The State Action Doctrine and the Rehnquist Court

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Introduction

Determining when private conduct is state action and thus subject to the Fourteenth Amendment has long been one of the most troublesome issues in constitutional law. Indeed, nearly every article about the state action doctrine published in the last twenty years quotes and concurs with Professor Charles Black's characterization of the doctrine as "a conceptual disaster area."[1] The Supreme Court's failure to construct a coherent state action doctrine is partly attributable, of course, to changes in the Court's membership. The Court's votes on state action cases are volatile, and the outcome of state action cases can change with relatively small changes in the Court's membership.[2] President Reagan's reshaping of the Court, therefore, is likely to have a great impact on the Court's

1. Black, *The Supreme Court, 1966 Term—Forward: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967); *see, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1690 (2d ed. 1988); Chemerinsky, *Rethinking State Action*, 80 NW. U.L. REV. 503, 504 (1985); Choper, *Thoughts on State Action: The "Government Function" and "Power Theory" Approaches*, 1979 WASH. U.L.Q. 757, 757; Friendly, *The Public-Private Penumbra—Fourteen Years Later*, 130 U. PA. L. REV. 1289, 1290-91 (1982); Phillips, *The Inevitable Incoherence of Modern State Action Doctrine*, 28 ST. LOUIS U.L.J. 683, 683 (1984); Rowe, *The Emerging Threshold Approach to State Action Determinations: Trying to Make Sense of* Flagg Brothers, Inc. v. Brooks, 69 GEO. L.J. 745, 745 (1981); Schneider, *The 1982 State Action Trilogy: Doctrinal Contraction, Confusion, and a Proposal for Change*, 60 NOTRE DAME L. REV. 1150, 1150 (1985).

2. The divergent approaches of the Vinson and Warren Courts on the one hand, and the Burger Court on the other, demonstrate the impact that changes in Justices can have on this issue. The Warren Court's state action decisions devised new theories by which to apply the Equal Protection Clause to ostensibly private conduct and broadened the application of existing theories. In contrast, the Burger Court restricted state action theories, making it much more difficult for a court to find state action. *See, e.g.*, Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment*, 46 S. CAL. L. REV. 1003, 1041 n.133 (1973) (the addition of Justices Rehnquist and Powell changed a mi-

state action doctrine.[3]

Despite the "conservative" majority created by President Reagan's appointments,[4] however, the direction that the Rehnquist Court[5] will take in shaping the state action doctrine is unclear. As one might expect, the Rehnquist Court's decisions reflect some inclination to continue the Burger Court's restriction of the state action doctrine. This tendency is most notably illustrated in the opinions and votes of Chief Justice Rehnquist.[6] Yet the Court's state action decisions also reflect movement, even among Reagan appointees, toward a broader state action doctrine. This movement is evident in Justice O'Connor's opinions.[7] The chaos of the

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nority position on state action issues into a solid and reliable six vote majority); Schneider, *supra* note 1, at 1152.

Because legal doctrine constrains new Justices' freedom, changes in the Supreme Court's membership do not result ordinarily in unbounded changes in law. *See generally* Schauer, *Does Doctrine Matter?*, 82 MICH. L. REV. 655 (1984). Doctrinal limits are less constrictive in state action decisions, however, because no settled doctrine ever emerged. The precedents are so varied and even contradictory that a new Justice can easily find sound Supreme Court precedent to support almost any state action decision.

3. President Reagan had tremendous influence on the Court not only because he appointed three Justices (four if one counts Chief Justice Rehnquist), but also because his administration went to great lengths to assure the appointment of Justices with political views similar to the President's.

4. *See* Howard, *Living with the Warren Legacy*, A.B.A. J., Oct. 1989, at 69 (Professor Howard notes that Justice Kennedy's first full term on the Court marked the emergence of a conservative "working majority," the Court's first in over twenty years.).

