories, the government has a duty to protect the rights of individuals from infringement. If the state fails to do this, if the laws of the state do not provide redress for rights violations, then it is denying liberties. To the extent that the drafters of the fourteenth amendment believed in a natural law, they also thought that the failure of the state to protect rights constituted a denial of rights and a deprivation of equality. Justice Bradley, who espoused a natural-rights

<sup>148</sup> Put somewhat differently, natural rights are protected because there are activities (e.g., speech) that are seen as inherently desirable. Therefore, any denial of these activities, regardless of the source, should be suspect.

<sup>149</sup> Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39, 49.

<sup>150</sup> J. LOCKE, *supra* note 143, at § 137.

<sup>151</sup> The Declaration of Independence para. 1 (U.S. 1776). Cf. P. SIGMUND, *supra* note 33, at 98 (Declaration of Independence founded on Locke's belief that governments are created to protect natural rights); J. WILSON, *THE WORKS OF JAMES MADISON 171-72* (McCloskey ed. 1967) (belief that government is created to preserve natural rights). See also *infra* text accompanying notes 159-72 (discussing a similar point in connection with consensus theories).

<sup>152</sup> Benedict, *supra* note 149, at 49.

<sup>153</sup> P. SIGMUND, *supra* note 33, at 85.

<sup>154</sup> See, e.g., J. LOCKE, *supra* note 143, § 130; Patterson, *supra* note 140, at 62 (individuals retain all rights not needed to be given to the government).

philosophy, stated in the *Civil Rights Cases* that there is state action if the state fails to adequately prevent and remedy private discrimination.<sup>155</sup> Professor tenBroek explains that

[p]rotection of men in their fundamental or natural rights was the basic idea of the clause . . . . Equal denial of protection, that is, no protection at all, is accordingly a denial of equal protection. The requirement of equal protection of the laws cannot be met unless the protection of the laws is given; and to give the protection of the laws to men in their natural rights was the sole purpose in the creation of government.<sup>156</sup>

Hence, under natural law theories, denials of liberty occur because the state fails to fulfill its responsibility to provide redress for rights violations. Therefore, the state is culpable for every private action depriving a person of constitutionally protected freedoms. In short, under natural law, like positivism, state action always exists. Courts applying the natural law must assume that the state common law protects natural rights and therefore provides vindication whenever a suit challenges private infringements of individual rights.

Individuals have no way to protect their liberties from private interference except through the government and the courts it creates to uphold rights.<sup>157</sup> Therefore, if under the state action doctrine courts dismiss cases involving challenges to private violations of liberties, natural rights are sacrificed. A theory of natural law requires a judiciary capable of redressing all violations of natural rights.<sup>158</sup>

### C. Consensus Theories

Although positivism and natural law are regarded as the two leading competing theories of rights,<sup>159</sup> neither completely explains contemporary constitutional decisionmaking. The Supreme Court repeatedly has protected rights, such as privacy and travel, that have no expression in positive law, without attempting to justify its decisions by appeals to natural law.<sup>160</sup> Therefore, another theory must explain these decisions. One frequently suggested alternative to natural law and positivism as a basis for deriving rights is "consensus theories."<sup>161</sup>

<sup>155</sup> See *supra* text accompanying notes 56-59; see also Goodman, *supra* note 2, at 1333-34 (describing Justice Bradley's belief in natural rights).

<sup>156</sup> J. TENBROEK, *supra* note 55, at 221-22.

<sup>157</sup> See Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083, 1113 (1960) (protection of rights depends on courts and society). Cf. Dworkin, *Natural Law Revisited*, 34 U. FLA. L. REV. 165, 186 (1982) (duty of courts to fulfill the natural law).

<sup>158</sup> See, e.g., Goodman, *supra* note 2, at 1333 ("The constitutional enforcement of natural [law] rights demands an assertive judiciary . . .").

<sup>159</sup> See, e.g., Brest, *supra* note 2, at 1296-97 ("The tension between positivism and natural law has been a perennial theme in American constitutional jurisprudence.").

<sup>160</sup> Of course, it is possible that the Justices are deriving rights from the natural law, but refusing publicly to announce this as their source.

<sup>161</sup> The distinction between natural rights and consensus as a source of rights can be traced to the

Consensus theories are premised on the belief that governments gain their authority from the consent of the governed.<sup>162</sup> Accordingly, government decisions should reflect the views of the people. In terms of rights, this theory provides that courts should discover rights by looking to social consensus.<sup>163</sup> Although under positivism courts also follow consensus, positivism limits courts to protecting that which is codified in law. In contrast, consensus theories allow courts to uphold unwritten, socially accepted rights. Dean Harry Wellington described the function of the Court under a consensus theory as being "to ascertain the weight of the principle in conventional morality and to convert the moral principle into a legal one by connecting it with the body of constitutional law."<sup>164</sup>

To evaluate the concept of state action under consensus theories requires an understanding of exactly what it means to find rights through a social consensus. At first blush, consensus seems a peculiar approach for finding rights. Because the whole point of judicial protection of constitutional rights is to check the majority,<sup>165</sup> social agreement should not be able to justify the violation of rights. Dean John Hart Ely explains the inherent inconsistency in the use of consensus as the foundation of judicial review: "[I]t makes no sense to employ the value judgments of the majority as the vehicle for protecting minorities from the value judgments of the majority."<sup>166</sup> If consensus is expressed by popularly elected legislatures, then there is no basis for judicial review of statutes under a consensus model.

More generally, individual rights are thought of as "trumps," to use Professor Dworkin's term, that justify stopping conduct violating those rights.<sup>167</sup> If there are widespread violations of a right—such as discrimination against blacks—then there obviously is a consensus that the right does not exist. The more frequent the denial of a particular liberty, the less able a court is to find the existence of the right and provide redress.

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time of the ancient Greeks. See Rosenbaum, *The Editor's Perspective*, in *THE PHILOSOPHY OF HUMAN RIGHTS* 9 (A. Rosenbaum ed. 1980) ("The sophists are known to have distinguished between convention (*nomos*) and nature (*physis*), both of which were used to analyze human morality in society."). For a discussion of modern consensus theories as applied in constitutional adjudication, see J. ELY, *supra* note 32, at 63-69.

<sup>162</sup> See, e.g., Corwin, *supra* note 45, at 152; Rosenbaum, *supra* note 161, at 12.

<sup>163</sup> See, e.g., A. BICKEL, *THE LEAST DANGEROUS BRANCH* 109 (1962); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 *YALE L.J.* 221 (1973).

<sup>164</sup> Wellington, *supra* note 163, at 284.

<sup>165</sup> As Justice Jackson, writing for the Court, noted in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943), "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."

<sup>166</sup> J. ELY, *supra* note 32, at 69.

<sup>167</sup> R. DWORKIN, *supra* note 82, at xi.

A simple consensus model provides little room for creating trumps over behavior.

Therefore, when theorists speak of consensus as a basis for finding rights, they must mean something more than the views of the majority at the moment. Professor Margaret Jane Radin has observed that the source of rights is really a “notion of [a] deep or coherent consensus.”<sup>168</sup> Likewise, Dean Wellington rejects simple consensus in favor of courts being “reasonably confident that they draw on conventional morality and screen out contemporary bias, passion, and prejudice.”<sup>169</sup> In short, consensus theorists believe that there exists a long-term, underlying, deeply embedded consensus to which courts should look as a source of rights.

If we assume that such a consensus exists and that courts could find it,<sup>170</sup> then the question concerning state action is whether the consensus is that rights should be protected from only governmental interference or whether the consensus is that rights should be safeguarded from both governmental interference and private infringements. Frankly, I find it difficult to answer this question because I have no idea how to ascertain the real, deeply embedded “consensus.” It seems that any discussion is completely speculative and that one “can convince oneself that some invocable consensus supports almost any position a civilized person might want to see supported.”<sup>171</sup>

With this caution in mind, I would argue that the concept of state action is inconsistent with the American consensus on rights. Rights are protected in this society in order to safeguard valued activities. Consider, for example, freedom of expression. Freedom of speech is defended both instrumentally—it helps people make better decisions—and intrinsically—individuals benefit from being able to express their views.<sup>172</sup> The consensus is that the activity of expression is vital and must be protected. Any infringement of freedom of speech, be it by public or private entities, sacrifices these values. In other words, the consensus is not just that the government should not punish expression; rather, it is that speech is valuable and, therefore, any unjustified violation is impermissible. If employers can fire employees and landlords can evict tenants because of their speech, then speech will be chilled and expression lost. Instrumentally, the “marketplace of ideas” is constricted while, intrinsically, individuals are denied the ability to express them-

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<sup>168</sup> Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1176 & n.109 (1980).

<sup>169</sup> Wellington, *supra* note 163, at 67.

<sup>170</sup> A “deep consensus” obviously never can be empirically verified because opinion polls measure only the current consensus, not the underlying, long-term consensus that is to be followed. I do not know how we ever can find out if such a consensus exists, and I do not know how courts will ever know if they’ve found it.

<sup>171</sup> J. ELY, *supra* note 32, at 43.

<sup>172</sup> See generally T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970) (explaining why freedom of speech is valued).

selves. Therefore, courts should uphold the social consensus by stopping all impermissible infringements of speech, not just those resulting from state action.