5. Using the identity of the Chief Justice to demarcate periods of Supreme Court history is a common but usually arbitrary "expedient," because the appointment of a new Chief Justice alone seldom causes major shifts in the Court's legal doctrine. *See* V. BLASI, THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T xi (1983); *see also* Schauer, *supra* note 2. Referring to the "state action decisions of the Rehnquist Court," however, is coincidentally appropriate. Prior to Justice Rehnquist's becoming Chief Justice in 1986, the last major state action decision was in 1982. The Court actually rendered three important state action decisions on the same date in 1982: Blum v. Yaretsky, 457 U.S. 991 (1982); Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982) (*Lugar* actually was more important as an interpretation of the "under color of law" requirement of 42 U.S.C. § 1983 (1988)); and Rendell-Baker v. Kohn, 457 U.S. 830 (1982). Following Justice Rehnquist's appointment as Chief Justice, the Court rendered four significant state action decisions in two years. Moreover, the Court's membership changed significantly between those two groups of state action decisions. Justice Scalia, replacing Chief Justice Burger, participated in all four of the 1987 and 1988 state action decisions. Justice Kennedy, replacing Justice Powell, participated in three. Although Justice O'Connor participated in the 1982 state action trilogy, she was in her first term on the Court and had not participated in the many earlier Burger Court state action decisions that shaped state action doctrine. With these three Reagan appointees and a new Chief Justice, therefore, the Court that decided the 1987 and 1988 state action cases had significantly different membership from the Courts that decided even recent state action cases.

6. *See infra* notes 349-381 and accompanying text. Although Chief Justice Rehnquist authored many of the opinions discussed in this Article while still an Associate Justice, for the sake of consistency, he will be referred to throughout as Chief Justice Rehnquist.

7. *See infra* notes 425-36 and accompanying text. Other members of the Court also have demonstrated an inclination to broaden the Burger Court's restrictive version of the state ac-

state action precedent is thus compounded by conflicting trends in the present Court.

This Article seeks to identify and define the different models of state action doctrine embraced by various members of the Court and to analyze the impact of those models on state action jurisprudence. The Article begins in Part I by examining the origins of the state action doctrine and the purposes it serves in the structure of the Constitution. Part II of the Article reviews and analyzes the state action theories developed and refined by the Vinson, Warren, and Burger Courts[8] by which courts apply fourteenth amendment restrictions to ostensibly private conduct.

Part III summarizes the Rehnquist Court's recent state action cases, and Part IV identifies three models of state action theory evident in those opinions and analyzes their impact on state action jurisprudence. Most of the present Justices, it finds, adhere to a state action doctrine that is more liberal than the doctrine espoused by Chief Justice Rehnquist and embraced by the Burger Court. It finds that the present Justices increasingly adhere to the O'Connor model of state action, which applies a liberal "joint participation" theory to find state action in a variety of circumstances.[9]

Part V concludes that the approach most consistent with the purpose of the Constitution and the state action doctrine is a merger of all three models. It concludes that the Rehnquist model, while the most accurate in pursuing the purpose of the Constitution and the state action doctrine, is unduly restrictive in some respects. The O'Connor model, while justifiably seeking to expand the Rehnquist model, does so in a manner that lacks useable standards and that creates excessive regulation of private conduct by the federal judiciary. A better approach is to modify the Rehnquist model, not with the O'Connor joint participation theory, but with a limited and controlled version of the Marshall model. That is, expand the Rehnquist model by including a "delegation" variant of the government function theory that is more flexible and less restrictive than Chief Justice Rehnquist's but more disciplined than Justice Marshall's.[10]

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tion doctrine, but Justice O'Connor more consistently embraces such an expansion. *See infra* note 427.

8. The Court first addressed the state action doctrine in Civil Rights Cases, 109 U.S. 3 (1883), but most of the decisions that shaped its modern configuration came from the Vinson, Warren, and Burger Courts after 1940.

9. *See infra* notes 425-61 and accompanying text.

10. *See infra* notes 484-88 and accompanying text.

I. The Basis and Function of the State Action Doctrine

A. Origin of the State Action Requirement

The central function of the United States Constitution is to provide a framework for national republican self-governance.[11] The Constitution concerns itself almost exclusively with the creation of federal governmental bodies, the allocation of governmental power among those federal bodies and the states, and the limitation of that governmental power at both the state and federal level. As summarized by Professor Tribe, the Constitution "controls the deployment of governmental power and defines the rules for how such power may be structured and applied."[12]

With one exception,[13] the Constitution does not seek to govern or regulate the affairs of individuals[14] and private entities.[15] Having established the branches of the federal government and having allocated governmental power among those branches and the states, the Constitution leaves the actual governing to the states and the federal bodies it created. The Constitution simply creates the structure through which, and the limits within which, these governmental bodies regulate the daily activities of individuals and define their rights and responsibilities vis-à-vis their neighbors.[16] These reciprocal rights and responsibilities among private citizens (such as the "right" to exclude others from one's property or the duty to refrain from taking another's property) owe their existence to legislation and state common law—not to the United States Constitution.[17] In essence, the Constitution governs American governments—not

11. *See* Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 94 (1966) ("constitutional law deals chiefly with the conduct of the government").