Similarly, the social consensus is that many forms of discrimination are wrong: individuals should not suffer because of characteristics such as race, gender, and religion. The universally accepted view that the government should not discriminate likely stems from a more general consensus that discrimination should be outlawed. Accordingly, under consensus theories, it makes little sense to limit the prohibition against discrimination to state action.

In sum, under consensus theory, rights are safeguarded in order to protect valued activities and freedoms. Any infringement—be it by the government or by private parties—sacrifices what is valued and offends the consensus. As such, under consensus theory, like under positivism and natural law, the concept of state action makes no sense.

#### D. *Modern Constitutional Law and the Protection of Rights*

It is quite likely that the contemporary Court does not follow any of these theories of rights in deciding the meaning and scope of constitutional provisions. In most cases in which the Court announces protection of new rights, the holding is not explained on the basis of the written law, the natural moral order, or the underlying social consensus.<sup>173</sup> Rather, the Court identifies those values deemed so fundamental as to justify protection from majoritarian interference. As Dean Sandalow explains, “constitutional law must now be understood as the means by which effect is given to those ideas that from time to time are held to be fundamental . . . .”<sup>174</sup>

Thus, protected rights cannot be traced to any single authoritative source, like the text of the Constitution, the natural law, or even a discernable social consensus.<sup>175</sup> Instead, the Court chooses the values that it believes require safeguarding and then writes an opinion justifying such protection.<sup>176</sup> In fact, Dean Ely observes that this view is the “prevailing academic line”—that the “Supreme Court should give content to the Constitution’s open-ended provisions by identifying and enforcing . . . those values that are, by one formula or another, truly important or fun-

<sup>173</sup> See, e.g., *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (finding family autonomy to be constitutionally protected); *Roe v. Wade*, 410 U.S. 113 (1973) (finding the right to abortion to be protected as part of constitutionally protected privacy rights); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (finding privacy to be constitutionally protected in the “penumbra” of the Bill of Rights).

<sup>174</sup> Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1184 (1977).

<sup>175</sup> Cf. Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445 (1984); Simon, *The Authority of the Constitution and its Meaning: A Preface to a Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 603 (1985) (discussing what it means for a source to be authoritative in constitutional interpretation).

<sup>176</sup> In another paper, I have termed this theory “open-ended modernism.” See Chemerinsky, *The Price of Asking*, *supra* note 31.



damental.”<sup>177</sup> Under this view, the Court exists to serve as a moral conscience, what Michael Perry has termed a “prophetic” role, articulating values to be protected from the political process.<sup>178</sup>

The concept of state action is most inappropriate under this approach to constitutional rights. If rights represent fundamental values, then any unjustified infringement of those values should be halted. Consider, for example, how constitutional rights differ from other types of rights, such as rights existing by virtue of contracts, the common law, or statutes. Constitutional rights are unique because they are the only ones which owe their existence to a judgment that they are “fundamental” and represent values that must be protected from political majorities. Legislatures can limit what might be included in contracts or modify the common law, but simple legislative majorities cannot change the character of constitutional rights.

Thus, if constitutional rights reflect activities and freedoms that are very highly regarded, then any denial of those rights should be scrutinized. For example, private discrimination denies the fundamental concept of equality; it should not be tolerated just because the harm is imposed by a nongovernmental entity. Privacy, including reproductive autonomy, is now deemed fundamental, and, as such, any intrusion should be reviewed. It certainly is possible that governmental infringement can be much worse than private actions, given the size of the government and its powers. Nonetheless, this is no reason completely to refrain from scrutinizing private infringements of fundamental values to ensure that the infringements really are minor or sufficiently justified. In short, if one sees the Court’s role as protecting fundamental values, then there is no reason why such rights should be safeguarded from only governmental action. Nothing in the definition of those values or in the rationale for their protection explains why protection is limited to government conduct.

#### IV. THE CONTEMPORARY JUSTIFICATIONS FOR THE STATE ACTION DOCTRINE

Thus far, this Article has demonstrated that the state action requirement is harmful because it permits infringements of important individual rights; that the doctrine is anachronistic when judged by its original purpose; that the Constitution’s language and history indicate that there should be no such requirement; and that under any theory of rights, it is wrong to protect liberties from only governmental interference. How, then, do judges and scholars justify retaining the concept of state action?

Contemporary commentators all offer the same two reasons for requiring state action. First, the doctrine protects individual liberty by de-

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<sup>177</sup> J. ELY, *supra* note 32, at 43.

<sup>178</sup> M. PERRY, *supra* note 74, at 98-99, 101-14.

fining a zone of private conduct that does not have to comply with the Constitution. Second, limiting the Constitution's protections to state action preserves state sovereignty by giving the states almost complete authority to regulate private behavior.<sup>179</sup> I believe that the state action requirement is unnecessary to achieve these purposes and, in fact, is counterproductive to these goals.

### A. *Preserving a Zone of Private Autonomy*

The state action doctrine frequently is defended on the ground that it "preserves an area of individual freedom by limiting the reach of federal law and federal judicial power."<sup>180</sup> Undoubtedly this is correct; the state action doctrine does preserve the liberty of private parties to ignore the Constitution and the limits contained within it.<sup>181</sup> In considering whether the *overall* effect of the state action doctrine is to enhance individual liberty, however, we must remember that every time a person's freedom to violate a constitutional right is upheld, a victim's liberty is sacrificed.<sup>182</sup> In each case when a question of state action arises, both the freedom of the violator and the freedom of the victim are at stake. In challenges to private racial discrimination, for example, there is the claimed liberty to discriminate, say, on freedom of association grounds,<sup>183</sup> and the claimed right to be free from discrimination.<sup>184</sup> No matter how a court decides, someone's liberty will be expanded and someone's liberty restricted.<sup>185</sup> To assert that the state action doctrine is

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<sup>179</sup> See, e.g., *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982); P. BREST & S. LEVINSON, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 920-21 (2d ed. 1983); L. TRIBE, *supra* note 15, at 1149-50; Burke & Reber, *State Action, Congressional Power and Creditors Rights: An Essay on the Fourteenth Amendment (pt. 1)*, 46 S. CAL. L. REV. 1003, 1011, 1016-17 (1973) (articulating these two justifications for the state action requirement).

<sup>180</sup> *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982).

<sup>181</sup> See, e.g., O. HANDLIN & M. HANDLIN, *THE DIMENSIONS OF LIBERTY* (1961). The authors write that

[t]he capacity to act through noncoercive means remained a critical element in American liberty. It preserved the latitude of choice available to the individual. By sustaining the conviction that desirable ends could be attained without calling upon the state, it helped set limits upon the use of political power without depriving society of services considered essential to its welfare.

*Id.* at 111.

<sup>182</sup> See J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 20, at 498; Henkin, *Shelley v. Kraemer: Notes for Revised Opinion*, 110 U. PA. L. REV. 473, 487 (1962) (inevitable choice between competing liberties).

<sup>183</sup> See Williams, *supra* note 91, at 36; Williams, *supra* note 9, at 375, 390 (describing liberty involved in recognizing freedom to discriminate).

<sup>184</sup> Many authorities have argued that the right to be free from discrimination almost always outweighs the right to discriminate. See Haber, *Notes on the Limits of Shelley v. Kraemer*, 18 RUTGERS L. REV. 811, 824-25 (1964); Henkin, *supra* note 182, at 477-78 n.10. Cf. *Norwood v. Harrison*, 413 U.S. 455, 469 (1973) ("[A]lthough the Constitution does not proscribe private bias, it places no value on discrimination. . . .").

<sup>185</sup> See J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 20, at 498 (inevitable choice between competing liberties).

desirable because it preserves autonomy and liberty is to look at only one side of the equation.

Furthermore, the state action doctrine is an absurd basis for choosing between the two liberties. The concept of state action completely ignores the competing rights at stake and chooses based entirely on the identity of the actors.<sup>186</sup> There is no reason to believe that the state action doctrine preserves more liberty than it denies because it does not even consider the rights involved.<sup>187</sup> In fact, under the state action doctrine, the rights of the private violator always are favored over the rights of the victims. Therefore, state action enhances freedom only if it is believed that the liberty to violate the Constitution always is more important than the individual rights that are infringed.

If the true goal were to protect individual freedom, then it would be sensible to eliminate completely the state action inquiry and, in each case, ask directly whose liberty should be upheld, the violator's or the victim's. In fact, abandoning the concept of state action would have precisely this effect, as courts could focus directly on the merits of the dispute.<sup>188</sup> Eliminating the requirement for state action obviously does not mean that courts would halt all private infringements of constitutional rights.<sup>189</sup> Rather, in each instance, the court would determine whether the violator's freedom provided an adequate basis for permitting the infringing activity. Moreover, it is unlikely that private actors always would be held to the same standards as the government, especially when the private party demonstrates a liberty interest in the challenged con-

<sup>186</sup> See, e.g., Brest, *supra* note 2, at 1330 ("In sum, the Court's state action doctrine seems a crude substitute for addressing and accommodating the concerns to prevent abuse of power on the one hand, and to protect individual autonomy and federalist values on the other.")