12. L. TRIBE, *Refocusing the State Action Inquiry*, in CONSTITUTIONAL CHOICES 246 (1985).

13. Only the thirteenth amendment prohibition of slavery applies to private as distinguished from governmental action. *See* L. TRIBE, *supra* note 1, at 1688.

14. "Individuals" is used in this Article to refer to all nongovernmental entities, including not only natural persons but also private corporations, associations, and other private entities.

15. R. ROTUNDA, J. NOWAK & J. YOUNG, 2 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 156 (2d ed. 1986); L. TRIBE, *supra* note 1, at 1688 & n.1; L. TRIBE, *supra* note 12, at 246; Henkin, Shelley v. Kraemer: *Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 479 (1962).

16. *See, e.g.*, R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 15, at 156; L. TRIBE, *supra* note 12, at 246.

17. *See* P. KAUPER, CIVIL LIBERTIES AND THE CONSTITUTION 129 (1962). State courts and legislatures create these rights and responsibilities and directly regulate private conduct by defining property interests, recognizing and providing relief for private causes of action, and providing criminal sanctions for certain prohibited conduct. *Id.* at 129-30. The Constitution does not concern itself with these private interests. Rather, it provides the structure and limits within which governments can make decisions about them.

Professor Kauper has stated:

Americans.[18]

Consistent with the function and purpose of the Constitution, the individual "rights" and liberties guaranteed by the Constitution are, for the most part, freedoms from certain kinds of governmental action. The first eight Amendments apply, either expressly or impliedly, only to actions of the federal government.[19] Similarly, the fourteenth amendment Due Process and Equal Protection Clauses expressly apply only to state governments.[20] Only the Thirteenth Amendment's prohibition of slavery directly restricts the actions of private citizens.[21] With that exception, the important constitutional liberties apply to and restrict only governmental actions.[22]

State action, defined as conduct by any state or federal government, is thus a requirement in any civil action seeking relief on the basis of these constitutional guarantees.[23] A litigant seeking the protection of

> [T]he limitations in the interest of the basic freedoms recognized by the Constitution are directed against the government. The 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. It is because the state enjoys the monopoly of lawfully granted coercive power that restraints on its power are recognized under the Constitution as the important conditions of liberty. 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.
>
> Civil rights as used in the sense that one person has a claim upon another, are the product of common law and legislation—they furnish the staple of the private law of contracts, torts, and property, and of a large and increasing body of public statutory law, including the large mass of criminal law.

Id.

18. Professor Tribe thus characterizes constitutional law as "metalaw." L. TRIBE, *supra* note 12, at 246.

19. The First Amendment, for example, does not guarantee that each individual will be able to speak freely without interference from anyone. It more modestly guarantees that "*Congress shall make no law* . . . abridging the freedom of speech, or of the press . . . ." U. S. CONST. art. I, § 1 (emphasis added). Thus, if a private citizen physically prevents an individual from making a speech, the individual's constitutional freedom of speech is in no way violated. If, on the other hand, the federal, state, or even local government prevents the individual from making the same speech, that governmental entity violates the First Amendment. The first amendment right to freedom of speech, therefore, is only a "right" not to be unreasonably silenced by the government.

20. San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 488 U.S. 522, 542 (1987).

21. L. TRIBE, *supra* note 1, at 1688.

22. *See* The Civil Rights Cases, 109 U.S. 3, 11 (1883) ("It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the [Fourteenth] [A]mendment."); United States v. Cruikshank, 92 U.S. 542, 554 (1875) ("[T]he [F]ourteenth Amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another.").

23. Although the "state action" issue arises in actions against federal, state, and local governments concerning various provisions of the Constitution, it most frequently arises in

these guarantees must establish that the allegedly unconstitutional conduct complained of "may fairly be said to be that of the [state]."[24] If the conduct is not that of the state, then it cannot be unconstitutional—however wrongful it may be—because the Constitution applies only to state action.

The United States Supreme Court first recognized this state action requirement in its post-Civil War decisions construing the scope of the Fourteenth Amendment, rendering its most important early application and analysis of the state action requirement in *Civil Rights Cases*.[25] The Court's decision in *Civil Rights Cases* arose from four criminal actions and one civil action brought under the Civil Rights Act of 1875 (the Act).[26] The defendants in each of the cases violated the Act by excluding blacks from privately owned hotels, theatres, and railroads. The defendants contended, however, that the Act was unconstitutional because it was beyond the constitutional powers of Congress. The United States and the private plaintiff argued, among other things, that the Act was passed pursuant to Congress's powers under sections one and five of the Fourteenth Amendment.[27]