<sup>187</sup> See Nerken, *supra* note 20, at 297 ("State action theory is not so much a way of thinking about contemporary problems of civil rights . . . as it is a substitute for thought."); Thompson, *Piercing the Veil of State Action: The Revisionist Theory and a Mythical Application for Self-Help Repossession*, 1977 WIS. L. REV. 1, 22 ("The current judicial approach to state action is no more than a disguised abstention doctrine: courts utilize it to avoid the fundamental issues presented by the cases."); Williams, *supra* note 9, at 372-73 ("[C]ourts are using this device as a convenient means of avoiding the difficult and delicate issue which really is posed.")

<sup>188</sup> Professor Goodman observes that

[w]hen the question presented is the constitutionality of what the *state* has done or failed to do—such as permitting or not prohibiting certain private conduct—the threshold state action determination is an entirely superfluous step in the analysis. Clarity and economy would be better served if the court moved immediately to the question whether allowing private individuals to act as they did amounts to a deprivation by the state of the life, liberty, or property of the victim or a denial by the state of the equal protection of the laws.

Goodman, *supra* note 2, at 1340 (emphasis in original).

<sup>189</sup> See Pollack, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959). Professor Pollack observes that

[o]f course, a finding of . . . state action does not doom the challenged discrimination. The existence of state action is a threshold problem, and with "this hurdle cleared" there remains "the ultimate substantive question, whether in the circumstances of this case the action complained of was condemned by the Fourteenth Amendment. . . ."

*Id.* at 9.

duct.<sup>190</sup> For example, in some situations, freedom of association might justify private racial discrimination, whereas the government never can claim such a right.

If the goal is to protect individual freedom, then it is best to decide cases on the merits, without reference to state action. The argument that the state action requirement is necessary to preserve individual autonomy obviously is based on the premise that there is a zone of private conduct that should not be constrained by the Constitution.<sup>191</sup> Accordingly, it would make the most sense to identify the precise rights in that zone and directly protect them. Consider an example frequently mentioned in the literature. It often is suggested that if there were no state action requirement, people could not exclude demonstrators from their living rooms and every dinner party would have to be racially integrated.<sup>192</sup> Such a prospect is antithetical because it offends a belief in privacy and freedom of association. Therefore, the logical way to avoid the harm is to hold directly that, in such circumstances, the rights of privacy and freedom of association outweigh freedom of speech and the right not to be discriminated against.<sup>193</sup> The state action doctrine adds absolutely nothing to the protection of individual liberties. The values hidden in the claim that state action is necessary to preserve personal autonomy can be made explicit and protected openly.<sup>194</sup>

Thus, abandoning the concept of state action does not eliminate the distinction between the public and private realms. Surely everyone believes that there are certain private activities that should be completely

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<sup>190</sup> Professor Goodman has suggested that if there were no state action requirement, then "[p]rivate conduct [would] be held unconstitutional whenever the same conduct by public officials would be so held." Goodman, *supra* note 2, at 1340. This argument fails to account for the fact that there often may be justifications for private behavior infringing rights that do not exist to justify government behavior. For example, individuals might justify discrimination on the basis of freedom of association or violations of others' speech rights as part of privacy. The government, by contrast, cannot claim rights of association or privacy.

<sup>191</sup> See, e.g., Williams, *supra* note 9, at 390 ("The vast amount of literature evaluating the concept of state action has almost universally omitted consideration of the desirable right of individuals and private groups to engage in a multitude of discriminations in our society.").

<sup>192</sup> See McCoy, *supra* note 83, at 792 n.29; Pollack, *supra* note 189, at 16.

<sup>193</sup> See Black, *supra* note 1, at 108 (direct protection of human privacies without the state action doctrine). The legislative history of the fourteenth amendment recognized the substantive difference between public activities and privacy to discriminate in one's own home. Senator Sumner, for example, declared that

[e]ach person, whether Senator or citizen, is always free to choose who shall be his friend, his associate, his guest. . . . His house is his "castle"; and this very designation, borrowed from the common law, shows his absolute independence within its walls; . . . but when he leaves his castle and goes abroad, this independence is at an end. He walks the streets, but he is subject to the prevailing law of equality; nor can he appropriate the sidewalk to his own exclusive use, driving into the gutter all whose skin is less white than this own.

Cong. Globe, 42d Cong., 2d Sess. 382 (1872).

<sup>194</sup> See, e.g., Karst & Horowitz, *supra* note 93, at 75-76 ("Whatever value the state-action limitation has can thus be achieved by striking the . . . balance in the name of substantive equal protection.").

uncontrolled by the state.<sup>195</sup> What is suggested is eliminating state action as the dividing line between public and private activities.<sup>196</sup> The state action doctrine is a totally arbitrary basis for separation; the division should be made by focusing on what is *substantively* desirable to keep private. The emphasis should be on defining the content of the private domain that is immune from state supervision in any form.<sup>197</sup> Simply stated, if the state action requirement is jettisoned, courts will directly balance the competing liberties involved in each case.<sup>198</sup> Such an approach maximizes protection of liberty, replacing the current policy of always choosing to favor the rights of the private violator over those of the victim.

At the very least, state action is unnecessary to protect individual autonomy; direct protection would be at least as effective in upholding personal liberties. In fact, I would suggest that the state action requirement is counterproductive—that individual freedom would be enhanced greatly by eliminating the state action doctrine.

First, allowing the concept of state action to determine when rights are protected undermines liberty by allowing all private invasions of rights, even when the balance completely favors the victims. For example, assume that a utility company with a state-granted monopoly refuses to provide service to blacks. If the holding of *Jackson v. Metropolitan Edison Co.* were followed, a court could not stop the discrimination because there is no state action.<sup>199</sup> Yet, it is hard to imagine any freedom of the utility company that outweighs the harms of the discrimination imposed.<sup>200</sup> Frequently, corporations are allowed to infringe basic rights,<sup>201</sup> even when their freedom is far less important than the liberties infringed.<sup>202</sup>

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<sup>195</sup> See, e.g., Mnookin, *The Public/Private Dichotomy: Political Disagreement and Academic Repudiation*, 130 U. PA. L. REV. 1429, 1438-39 (1982) (need for private realm beyond reach of government and disagreement between liberals and conservatives as to what should be the content of this zone).

<sup>196</sup> See, e.g., Brest, *supra* note 2, at 1301 (state action represents the division between the public and private sectors).

<sup>197</sup> Judge Friendly observed that “courts should pay heed, in testing for government action, to the ‘value of preserving a private sector free from the constitutional requirements applicable to government institutions.’” *Jackson v. Statler Found.*, 496 F.2d 623, 639 (2d Cir. 1974) (Friendly, J., dissenting from the denial of rehearing en banc).

<sup>198</sup> See Black, *supra* note 1, at 108 (“[T]echniques of substantive interpretation can avoid . . . result[s] . . . not wanted by anyone.”).

<sup>199</sup> 419 U.S. 345 (1975). *Jackson* involved a claim that the utility company denied due process by terminating service without providing a hearing. The Supreme Court held that there was no state action.

<sup>200</sup> In fact, Justice Marshall, dissenting in *Jackson*, noted that “[t]he value of pluralism and diversity are simply not relevant when the private company is the only electric company in town.” *Id.* at 372-73 (Marshall, J., dissenting).

<sup>201</sup> See *supra* notes 18-27 and accompanying text.

<sup>202</sup> See Berle, *supra* note 132, at 942-43, 951-52 (need to control corporate violations of the Con-

The state action doctrine protects the freedom of private violators from constitutional sanctions. It completely sacrifices the rights of the victims, even in cases when there is absolutely no justification for doing so. Therefore, eliminating the state action doctrine would enhance liberty by ending the arbitrary favoritism of violators over victims. Without a state action requirement, cases would be decided in a manner that maximizes liberty.

Second, eliminating the state action doctrine enhances protection of liberty by focusing attention directly on the valued rights. Obviously, the courts already balance somewhat in determining when state action exists.<sup>203</sup> For example, the state action doctrine is applied more leniently in cases involving allegations of private racial discrimination than in situations when the challenge is to a violation of other rights.<sup>204</sup> This differential approach reflects the courts' unarticulated conclusion that stopping racial discrimination is more important than protecting other rights—that in instances of discrimination the rights of the victim are more important than those of the violator.<sup>205</sup> But this balancing is hidden by the courts, obscured behind the question whether there is state action.

Liberty would best be protected if the courts openly articulated the competing interests that they were balancing.<sup>206</sup> This would force the courts clearly to identify and define the conflicting liberties, enhancing understanding of each of the rights at stake. In dismissing cases for want of state action, the courts fail to describe the liberties of the violators that are preserved by court abstention, and thus the zone of private autonomy protected by the state action doctrine remains undefined. If there are liberties sufficiently important to justify discrimination or infringements of freedom of speech, society is best off if these interests are articulated so that they can be applied in other situations and recognized as a part of personal freedom.<sup>207</sup>

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stitution); Hale, *supra* note 58, at 149; Miller, *The Constitutional Law of the "Security State,"* 10 STAN. L. REV. 620, 663 (1958).

<sup>203</sup> See, e.g., *Seidenberg v. McSorley's Old Ala. House, Inc.*, 317 F. Supp. 593, 597 (S.D.N.Y. 1970); Brown, *State Action Analysis of Tax Expenditures*, 11 HARV. C.R.-C.L. L. REV. 97, 116-19 (1976); Glennon & Nowak, *supra* note 3, at 227, 232 (court already balances in determining if state action exists).

<sup>204</sup> See Antown, *State Action: Judicial Perpetuation of the State/Private Distinction*, 2 OHIO N.U.L. REV. 722, 726-27 (1975); McCoy, *supra* note 83, at 789 (race treated differently in finding state action).

<sup>205</sup> See, e.g., *Coleman v. Wagner College*, 429 F.2d 1120, 1127 (2d Cir. 1970) (Friendly, J., concurring) (expressing view that race should be treated differently in finding state action).

<sup>206</sup> Professor Williams argues that

[o]nly by moving beyond the cant of state action to the merits of the constitutional issue in cases involving individual constitutional rights against discrimination can there be an effective studied line of principles established which will enable the state to permit and encourage private discrimination but prohibit the state from making its own policy one of discrimination.

Williams, *supra* note 9, at 390.

<sup>207</sup> Compare the views of Professors Van Alstyne and Karst:

Law does not rule when the motivations behind judicial decisions are kept hidden. Reasoned

Finally, the state action doctrine does not adequately protect liberties because even if state action is found and private parties are deemed to infringe rights with the impermissible aid of the state, the court does not order the offensive conduct to stop. Rather, the court orders the state only to disengage itself from the challenged activity.<sup>208</sup> Although in some cases the effect is to end the constitutional violation, in other instances the behavior continues, but without the state's involvement.<sup>209</sup> Liberty would be maximized if the court could directly halt the violations of rights.

A different, stronger argument might be made that the state action requirement protects personal autonomy by creating a shield that immunizes certain conduct from any governmental review. Arguably, without a state action doctrine, individuals could be called into court to justify any behavior that interferes with another person's rights. The prospect of such government review is itself a denial of liberty and the state action doctrine is useful because it creates a zone of private activity about which the government may not even inquire.

The flaw in this argument is that it assumes that the state action requirement is necessary to create such a shield. There is no reason why laws and legal doctrines cannot directly create a shield in the absence of a state action doctrine. Balancing need not be done on a case-by-case basis by calling individuals into court in each instance to account for their actions. General rules could be formulated in some areas, where the balance in almost every case will be in a particular direction. For example, a broad rule might be articulated that the associational rights of hosts of private dinner parties always will outweigh the rights of uninvited guests not to be discriminated against. Thus, there never would be a basis for an uninvited individual to sue; a shield is created protecting this area of private conduct from judicial scrutiny. Similar broad rules could be created in other situations where the balance is very one-sided in favor of potential defendants and the benefits of review with the possibility of finding an exceptional case are outweighed by the intrusion of the inquiry. It is quite likely that many such broad rules would be developed to protect individual behavior, while many fewer rules would exist to

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opinions announce the law only when the stated reasons truly reflect the real reasons for deciding. Any of the choices open to the Court involve a risk; we prefer the risks of candor to those of deception.

Van Alstyne & Karst, *supra* note 119, at 58.

<sup>208</sup> See, e.g., *McNeal v. Tate County School Dist.*, 460 F.2d 568 (5th Cir. 1971), *cert. denied*, 413 U.S. 922 (1973); *Hall v. St. Helena Parish School Bd.*, 197 F. Supp. 649 (E.D. La. 1961), *aff'd*, 368 U.S. 515 (1962); *Antown*, *supra* note 204, at 725 (courts do not enjoin private conduct; rather, they stop just state involvement).

<sup>209</sup> For example, in *Evans v. Newton*, 382 U.S. 296 (1966), the Supreme Court held that there was state action when the city maintained a park for whites only that had been set up by an individual's trust. In light of this decision, racial discrimination in the park was not eliminated; rather, control of it was turned over to private individuals. For additional discussion on the constitutional issues involved in the termination of this trust, see *Evans v. Abney*, 396 U.S. 435 (1970).

protect corporate conduct, and even fewer for monopoly or utility behavior. The broad rules simply would create general principles explaining the outcome of many particular cases, with the likelihood that individuals would more often have justification for their actions than would institutional entities.

Again, articulating such rules would increase, not decrease, personal liberty and autonomy. Now, private conduct is shielded from review even in situations when there is no justification for such protection. Furthermore, the courts never articulate the value of the activities they are protecting; such an articulation would make clear the rights thought to be an inherent part of privacy and freedom.

In sum, it is specious to argue that the state action doctrine is desirable because it promotes personal freedom. The requirement of state action does nothing to enhance liberty and a great deal to lessen it.

### *B. Preserving a Zone of State Sovereignty*

A second contemporary justification for the state action requirement is that it upholds federalism by preserving a zone of state sovereignty.<sup>210</sup> The *Civil Rights Cases* held that federal constitutional rights do not govern individual behavior and, furthermore, that Congress lacks authority to apply them to private conduct:<sup>211</sup> structuring the legal relationships of private citizens was for the state, not the national government.<sup>212</sup> Thus, the state action doctrine protects state sovereignty by leaving governance of individual behavior to state political processes.<sup>213</sup>

This justification for state action assumes, first, that under the Constitution there is a zone of activities completely reserved to state control.<sup>214</sup> The Court in the *Civil Rights Cases* explicitly stated that the

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<sup>210</sup> See, e.g., *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982); Burke & Reber, *supra* note 179, at 1011 (state action doctrine preserves state sovereignty).

In evaluating this justification for requiring state action, it is important to note that there is a tension between wanting state action to protect individual autonomy and wanting it to preserve state sovereignty. Professor Tribe makes the point that the greater the realm of conduct reserved to the individual, the less there is that the state may regulate. The more the state may control, the greater the zone of state authority, the smaller is the area of individual liberties. L. TRIBE, *supra* note 15, at 1150.

<sup>211</sup> 109 U.S. 3, 11 (1883).

<sup>212</sup> See Burke & Reber, *supra* note 179, at 1012-18 (states' role to design legal systems for regulating individual behavior); Kinoy, *supra* note 58, at 396 (the *Civil Rights Cases* reflect decision "that the primary responsibility for the enforcement of the rights of the freedmen was to be turned over to the individual southern states").

<sup>213</sup> See Kinoy, *supra* note 58, at 397 ("The heart of the Bradley opinion was its assumption that the primary responsibility for the protection of rights . . . [was to be] assumed by the individual states.").

<sup>214</sup> See, e.g., Note, *The Disintegration of a Concept: State Action Under the Fourteenth and Fifteenth Amendments*, 96 U. PA. L. REV. 402, 411 (1948) ("The Constitution, with a few necessary exceptions, left the regulation by law of the individual to the states.").



tenth amendment creates such a zone of authority,<sup>215</sup> and that congressional regulation of private conduct “is repugnant to the Tenth Amendment.”<sup>216</sup> The regulation of private behavior, including protection of civil rights, was seen as a matter entirely of state, not federal, authority.<sup>217</sup>

Thus, the *Civil Rights Cases* reflected a belief in “dual sovereignty”—that there is a domain which only the states may regulate. The doctrine of “dual sovereignty” dominated constitutional law from the late nineteenth century until 1937. Repeatedly during this era, the Supreme Court struck down congressional economic regulations, holding that they concerned activities which only the states may control.<sup>218</sup> But the experience of the Depression, the pressure from President Roosevelt’s Court-packing plan, and the perceived need for federal government actions led to the complete demise of the concept of dual sovereignty.<sup>219</sup> No longer is it believed that there is a zone of activities which only the states may regulate.<sup>220</sup>

In 1940, in *United States v. Darby*, the Supreme Court declared that the tenth amendment “states but a truism that all is retained which has not been surrendered.”<sup>221</sup> In other words, under this view of the tenth amendment, Congress may legislate if it points to an enumerated power

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<sup>215</sup> The tenth amendment provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.” U.S. CONST. amend. X. Professors Nowak, Rotunda, and Young explain the importance of the tenth amendment to the Court’s decision in the *Civil Rights Cases*:

[A] majority of the Court used the tenth amendment to interpret both the applicability of the fourteenth amendment and the grant of power given to Congress by that amendment. The decision came at the time that justices were also beginning to restrict the scope of federal power under the commerce clause by using the tenth amendment to protect intra-state activities from federal regulation.

J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 20, at 500.

<sup>216</sup> 109 U.S. 3, 15 (1883).

<sup>217</sup> See A. BLAUSTEIN & R. ZANGANDO, *supra* note 113, at 283 (*Civil Rights Cases* left protection of individual rights to the states); Kinoy, *supra* note 58, at 396, 423-24; Scott, *supra* note 114, at 564.

<sup>218</sup> See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (striking down congressional regulations as exceeding congressional power and violating state sovereignty).

<sup>219</sup> See Miller, *supra* note 202, at 628, 630 (describing the demise of “dual federalism” and quoting Harold Laski: “[T]he epoch of federalism is over.”); *The Obsolescence of Federalism*, 98 NEW REPUBLIC 367 (1939); Note, *State Action and the Burger Court*, 60 VA. L. REV. 840, 842 (1975) (“Such federalism concerns no longer form the basis for state action opinions today.”).