The Supreme Court held that the defendants' discriminatory acts did not violate section one of the Fourteenth Amendment and thus were not subject to congressional regulation under section five, because their actions did not constitute state action. The Court noted that section five

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actions concerning the Fourteenth Amendment. Although the "rights" asserted by plaintiffs vary in these different contexts, the state action doctrine does not. This Article, therefore, generally refers to the state action issue as it relates to the fourteenth amendment limitations on state government, but the state action issue and doctrine apply equally to other constitutional guarantees and to other governments. *See San Francisco Arts & Athletics*, 488 U.S. 522 (applies the state action doctrine to determine if the federal government is responsible for the actions of the United States Olympic Committee such that the Committee's activities are state action subject to the Fifth Amendment).

24. Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

25. 109 U.S. 3 (1883). The Court addressed the issue earlier but in less depth in United States v. Harris, 106 U.S. 629, 637-38 (1883), *Ex Parte* Virginia, 100 U.S. 339, 346-47 (1880), and *Cruikshank*, 92 U.S. at 554-55.

26. The Act provided criminal and civil sanctions against any person who was denied "full and equal enjoyment" of various public facilities and conveyances on the basis of race. Civil Rights Act of 1875, 18 Stat. 335, 336 chap. 114.

27. The Fourteenth Amendment provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . . .
>
> . . . The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article.

U.S. CONST. amend. XIV, §§ 1, 5.

of the Amendment gives Congress power only to enforce the Amendment's other provisions.[28] Congress had power to punish the defendants, therefore, only if their conduct violated the Fourteenth Amendment itself. The Court then examined section one of the Amendment, which the Act purported to enforce. Noting that the provision is "prohibitory upon the States," the Court stated:

> It is *State action* of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all *State legislation, and State action of every kind,* which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws.[29]

The defendants' exclusion of blacks from their facilities, the Court held, did not violate section one of the Amendment because it was not done pursuant to state law or under state authority.[30]

B. The Role and Purpose of the State Action Requirement in the Structure of the Constitution

Any evaluation or application of the state action requirement must

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28. *The Civil Rights Cases,* 109 U.S. at 11.

29. *Id.* (emphasis added).

30. Because the defendants' actions did not violate section 1 of the Amendment, the Court held, Congress did not have the power under section 5 to prohibit or otherwise regulate the activity. *Id.* at 18-19. The Court stated:

> [T]he law in question cannot be sustained by any grant of legislative power made to Congress by the Fourteenth Amendment. That amendment prohibits the States from denying to any person the equal protection of the laws, and declares that Congress shall have power to enforce, by appropriate legislation, the provisions of the amendment. The law in question, without any reference to adverse State legislation on the subject, declares that all persons shall be entitled to equal accommodations and privileges of inns, public conveyances, and places of public amusement, and imposes a penalty upon any individual who shall deny to any citizen such equal accommodations and privileges. This is not corrective legislation; it is primary and direct; it takes immediate and absolute possession of the subject of the right of admission to inns, public conveyances, and places of amusement. . . . Whether it would not have been a more effective protection of the rights of citizens to have clothed Congress with plenary power over the whole subject, is not now the question. What we have to decide is, whether such plenary power has been conferred upon Congress by the Fourteenth Amendment; and, in our judgment, it has not.

Id.

Later cases have recognized broader congressional power under section 5 of the Fourteenth Amendment to enforce the Amendment than the Court allowed in *Civil Rights Cases,* and they have construed the Thirteenth Amendment more broadly. But the essential holding of the decision, that only the state can violate the Fourteenth Amendment and that state action is a requirement in any action seeking the Amendment's protection, has remained intact.

be based upon the values and purposes that the requirement serves.[31] Understanding the purpose of the state action requirement in turn requires an understanding of the role and purpose of the Fourteenth Amendment, from which the state action requirement arises. "[T]he fundamental purpose of the fourteenth amendment [is] to protect the individual from arbitrary government interference."[32] The state action requirement limits the operation of the Fourteenth Amendment to serving that purpose only, and it prevents federal courts from using the Amendment to govern directly the actions of individuals. In so doing, the state action requirement preserves the federalist structure of governmental power and maintains the separation of power among the branches of the federal government.[33]

The federalist structure established by the Constitution contemplated a strong federal government but one that played a limited role in regulating the daily activities of individuals and private entities. While the Constitution limited congressional lawmaking power to specific enumerated areas, it left the states with "the general mass of power . . . with special exceptions only."[34] Although Congress intended the Fourteenth Amendment to expand federal authority and contract state discretion, it sought to do so by putting standards and limits on the actions of state governments; it did not seek to expand federal substantive authority to regulate individuals directly.[35] By limiting the Amendment's application to state governmental actors, therefore, the state action requirement prevents federal courts from using the Amendment to regulate private activ-

31. *See* Burke & Reber, *supra* note 2, at 1009-10.