<sup>220</sup> See *Garcia v. San Antonio Metropolitan Dist.*, 105 S. Ct. 1005 (1985) (state sovereignty is protected through the political process). See also Benedict, *supra* note 149, at 41 (“The essential difference between modern constitutional nationalism and that prevalent at the time of the Civil War was the latter’s acceptance of the notion that there was a reserved area of State jurisdiction beyond the competence of national authority.”).

<sup>221</sup> 312 U.S. 100, 124 (1941). I recognize that while cases such as *Darby* establish that states do not have sovereignty that limits federal congressional actions, such sovereignty might exist as a limit to federal judicial review. For a refutation of this argument, see *infra* text accompanying notes 232-36.

as justification for its action. If such authority exists, congressional action is valid, irrespective of the activity regulated. There are no activities that only state governments can regulate.<sup>222</sup> Viewing the state action requirement as a way to protect state sovereignty, thus, is based on the false assumption that there exists a zone of constitutionally reserved state authority.

Second, even if such a zone exists, there is the further assumption that a state's area of control includes determining the protection of individual rights. In particular, it is assumed that state autonomy includes the ability of the state to decide which fundamental rights will not be protected from private interference. The claim must be that under the fourteenth amendment states have the right to decide to do nothing to stop private discrimination or abridgment of free speech. Once it is established that constitutional rights should be protected from private interference, however, then why tolerate a state's refusal to provide protection? State sovereignty provides a justification only if it is believed that a state's rights are more important than individual rights—a premise consistently rejected since the Civil War.

Furthermore, the language and purpose of the fourteenth amendment make it evident that states have an obligation to prevent private violations of rights.<sup>223</sup> It has long been recognized that a state denies equal protection if it fails to enact and enforce laws safeguarding the liberties of its citizens.<sup>224</sup> Even the *Civil Rights Cases* assumed that states had an obligation to redress all violations and that the failure to do so justified congressional action.<sup>225</sup> Thus, no zone of state autonomy is protected by the state action concept because states have no freedom to deny rights through inaction.

Finally, the fact that Congress is now accorded complete authority to protect constitutional rights from private interference indicates that this is not an area reserved to the states.<sup>226</sup> Under the thirteenth amend-

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<sup>222</sup> Only in one decision since 1937, *National League of Cities v. Usery*, 426 U.S. 833 (1976), has the Supreme Court struck down federal legislation on the basis of state sovereignty. In 1985, the Supreme Court overruled *Usery* in *Garcia v. San Antonio Metropolitan Dist.*, 105 S. Ct. 1005 (1985). See also *Equal Employment Opportunity Comm'n v. Wyoming*, 460 U.S. 226 (1983); *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 74 (1982); *Hodel v. Virginia Surface Min. and Rec. Ass'n*, 452 U.S. 264 (1982) (refusing to invalidate federal legislation on the basis of the tenth amendment).

<sup>223</sup> See *supra* text accompanying notes 86-111.

<sup>224</sup> For example, Professor Peters writes that

[t]he states are under a duty to make and enforce laws which provide an individual with an effective remedial process for interference with his civil rights. The states violate this duty when "through nonaction," they fail to provide such a remedy. This failure is a denial of the equal protection of the laws.

Peters, *supra* note 51, at 328.

<sup>225</sup> *Id.* at 329.

<sup>226</sup> See Quinn, *supra* note 20, at 151 ("To the extent that Congress is allowed to extend its enforcement powers under the fourteenth amendment by determining for itself what constitutes a vio-

ment, for example, Congress “has the power . . . to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.”<sup>227</sup> This expansive authority to protect the rights of blacks includes the ability to outlaw most forms of private racial discrimination.<sup>228</sup> Although the limitations on congressional power announced in the *Civil Rights Cases* never have been officially overruled, it is widely accepted that Congress has broad power under section five of the fourteenth amendment to stop private violations of liberty and equality.<sup>229</sup> Congress even has the authority to stop private discrimination by using its powers to regulate interstate commerce.<sup>230</sup> The conclusion is unequivocal: Preventing private violations of rights is not left exclusively to the states. State sovereignty is not sacrificed by federal protection of liberty.<sup>231</sup>

It might be argued that although Congress has the authority to override state control of private behavior, courts do not have this power. The notion is that states have their institutional interests represented in Congress, and, therefore, the legislature can be trusted best to balance national and state interests.<sup>232</sup> Yet, concluding that courts may not stop private infringements of rights assumes that states have the authority to tolerate the denial of liberty and equality if Congress does not act to

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lation of the fourteenth amendment, the state action doctrine can no longer be viewed by the Court as an inherent limitation on the fourteenth amendment.”).

<sup>227</sup> *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968).

<sup>228</sup> See, e.g., *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1974); *Tillman v. Wheaton-Haven Recreation Ass’n, Inc.*, 410 U.S. 431 (1973); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1970) (applying civil rights statute, passed pursuant to the thirteenth amendment, to ban private discrimination); see also *Glennon & Nowak, supra* note 3, at 243; *Larson, The New Law of Race Relations*, 1969 WIS. L. REV. 470, 502-03 (congressional power to eliminate most forms of private racial discrimination).

<sup>229</sup> See *Frantz, Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 72 YALE L.J. 1353, 1359-60 (1964); Comment, *Current Developments in State Action and Equal Protection of the Law*, 4 GONZ. L. REV. 233, 239-41 (1969) (congressional power to prevent private discrimination under the fourteenth amendment). See also *United States v. Guest*, 383 U.S. 745 (1966) (five of the Justices, although not agreeing as a majority of the Court, expressed the view that Congress, under the fourteenth amendment, may prevent private discrimination).

<sup>230</sup> See, e.g., *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (sustaining the constitutionality of the Civil Rights Act of 1964 as a permissible exercise of congressional commerce power).

<sup>231</sup> For example, Professor Carr states that

[i]t is neither a distortion of constitutional principles nor a perversion of the purposes of our Constitution to say that in a democratic society citizens must enjoy basic rights, such as freedom to discuss public affairs, and that the central government must possess sufficient power to protect these rights—particularly when local governments are unable or unwilling to protect them.

R. CARR, *FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD* 204 (1947).

<sup>232</sup> Cf. *Garcia v. San Antonio Metropolitan Dist.*, 105 S. Ct. 1005 (1985) (political safeguards of federalism are sufficient to protect states’ interests); L. TRIBE, *supra* note 15, at 139-43 (distinguishing between congressional and judicial power to abrogate eleventh amendment immunity); Wechsler, *The Political Safeguards of Federalism*, 54 COLUM. L. REV. 543 (1954) (states’ interests are represented in Congress, and, therefore, federalism issues can be left to the legislature).

restrain them. States clearly have no such authority. As a court expressed in 1873, soon after the adoption of the thirteenth, fourteenth, and fifteenth amendments, “[these] amendments have left nothing to the comity of the states affecting the subjects of their provisions. They manifestly intended to secure the right guaranteed by them against infringement from any quarter.”<sup>233</sup> If nothing is reserved to the states, then there is no limitation on the judicial power to vindicate rights because of state sovereignty.

Furthermore, to conclude that only Congress can compel states to safeguard rights leaves protection of basic liberties to the political process. If Congress does not remedy state denials of liberty, violations of individual freedoms would be unchecked. The argument about state sovereignty is that states, through their political systems, have the authority to structure individual activities.<sup>234</sup> Such deference to majoritarian politics, however, is completely inappropriate when rights are at stake.<sup>235</sup> The whole idea of enshrining rights in a Constitution is to protect them from majority rule.<sup>236</sup> Judicial review to prevent state denials of due process and equal protection therefore is essential.

Finally, eliminating the requirement of state action would not cause a loss of state autonomy. Although states would be compelled to protect rights, they would have great flexibility in choosing the means to be used. State laws would become a major guarantee of liberty, making detailed federal standards unnecessary. Once laws protecting the rights of individuals were well established, federal supervision would be largely unnecessary.<sup>237</sup> Thus, in the long term, more responsibility would shift to state governments, enhancing state sovereignty.

The conclusion is clear: State sovereignty cannot be used as an excuse to justify violations of constitutional rights. States do not have the

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<sup>233</sup> *United States v. Given*, 25 F. Cas. 1324, 1326 (C.C.D. Del. 1873) (No. 15,210).

<sup>234</sup> See Goodman, *supra* note 2, at 1336 (describing the notion that “the conflicting interests of nongovernmental actors should, in general at least, be resolved through the democratic political process . . . rather than through judicial application of the fourteenth amendment”).

<sup>235</sup> Rights, as Professor Dworkin points out, are “political trumps held by individuals” that justify overruling collective decisions. R. DWORKIN, *supra* note 82, at xi. Since the Court’s famous footnote in *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938), it has been accepted that judicial review is necessary to protect individual liberties from majority rule. For a discussion of the importance of this philosophy in modern constitutional law, see J. ELY, *supra* note 32, at 73-77.

<sup>236</sup> See, e.g., *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (purpose of the Bill of Rights is to protect rights from majority rule); L. TRIBE, *supra* note 15, at 9-11 (arguing that a constitution is intentionally antimajoritarian in that it is intended to thwart short-term impulses to achieve greater long-term benefits).