32. *Id.* at 1012.

33. *See id.* at 1011. According to a number of commentators, the state action requirement also promotes or preserves individual liberty and the "private structuring of relationships." *Id.* at 1016-17. Because the state action requirement does not preclude government from intruding upon private activities, however, it does not really protect individual liberty in an absolute sense. The state action requirement, as distinguished from the Fourteenth Amendment itself, does not prevent legislatures or state courts from intruding upon any private activity. *See* Tushnet, Shelley v. Kraemer *and Theories of Equality*, 33 N.Y.L. SCH. L. REV. 383, 396-97 (1988). The state action requirement does prevent federal courts from intruding upon and regulating private activities and relationships as a matter of constitutional law. *See* Burke & Reber, *supra* note 2, at 1016-17.

34. Burke & Reber, *supra* note 2, at 1015 n.28 (quoting 9 WRITINGS OF JAMES MADISON 199-200 (Hunt ed. 1910)).

35. *See* Choper, *supra* note 1, at 762. *But see* Gerhardt, *The Ripple Effects of* Slaughter-House: *A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 418 & n.40 (1990); Thompson, *Piercing the Veil of State Action: The Revisionist Theory and a Mythical Application to Self-Help Repossession*, 1977 WIS. L. REV. 1, 15 (arguing that the drafters of the Fourteenth Amendment intended it to protect the "fundamental rights" of United States citizens from even private infringement).

ity that the Constitution reserved for state—not federal—authority.[36]

The state action requirement also prevents the federal courts from using the Fourteenth Amendment to usurp authority that the Constitution granted to the executive and legislative branches. Federal judicial authority to articulate positive law regulating private conduct is extremely limited.[37] To the extent that the federal government has authority to regulate private activities and relationships, that authority is vested mainly in Congress. By limiting the application of the Fourteenth Amendment to governments, the state action requirement prevents federal courts from directly regulating private activity that the Constitution deemed best governed by the representative branches.[38]

II. State Action Theories

Having established the state action requirement in its post-Civil War cases, the Court did not immediately articulate a test for determining when the state action requirement is met. Determining when the state—as distinguished from some private entity—has acted may have seemed and may have been easy when the Court decided *Civil Rights Cases.* Over the years, however, governments acted with or through not only individual officers but also private citizens. In order to assure that this type of "state action" was carried out within the constraints of the Fourteenth Amendment, the Court devised a number of "state action theories" under which the Fourteenth Amendment and other constitutional restraints applied to ostensibly private entities. This part of the Article reviews and analyzes these theories.

Imposing categories and labels on the Court's different approaches to state action issues is somewhat arbitrary and potentially misleading. The Court seldom describes its decisions as creating a structure of discrete state action theories.[39] Rather, the Court's decisions follow the more traditional judicial style of deciding each case based on the facts of the case, guided by similarly fact-specific decisions of the past.[40] In addition, the Court uses different phrases to refer to the same or similar theo-

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

37. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938); M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 120 (2d ed. 1990); J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE §§ 4.1-4.7 (1985).

38. *See* Burke & Reber, *supra* note 2, at 1017.

39. *See, e.g.*, Tulsa Professional Collection Servs., Inc. v. Pope, 485 U.S. 478 (1988); Reitman v. Mulkey, 387 U.S. 369 (1967); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).

40. *See, e.g.*, *Pope*, 485 U.S. 478; *Reitman*, 387 U.S. 369.

ries.[41] The Court's state action decisions also frequently contain elements of several theories.[42]

Nonetheless, the Court's state action decisions do create some clearly distinguishable approaches to the state action issue. The government function theory epitomized by *Marsh v. Alabama*,[43] for example, clearly is a discrete conceptual approach from the joint participation/symbiosis theory epitomized in *Burton v. Wilmington Parking Authority*.[44] Analysis of the Court's state action decisions requires separate analysis of the various theories under which the Court has applied the Fourteenth Amendment to ostensibly private conduct. This section will analyze the distinct state action theories by which each of the following types of conduct may be considered state action and thus subject to the Fourteenth Amendment: (A) overt actions of state employees, officers, and agencies;[45] (B) the creation and enforcement of substantive civil law; (C) state inaction: the denial of judicial relief or other state intervention; (D) governmentally regulated private conduct; (E) joint participation between state officials and private entities; and (F) private entities assuming government functions or powers.