<sup>237</sup> I recognize that this argument is somewhat overly simplistic because there still would be a need for judicial review in order to determine if the states were providing “adequate” protection. Nonetheless, the point is that states would have a good deal of discretion in deciding the form and manner of protection, so long as protection was provided.

power to prevent redress of denials of liberty and equality. Thus, the concept of state action is not necessary to protect federalism.

*C. State Action as an Allocator of Decisionmaking Authority*

Thus far in this section, I have argued that there is no substantive justification for the state action doctrine and that the doctrine is undesirable as a tool for protecting individual autonomy and state sovereignty. An alternative case for the concept might be made on the procedural level—that state action serves a useful function in allocating decision-making authority.<sup>238</sup> The claim is that it is desirable to have a forum devoted solely to stopping government violations of individual rights. Placing cases involving private violations in this arena arguably would dilute the effectiveness of the protection from the government. Thus, the function of the state action doctrine is to make it the role of the federal courts to provide redress against the government, while other bodies, most notably the states, are given responsibility for protecting individuals from each other.<sup>239</sup> From this perspective, the state action doctrine serves a useful purpose as a “gatekeeper”—the basis for dividing decisionmaking authority.

The question, however, is whether this is the best way to restrict the flow of cases into the federal courts. There are countless other ways to restrict the workload of the federal judiciary. For example, other classes of cases, such as diversity suits, could be removed from the federal dockets, making room for a new type of litigation. Alternatively, the state action requirement could be eliminated, but the protection of constitutional rights from private interference could be assigned to the state courts, with review only to the United States Supreme Court. Although I would oppose this latter alternative, being unwilling to trust state courts with the protection of constitutional rights, it does indicate that the state action doctrine is not necessary as a way to reduce the caseload of the federal courts.

Furthermore, the state action doctrine should be retained as the “gatekeeper” only if, first, other decisionmakers are effectively protecting rights from private interference, and, second, if the costs of eliminating the doctrine outweigh the benefits. Neither of these assumptions is tenable.

The state action doctrine would impose little harm if the other parts

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<sup>238</sup> The argument based on allocation of decisionmaking, unlike the other two considered in this section, is not usually mentioned explicitly by scholars and judges as a justification for state action. Nonetheless, it represents a likely response by those who would argue in favor of retaining the state action requirement.

<sup>239</sup> This argument assumes that Congress will not enact statutes protecting rights from private interference (like the Civil Rights laws), but instead, that all protection will come from the states. If Congress enacts statutes with enforcement in the federal courts, then the cases are already before the federal judiciary and the state action requirement does not serve any “gatekeeping” function.

of the government were effectively protecting rights from private interference. Although, undoubtedly, some protection of rights exists apart from the federal courts, especially in the area of federal civil rights laws, many rights exist for which there are no apparent protections.<sup>240</sup> Speech rights and rights to reproductive autonomy, to name but two examples, rarely are protected from private interference.<sup>241</sup> Using the state action doctrine as the "gatekeeper" imposes a large cost in terms of such unprotected rights.

Furthermore, it is absurd to assign other branches of government the responsibility for protecting fundamental values and then completely to ignore whether they are performing this essential task. The state action doctrine requires federal courts to dismiss allegations of private infringements of constitutional rights without any inquiry into the availability of effective redress. Using the state action doctrine as a "gatekeeper" assumes that all other classes of cases in the federal courts are more important than those involving private violations of rights, a conclusion that seems indefensible in light of the importance of individual rights to this society.

On the other hand, what is the benefit of keeping the state action doctrine as a "gatekeeper"? The argument is that eliminating the state action doctrine would cause a massive increase in litigation and thus would flood the courts.<sup>242</sup> This is a familiar argument, one that is advanced against every proposal for expanding the protection of rights. The real questions are how much of an increase there will be and whether the additional cases are worth the costs.

First, the extent of the increase in litigation is uncertain because people already file suits alleging infringements of rights.<sup>243</sup> Although such suits usually are dismissed for want of state action, the state action doctrine is sufficiently incoherent and unpredictable that people have an incentive to keep trying to persuade the court to find state action in their situation and vindicate their rights. Some authorities even conclude that so many of these suits are filed that abolishing state action would *decrease* the amount of litigation. One commentator concluded that

[a]ny argument [which claims] . . . such a direct balancing approach would overburden the courts is unconvincing. The present ad hoc approach under the state action doctrine, which results in fine "distinctions" between analogous cases, appears to incite litigation rather than foreclose it. This follows from the quasi-jurisdictional nature of the state action doctrine. The merits of a plaintiff's claim are never reached if no state action is found. Similarly

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<sup>240</sup> See *supra* notes 22-27 and accompanying text.

<sup>241</sup> See *supra* notes 25-27, 60-62 and accompanying text.

<sup>242</sup> Judge Friendly observed that eliminating the state action requirement "would mean mounting dockets for the Supreme Court and other courts, especially for lower federal courts in suits under the civil rights statutes." H. FRIENDLY, *supra* note 104, at 17.

<sup>243</sup> See *supra* notes 22-27. It should be noted that the cases cited in these notes are only a representative sample; many times this number of cases posing the issue of state action arise each year.

situated plaintiffs are therefore encouraged to find distinctions in the quality of state involvements in their controversy so that they may argue the merits.<sup>244</sup>

It is unlikely that eliminating the state action requirement would reduce the amount of litigation because once courts begin redressing private infringements of rights, more people will file suits. Also, decisions on the merits will take more resources than will dismissals for want of state action. Nonetheless, the point is that the overall increase in suits might be more of a drizzle than the expected flood.

Second, any large increase in lawsuits will be only a short-term phenomenon. Once the courts clearly articulate rights, and through a body of precedents announce the appropriate standards of conduct, people will adapt their behavior, cases will more likely be settled,<sup>245</sup> and courts will dispose of claims more efficiently.<sup>246</sup> Thus, Professor Van Alstyne concluded that the elimination of the state action requirement “need not occasion any long run surfeit of cases.”<sup>247</sup>

Moreover, the degree of the increase in litigation would be directly proportionate to the need for the elimination of the doctrine. Eliminating the state action requirement will cause little increase in cases if other sources are effectively protecting rights. If the federal government already is protecting the rights, then eliminating the state action requirement would add at most another cause of action to existing complaints. If rights are now protected by the states, the only effect would be a shift in forums, from state to federal courts—a problem that could be dealt with by jurisdictional rules redirecting cases. Furthermore, there is no *denial* of rights under the fourteenth amendment if the states’ laws provide full protection.

Alternatively, if other levels of government are not adequately protecting rights from private interference, then eliminating the state action requirement could result in a large increase in the number of cases. The increase, however, would be essential to ensure the effective protection of fundamental rights.

Ultimately, whatever the actual increase in the number of cases filed, the most important question is whether the additional litigation is worth the additional cost in terms of judicial resources. I believe that the answer is clear: Protecting fundamental personal liberties is essential and

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<sup>244</sup> Quinn, *supra* note 20, at 155-56 (concluding that deciding cases challenging private violations of rights would decrease the amount of litigation).

<sup>245</sup> Cf. Galanter, *Reading the Landscape of Disputes*, 31 UCLA L. REV. 4, 27-28 (1983) (“Of those claims that become lawsuits, settlement is the prevalent mode of disposition.”).

<sup>246</sup> See Thompson, *supra* note 187, at 30 (“[T]hrough stare decisis, the floodgates of litigation problem, already a troubling problem in the fourteenth amendment area, would be eased, not exacerbated.”); Van Alstyne, *Mr. Justice Black, Constitutional Review, and State Action*, 1968 DUKE L.J. 218, 246 (decisions on the merits will be influenced by stare decisis, a principle that will restrict caseloads).

<sup>247</sup> Van Alstyne, *supra* note 246, at 247.

society must make forums available to accomplish this task. The state action doctrine should not be used to allocate decisionmaking authority because it unjustifiably assumes that protecting individual rights from private interference is less important than all other cases on the federal court dockets. If government was created to protect the rights of people, as the Declaration of Independence states, then there is an obligation to invest what is necessary to allow people to vindicate their rights.<sup>248</sup>

#### V. DOING AWAY WITH THE STATE ACTION REQUIREMENT

I have argued that limiting the Constitution's protections to state action is harmful because it permits deprivations of fundamental liberties and that it is completely unnecessary because nothing valuable would be lost without it. The inescapable conclusion is that the doctrine should be banished from American law. The effect of discarding the concept of state action is that the Constitution would be viewed as a code of social morals, not just of governmental conduct, bestowing individual rights that no entity, public or private, could infringe without a compelling justification.<sup>249</sup> Such an approach makes sense especially because the "Constitution was designed to embody and celebrate values and to inculcate proper acceptance of them, as much as to compel governments to abide by them."<sup>250</sup>

Freedom of speech, privacy, and equality are rights of the individual that must be protected from all unjustified deprivations. This does not necessarily mean that protection must come from the Constitution or the federal courts. The legislatures, federal and state, can protect rights from private interference by statute, as Congress did in the area of civil rights. State courts can protect rights through the development of the common law. When protection is afforded in this way, application of the Constitution is unnecessary and would be eliminated—not because of the application of the state action doctrine, but because there is no deprivation of rights.

Direct application of the Constitution is necessary only to see if other sources are providing adequate protection. Eliminating the state action requirement would, I hope, encourage legislatures and state courts to fulfill their roles in protecting rights. If no other redress exists, then it would be essential that the federal courts provide protection. Because such violations of rights occur "under color of state law,"<sup>251</sup> federal

<sup>248</sup> See Thompson, *supra* note 187, at 30 ("The values of the Constitution should not be balanced against the demands of judicial economy.").

<sup>249</sup> See Bennett, *The Constitution and the Moral Order*, 3 HASTINGS CONST. L.Q. 899, 911 & n.4 (1976) (speaking of the Constitution as a "'code for reference,' what in medieval days had been called 'jus civile'"; "the body of Roman law relating to private rights, the Civil Law") (citations omitted).

<sup>250</sup> Franz v. United States, 707 F.2d 582, 594 n.45 (D.C. Cir. 1983).

<sup>251</sup> See *supra* text accompanying notes 86-104.



courts have jurisdiction under section 1983 to hear all cases challenging interference with constitutionally protected rights.<sup>252</sup> In deciding such cases, courts must assume that the state common law does not deny constitutionally guaranteed liberty and equality. That is, the courts must act as if the common law of the states protects people from violations of their rights, because to do otherwise would be for the state to deprive people of their constitutional rights. States, of course, may overrule the common law, but only to define the specific content of rights and to provide mechanisms for redressing violations. A state statute that prevented the vindication of rights obviously would be unconstitutional.<sup>253</sup>

Again, applying constitutional principles to private conduct does not mean that all individual conduct must meet the same standard as that required of the government.<sup>254</sup> Courts would apply traditional principles of constitutional adjudication to determine if sufficiently important justifications exist for the challenged conduct.<sup>255</sup> Essentially, the courts would balance the rights of the violator and victim in deciding the proper result. Thus, the entire inquiry as to state action would be discarded; the only question would be whether a person's rights were unjustifiably infringed.<sup>256</sup>

One objection to eliminating the requirement of state action is that it seemingly would make almost every crime or tort a constitutional violation. Any action denying life, liberty, or property—meaning most crimes and torts—would, arguably, be actionable as a constitutional claim.<sup>257</sup> This objection, however, ignores the fact that if state criminal and tort laws provide adequate remedies, then there is no denial of due process.

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<sup>252</sup> 42 U.S.C. § 1983 (1982).

<sup>253</sup> Thus, the holding in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), would not be disturbed. It always would be assumed that the state common law effectively protected federal constitutional rights. Thus, a federal court enforcing the Constitution to protect individuals from private violations of rights would do so by applying the protection that the state's common law provides. In addition, *Erie* directly involved only the choice of law in diversity cases, and cases involving denials of rights would not be presented in that manner.

<sup>254</sup> See, e.g., Horowitz & Karst, *supra* note 94, at 45; Williams, *supra* note 91, at 31 (finding state action and deciding to apply the Constitution do not resolve the ultimate issue of constitutionality).

<sup>255</sup> The determination whether the challenged action is permissible would follow usual patterns of constitutional interpretation, with the degree of scrutiny depending on the nature of the right in question. Karst & Horowitz, *supra* note 93, at 75.

<sup>256</sup> See Williams, *supra* note 9, at 368-69. Cf. Alexander, *supra* note 131, at 896 n.6 (the only real question is whether the conduct is unconstitutional).

<sup>257</sup> Cf. Goodman, *supra* note 2. Professor Goodman writes that [n]o one, I hope, would dream of arguing that ordinary homicide is a deprivation of life, ordinary kidnapping a deprivation of liberty, ordinary theft a deprivation of property, in violation of the fourteenth amendment, even when not committed by an employee of the state. The contrary view would not only disregard the clear language of the amendment, it would convert the Constitution into a comprehensive code of torts and crimes, duplicating or displacing the mass of state laws on these subjects and transferring to federal judges, now only a few hundred, a large part of the responsibilities currently borne by many thousand state judges.

*Id.* at 1343.

As Professor Goodman explained, "what prevents these garden-variety crimes from being constitutional violations is not that they are committed by private actors, but that the victims are afforded 'due process of law' through post-deprivation damage remedies . . . ."<sup>258</sup> In *Parratt v. Taylor*, the Supreme Court held that there is no denial of due process if the state provides adequate postdeprivation remedies (except in situations when the claim is a failure to provide predeprivation due process).<sup>259</sup>

What about situations when the claim is that a private entity denied procedural due process by failing to provide a predeprivation hearing? Would every private action, for example, every firing by a private employer or every termination of service by a telephone company, have to be accompanied by full trial-type procedures? Certainly not, because the Supreme Court already has announced that in determining what process is due under the fourteenth amendment, it will balance the interest at stake, the benefits of procedural requirements, and the costs of different levels of procedure.<sup>260</sup> Therefore, using such a balancing approach, in almost all imaginable instances, the most minimal procedural formalities—what social courtesy requires anyway—should suffice.<sup>261</sup> For example, before a utility company terminates someone's service, the issue raised in *Jackson v. Metropolitan Edison Co.*,<sup>262</sup> probably all that is required is "minimal mailed notices and an opportunity to see a company officer."<sup>263</sup> In short, applying the due process clause to private behavior should not pose any major problems.

A second objection to eliminating the state action doctrine is that there will be an undesirable increase in the power of the judiciary:<sup>264</sup> if courts are able to redress all private violations of rights, they will have too much control over American society.<sup>265</sup>

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

<sup>259</sup> 452 U.S. 527 (1981) (negligent loss of a prisoner's property does not involve a denial of due process because the state provides a fully adequate postdeprivation process and there is no claim that a predeprivation hearing was possible or appropriate). See generally Smolla, *The Displacement of Federal Due Process Claims by State Tort Remedies: Parratt v. Taylor and Logan v. Zimmerman Brush Co.*, 1982 U. ILL. L.F. 831 (1982).

<sup>260</sup> See *Mathews v. Eldridge*, 397 U.S. 319 (1976) (articulating the balancing test for determining what process is due).

<sup>261</sup> See, e.g., *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 373 (1974) (Marshall, J., dissenting).

<sup>262</sup> 419 U.S. 345 (1974).

<sup>263</sup> Quinn, *supra* note 20, at 165.

<sup>264</sup> See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982) ("Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power."); Brest, *supra* note 2, at 1324 ("The very existence of the doctrine serves as a limitation on the exercise of the judicial power."); Choper, *Thoughts on State Action: The "Government Function" and "Power Theory" Approaches*, 1979 WASH. U.L.Q. 757, 762 (power of judges without a state action requirement).

<sup>265</sup> See H. FRIENDLY, *supra* note 104, at 17 ("The courts lack the time, the empirical knowledge,

Before appraising this institutional argument, it is crucial to realize that what is important is ensuring that individual liberties are protected. The allocation of power among the branches of government in accomplishing this task is less important than the fact that the rights are safeguarded.<sup>266</sup> Furthermore, a court would create remedies on its own only if the state and Congress failed to act to ensure the full protection of personal liberties. If the legislature provided adequate means for guaranteeing rights, court action would be unnecessary. For example, even in the area of federal constitutional rights, the Supreme Court has declared that it will create a common-law remedy, a *Bivens*-type action, only if no other remedies are provided by the legislature.<sup>267</sup> Therefore, if the legislatures are concerned that too much power has shifted to the judiciary after the elimination of the state action requirement, the legislatures can alter that situation by providing adequate alternative means for protecting rights.<sup>268</sup>

More importantly, in evaluating the claim that the courts will have too much power, the question is, "too much power compared to what?" The common-law role of the courts was to ensure the vindication of all rights that an individual possesses.<sup>269</sup> Therefore, eliminating the state action doctrine merely would restore the powers that traditionally belonged to the courts. Moreover, in modern society, the most important role courts perform is the protection of rights. Through the removal of the state action requirement, courts would be given precisely the power to accomplish this task. Perhaps some day society will devise alternate means for resolving grievances among people so that they need not resort to the courts. But until that time, a judicial forum must be available whenever constitutional rights are violated.

A final objection is that eliminating the state action requirement would serve little purpose because rights quickly would be lost through private transactions.<sup>270</sup> The rights of individuals can be adjusted by contractual agreement, making it possible for people to relinquish their

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and the wisdom to handle every claim of unequal or arbitrary treatment by individuals enforced or not prevented by the states.").

<sup>266</sup> See *L. TRIBE*, *supra* note 15, at iv (substantive results are more important than institutional arrangements).

<sup>267</sup> See, e.g., *Bush v. Lucas*, 462 U.S. 367 (1983) (refusing to recognize a common-law action to protect first amendment rights when Congress has provided an adequate mechanism to remedy violations). In *Bivens*, the Court created a common-law cause of action to vindicate a claim of violation of fourth amendment rights, holding that without such a cause of action, there would be no remedy to protect the constitutional rights at stake. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). See also *Carlson v. Green*, 446 U.S. 14 (1980); *Davis v. Passman*, 442 U.S. 228 (1979).

<sup>268</sup> For example, in *Bush v. Lucas*, 462 U.S. 367 (1983), the Court held that an adequate administrative procedure for vindicating rights made court recognition of a common-law right to sue unnecessary.