A. Overt Conduct of State Employees, Officers, and Agencies

If the Fourteenth Amendment is to have any meaning, it must apply to the overt activities of state officials and employees, especially when they carry out official state policy. Such activities are the purest form of state action. In one of its earliest decisions concerning the state action issue, the Court declared:

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41. For example, the Court in *Burton* did not expressly label the state action theory it applied but characterized the state as a "joint participant" in the challenged private activity. *Burton*, 365 U.S. at 715. Chief Justice Rehnquist later named this theory "symbiosis." Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 175 (1972). For a discussion of this state action theory, see *infra* notes 192-219 and accompanying text.

42. *See, e.g.*, Blum v. Yaretsky, 457 U.S. 991 (1982); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

43. 326 U.S. 501, 506-08 (1946).

44. 365 U.S. 715 (1961).

45. Although the state action "doctrine" generally refers to those decisions that determine the applicability of the Fourteenth Amendment to private actors, this section will address the full range of activities that can be considered state action, including activities that are undeniably state action, such as the conduct of state employees and agents and state legislation. Meaningful analysis of the state action doctrine requires that these topics be included because state action in the end is a continuum from full state initiation and implementation to state authorization of private activity to completely private initiation and implementation with no state impact. Clear state action progressively fades into clear private action, and it is the role of the state action doctrine to define where on this continuum the Fourteenth Amendment no longer applies. Analysis of the state action doctrine requires analysis of any conduct near this ambiguous division.

> A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The [Fourteenth Amendment], therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power . . . his act is that of the State.[46]

Furthermore, the Court consistently has held that the conduct of a state officer or agency is state action subject to the Fourteenth Amendment even if the officer's actions are contrary to official policy or state law. In *Home Tel. & Tel. Co. v. Los Angeles*,[47] the Court rejected the proposition that the Fourteenth Amendment reaches only those actions of state officers that are authorized by the state.[48] Rather, the Court stated, the Amendment applies whenever "an officer or other representative of a State in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Amendment[;] inquiry concerning whether the State has authorized the wrong is irrelevant . . . ."[49] The Court repeatedly has adhered to this ruling to hold state officers civilly and criminally liable under federal civil rights statutes.[50]

Recent state action cases confirm the Court's continued adherence to both of these rulings. The Court recently noted, for example, that the actions of a state university unquestionably are subject to the Fourteenth Amendment.[51] The Court stated: "A state university without question is a state actor. When it decides to impose a serious disciplinary sanction upon one of its tenured employees, it must comply with the terms of the Due Process Clause of the Fourteenth Amendment."[52] Likewise, the Court stated in *West v. Atkins*[53] that "a public employee [generally] acts under color of state law while acting in his official capacity or while exer-

46. *Ex Parte* Virginia, 100 U.S. 339, 347 (1880).

47. 227 U.S. 278 (1913).

48. *Id.* at 287.

49. *Id.*

50. *See, e.g.,* Monroe v. Pape, 365 U.S. 167 (1961); Screws v. United States, 325 U.S. 91 (1945) (upheld the conviction of police officers under federal civil rights statute even though the officers' actions—beating a man to death following his arrest—were a felony under state law); United States v. Classic, 313 U.S. 299 (1941).

51. NCAA v. Tarkanian, 488 U.S. 179, 192 (1988).

52. *Id.* For additional discussion of this case, see *infra* notes 304-28 and accompanying text.

53. 487 U.S. 42 (1988).

cising his responsibilities pursuant to state law."[54] The Court further noted that *Polk County v. Dodson*[55] "is the only case in which [the] Court has determined that a person who is employed by the State and who is sued under section 1983 for abusing his position in the performance of his assigned tasks was not acting under color of state law."[56] The *Dodson* decision, the Court continued, turned on the peculiar "professional obligation of the criminal defense attorney to be an adversary of the State."[57]

State action is clearly present, therefore, when an officer or agent of the state uses or abuses the power of his office. Few judges or scholars have difficulty applying the Fourteenth Amendment in this type of case because "the action is initiated and engaged in by a party who openly proclaims his public position and the state authority under which he acts."[58] All of the Justices on the present Court apparently agree that state action exists in these types of cases.[59]

B. The Creation and Enforcement of Substantive Civil Law

If any conduct can be attributed to the state, it is the creation of state law by a state's official policy-making bodies. To the extent that a state ever acts as a discrete entity, it is through its legislature or its common law courts. State law, the end product of the endeavors of these policy-making bodies, is the quintessence of the state. Whether it is in the form of legislation, common law, or any other official body of state authority, state law is state action.[60]

State law[61] includes the body of common and statutory law by which courts decide private disputes. When citizens submit a dispute to a court for resolution, the legal rule by which the court decides the dispute is itself the product of state action.[62] The substantive rule of law

54. *Id.* at 50.
55. 454 U.S. 312 (1981).
56. *West*, 487 U.S. at 50.
57. *Id.* at 52.
58. Burke & Reber, *supra* note 2, at 1045.
59. *See West*, 487 U.S. at 49.
60. *See, e.g.*, Reitman v. Mulkey, 387 U.S. 369, 392 (1967) (Harlan, J., dissenting) ("There is no question that the adoption [of a state constitutional amendment] constituted 'state action' within the meaning of the Fourteenth Amendment"); Paul v. Watchtower Bible & Tract Soc'y, 819 F.2d 875, 880 (9th Cir. 1987) ("State laws whether statutory or common law . . . constitute state action.").
61. "State law" here refers to all law promulgated by recognized governmental bodies, including state, federal, and local governments.
62. All legal rules, not just those used to resolve civil disputes, are the product of state action. Unlike legal rules that apply to civil disputes, however, legal rules applied in other contexts almost universally are perceived to be state action. With respect to legal rules in such

applied in every civil case dictates whether the state will afford relief, the circumstances under which it will afford relief, and the nature of the relief. By affording judicial relief, the state forcibly intervenes in the litigants' dispute to require compensation or to regulate conduct. Even a decision not to intervene—a decision not to afford relief but instead to leave the parties to their own devices—is a decision by the state that must conform to constitutional restraints on state action.[63] Whether it is in the form of a statute or a rule of common law, the substantive rule of law applied in civil litigation is state action and thus must conform to the constitutional restrictions of the Fourteenth Amendment.[64]

New York Times Co. v. Sullivan[65] provides a familiar example of this rule.[66] Sullivan, an elected official in Alabama, filed that action in an Alabama court alleging that an advertisement in the *New York Times* libeled him. Some of the statements in the advertisement were in fact false. Further, because the statements tended to injure Sullivan's reputation, the trial court deemed them "libelous per se."[67] Under Alabama libel law, therefore, general damages and malice were presumed so that a jury could and in fact did award compensatory damages without proof of pecuniary injury or malice.[68] After the Alabama Supreme Court affirmed the judgment, New York Times Co. petitioned for certiorari, contending that the Alabama law and the judgment violated the First and Fourteenth Amendments.[69]

En route to holding Alabama defamation law unconstitutional, the United States Supreme Court easily rejected Sullivan's argument that a rule of law articulated and applied in a civil lawsuit is not state action subject to the restraints of the Fourteenth Amendment. Indeed, it disposed of the state action issue in a single paragraph, stating:

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other contexts as the enforcement of criminal statutes or government regulations, for example, governments not only formulate the rule but also initiate the rule's application and effect its enforcement, all to serve governmental policy. Such governmental activity is pure state action. *See supra* notes 46-59 and accompanying text. Because private parties at their option invoke the legal rules that govern civil litigation, courts have been more reluctant to apply the Fourteenth Amendment to those laws.

63. *See infra* notes 101-08, 113-30 and accompanying text.

64. *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 n.51 (1982) ("Although this is a civil lawsuit between private parties, the application of state rules of law by the Mississippi state courts in a manner alleged to restrict First Amendment freedoms constitutes 'state action' under the Fourteenth Amendment."); *Paul*, 819 F.2d at 880.

65. 376 U.S. 254 (1964).

66. *See* G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW 1491 (1986) [hereinafter CONSTITUTIONAL LAW]; Tushnet, *supra* note 33, at 385 (1988).

67. *Sullivan*, 376 U.S. at 262-63, 267.

68. *Id.*

69. *Id.* at 264.

> Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that law has been applied in a civil action and that it is common law only, though supplemented by statute. . . . 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.[70]

The fact that state law constitutes state action does not mean, of course, that the law is unconstitutional. A court faced with a constitutional attack on that substantive law still must decide the distinct issue of whether the law violates constitutional restrictions. The law's application may result in the state's forcibly taking a defendant's property by enforcing a judgment for damages or restricting his liberty with an injunction, but such action without more does not violate the Fourteenth Amendment. The court must determine if the law applied takes the defendant's property or restricts his liberty "without due process of law" or denies him "equal protection of the laws."[71] Deciding whether the substantive state law in question violates these restrictions is an issue of substantive constitutional law that is distinct from the state action question.