<sup>269</sup> See *supra* text accompanying notes 32-41.

<sup>270</sup> I am grateful to my colleague, Alan Schwartz, for pointing this problem out to me and for lengthy discussions about possible approaches to it.

newly gained protection. For example, landlords or employers might secure waivers of free speech rights as a part of leases or employment contracts. The effect of eliminating the state action doctrine would appear to be negated if such waivers occurred on a widespread basis.

Courts, however, would attempt to ensure that, as with any waivers of rights, the waiver is voluntary—that it is an “intentional relinquishment or abandonment of a known right or privilege.”<sup>271</sup> The courts would assure that the contractual provision is not unconscionable, but represents a “consensual, ‘free choice’ . . . [reflecting] the individual’s freedom to forgo benefits or safeguards through the uncoerced exercise of his rational faculties.”<sup>272</sup>

If all waivers of rights are voluntary, an individual giving up rights must be gaining something in return that he or she regards as being of at least slightly greater value.<sup>273</sup> Therefore, extending rights would serve a valuable purpose, even when the rights are waived. Now private entities can violate rights for free, paying nothing for the infringement. If the state action doctrine were eliminated, the value of rights to the violator and the victim would be better reflected in transactions. The social value of rights would be included in the market system.

This argument may be too simplistic: if rights have value to individuals, they now would bargain for them in negotiating contracts. For example, if tenants cared about expression, they would pay to have included in their leases clauses preventing them from being evicted because of speech activities. From this view, rights already are part of the

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<sup>271</sup> Johnson v. Zerbst, 304 U.S. 438, 464 (1937).

<sup>272</sup> Tigar, *Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 8 (1970). For development of the idea that respect for individual autonomy means that individuals should be able to enter into the contracts of their choice, see C. FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981).

<sup>273</sup> Individuals will gain nothing only if they are unable or unwilling to bargain in exchange for their rights. If they are unable to bargain because the waiver is imposed upon them, then, obviously, the waiver is not voluntary. Alternatively, if individuals are able to bargain, then there is no reason to believe that they would be inherently unwilling to do so. Cf. Schwartz, *Book Review*, 31 AM. J. COMP. L. 742, 750 (1983) (whether individuals act in a less rational way in purchasing contract terms than they act in purchasing products or services).

An argument might be made that at the time of bargaining for contracts, individuals often will make incorrect choices because they do not perceive how important the waived rights could be for them at a later time, although they do perceive accurately the importance of other contract terms (e.g., money). Yet, there are problems with this approach. First, why should individuals not be free to make this choice, even if in error? In other areas society allows people to make crucial decisions on any criteria they choose, including ones “that affect their futures in an important way, such as where and at what to work, whom to marry, whether to have children, whether to be soldiers and where to live.” Schwartz, *The Enforceability of Security Interests in Consumer Goods*, 26 J. L. & ECON. 117, 157 (1983). Second, if the concern is that future consequences will not be appreciated, legislatures can impose time limits restricting the period in which such provisions can be enforced. Finally, the problem should be only short term, for the first set of contracts after the elimination of the state action requirement. After that, people should realize their errors and be unwilling to waive rights without adequate compensation.

market.<sup>274</sup>

Eliminating the state action requirement, however, would make a difference by changing the starting place. Now, if tenants want to protect their rights, they must pay for them. If the state action requirement is abolished, tenants will possess the right not to be evicted based on the content of their speech, and landlords must pay them for the right to evict based on such expression. In essence, eliminating state action gives individuals another form of income—the economic value of the rights they are awarded by applying the Constitution to private parties.

Traditionally, economists have “assume[d] that income effects of this sort are small because owning a legal right is unlikely to add very much to a person’s wealth, nor will losing one make a person considerably poorer.”<sup>275</sup> Recent studies, however, dispute this assumption, and “[i]f this evidence generalizes to real cases, the assignment of legal rights could determine outcomes more frequently than is commonly supposed.”<sup>276</sup> In other words, current literature suggests that bestowing rights—changing the starting place of bargaining over rights—could result in a major difference in transactions.

Moreover, it is possible that some rights are sufficiently important that they will be deemed “inalienable”—“one[s] that may never be waived or transferred by [their] possessor.”<sup>277</sup> Some rights may be deemed so essential to personhood, or so inherent to the “structure of a decent society,” that society will not allow waivers.<sup>278</sup> For example, the thirteenth amendment’s prohibition against involuntary servitude has been deemed inalienable.<sup>279</sup> Individuals are denied the freedom to sell themselves into slavery both because servitude is offensive to basic concepts of personhood and because as a “social practice [it is] incompatible with a free society.”<sup>280</sup>

Other rights might be deemed sufficiently important that, although

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<sup>274</sup> For example, the famous Coase Theorem predicts that regardless of liability rules, in the absence of transactions costs, people will bargain over the allocation of rights and reach the most efficient result. See Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

<sup>275</sup> Schwartz, *supra* note 273, at 141 n.50.

<sup>276</sup> *Id.* See also Knetsch, *Legal Rules and the Basis for Evaluating Economic Losses*, 4 INT’L REV. L. & ECON. 5 (1984).

<sup>277</sup> McConnell, *The Nature and Basis of Inalienable Rights*, 3 LAW & PHIL. 25, 25 (1984). There is a large body of literature debating the question whether inalienable rights should exist. *Id.* at 25 nn. 2-3.

<sup>278</sup> Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1387 (1984). It is not my purpose to outline which rights should be inalienable or even which criteria courts should use in making such determinations. Rather, I simply wish to point out that the issue of waiver could be partially solved by deeming especially important rights to be inalienable.

<sup>279</sup> The peonage cases establish that the thirteenth amendment creates an inalienable prohibition against involuntary servitude. U.S. CONST. amend. XIII. See, e.g., *Bailey v. Alabama*, 219 U.S. 219 (1911); *Clyatt v. United States*, 197 U.S. 207 (1905).

<sup>280</sup> Kreimer, *supra* note 278, at 317-18.

they may be waived, such waiver cannot be made a condition for receipt of a benefit. In essence, this would apply the existing doctrine of unconstitutional conditions, "which holds that government may not condition the receipt of benefits upon the nonassertion of constitutional rights even if the receipt of benefits is in all other respects a 'mere privilege.'"<sup>281</sup> The unconstitutional-condition doctrine might be applied in circumstances when the accumulation of private power is especially large or the right involved is deemed particularly important.<sup>282</sup>

Ultimately, the possibility of waivers is not an argument against extending rights by eliminating the state action requirement. No one would argue that the fifth amendment's right against self-incrimination should be eliminated just because people often confess or that the first amendment should be abolished because people often do not exercise their rights of expression. Nor should the possibility of waiver between private parties matter in deciding whether to eliminate the state action requirement. Rights should be extended because they reflect fundamental values that should be protected from unjustified interference by all sources, public or private.

## VI. CONCLUSION

This is certainly not the first article to propose the elimination of the state action doctrine. Professors Black, Karst, and Horowitz, to name a few, made persuasive arguments to this effect during the 1950s and 1960s.<sup>283</sup> Nor do I believe that this Article will be any more successful than the earlier efforts. The Burger Court appears irrevocably committed to limiting the application and scope of the Constitution's protections.<sup>284</sup>

So what is the value of another article on state action? First, I hope that change, at least in the long term, will occur if it is demonstrated emphatically and repeatedly that limiting the Constitution's protections to state action makes no sense. History shows that if doctrines and concepts are attacked long enough and hard enough they may begin to crumble. This Article is an attempt to contribute to that effort by exam-

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<sup>281</sup> L. TRIBE, *supra* note 15, at 510. See also *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 593 (1926); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1445-46 (1968).

<sup>282</sup> Kreimer, *supra* note 278, at 1394.

<sup>283</sup> See, e.g., Black, *supra* note 1; Karst & Horowitz, *supra* note 93; Horowitz & Karst, *supra* note 94.

<sup>284</sup> With the possibility of a conservative Court for the foreseeable future, it might be argued that it is better to keep the state action doctrine as a way to limit the judiciary's power and to protect the values that I have advocated in this Article. First, I see it as unlikely that a conservative Court will eliminate the state action requirement. The Burger Court has shown no such inclination and, in fact, a strong disposition to the contrary. Second, even if the state action doctrine were eliminated, a conservative Court likely would reach the same result as now, upholding private behavior, just explaining the outcome as a decision on the merits rather than on the basis of state action.

ining the historical and jurisprudential underpinnings of the state action requirement—an analysis that thus far has been absent from the state action literature.

Furthermore, even if the Court never completely abolishes the state action requirement, it still can expand the Constitution's protections by increasingly finding state action to be present. If judges can be persuaded that private infringements of constitutional rights undermine vital liberties, then perhaps they will return to the earlier trend and at least liberalize the state action doctrine. In addition, perhaps Congress and the states will act to safeguard rights from private interference.

Finally, thinking about the state action doctrine is useful because of the concept's importance in separating the public and private sectors of American society. At a time when the public/private distinction is increasingly blurred and increasingly attacked, it is necessary to consider what should be the basis for division and what should be the content of each domain. I believe that such analysis would be greatly improved by eliminating the state action requirement.