In determining the constitutionality of substantive law applied in civil litigation, courts must distinguish the action of the state from the conduct of the litigants seeking relief. Judicial enforcement of a plaintiff's legal rights does not violate the Fourteenth Amendment just because the plaintiff's motives or conduct would violate the Amendment if they were the state's.[72] The real state action is the creation and application of a substantive rule of law. Ordinarily, then, it is that state action—the creation and application of law—to which the Fourteenth Amendment applies.[73] The state law and its application violate the Fourteenth Amendment only if the law's application itself—as distinct from the con-

70. *Id.* at 265 (citations omitted).

71. U.S. CONST. amend. XIV, § 1.

72. The classic example of this point is the case of a private homeowner who welcomes his white neighbors onto his property but who institutes criminal trespass actions against any of his black neighbors who enter his property. *See* McCoy, *Current State Action Theories, the* Jackson *Nexus Requirement, and Employee Discharges by Semi-Public and State-Aided Institutions*, 31 VAND. L. REV. 785, 792 & n.29 (1978). Although the state would violate the Fourteenth Amendment if it acted as the homeowner did, few would argue that the state's criminal prosecution and conviction of the trespasser at the insistence of the homeowner violates the Amendment. *See, e.g.*, *id.*; CONSTITUTIONAL LAW, *supra* note 66, at 1494.

73. The conduct of ostensibly private litigants may be deemed state action under the other state action theories discussed below. Their conduct is not state action, however, simply because they seek judicial enforcement of their perceived legal rights.

duct of the plaintiff—deprives the aggrieved citizen of property or liberty without due process of law or denies equal protection of the laws.

In *Sullivan*, for example, the Court ruled that Alabama defamation law as applied by the Alabama courts violated the Fourteenth Amendment, quite apart from the plaintiff's private actions.[74] The Court reasoned that Alabama's imposition of liability for a merely negligent—as opposed to a purposeful or reckless—publication of a false statement, would deter "would-be critics of official conduct . . . from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so."[75]

Only in the controversial and ambiguous case of *Shelley v. Kraemer*[76] has the Court suggested that a plaintiff's conduct is state action merely because the state affords her judicial relief. The Court, however, has refused, for the most part,[77] to recognize that theory of state action in subsequent cases.[78]

In *Shelley*, the owners of a number of adjacent tracts of land signed and recorded a covenant restricting occupancy of the land to whites.[79] The owners of one tract sold and conveyed their land to the Shelleys, a black family. Owners of other property subject to the covenant then filed a civil action in a Missouri court to enforce the covenant. After the Missouri Supreme Court held that the covenant should be enforced pursuant to racially neutral rules of contract and property law, the Shelleys peti-

74. *Sullivan*, 376 U.S. at 264-65. One could argue that the mere existence of a law without any enforcement or specific application to individuals or disputes, though state action, does not violate the Fourteenth Amendment because without enforcement it arguably deprives no one of life, liberty, property, or equal protection of the laws. One likewise can argue that a court's denial of relief, though state action, does not deprive anyone of life, liberty, or property. By denying relief, the state merely chooses not to intervene in the dispute and leaves the private parties to their own devices. *See infra* notes 101-30 and accompanying text. When the court grants judicial relief, however, the state itself plainly deprives the defendant of interests protected by the Due Process Clause. A judgment for damages uses state power to take property from the defendant, and an injunction uses state power to restrict the defendant's liberty.

75. *Sullivan*, 376 U.S. at 279. The Court thus held that the First and Fourteenth Amendments "[prohibit] a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80.

76. 334 U.S. 1 (1948).

77. The Court really followed *Shelley* only in Barrows v. Jackson, 346 U.S. 249 (1953), in which the Court extended *Shelley*'s holding to apply not only to equitable enforcement of restrictive covenants, but also to judicial awards of damages for breach of the covenants.

78. *See*, G. GUNTHER, CONSTITUTIONAL LAW 1002-06 (10th ed. 1980); McCoy, *supra* note 71, at 792; Schneider, *State Action—Making Sense Out of Chaos—An Historical Approach*, 37 U. FLA. L. REV. 737, 754 (1985).

79. *Shelley*, 334 U.S. at 45.

tioned the United States Supreme Court for certiorari, contending that Missouri's enforcement of the covenant violated the Equal Protection Clause of the Fourteenth Amendment. The Court, in "one of the most controversial and problematical decisions in all of constitutional law,"[80] held that the state court's enforcement of the covenant was state action that violated the Equal Protection Clause of the Fourteenth Amendment.[81]

The Court's ruling is troubling not because it treats judicial action as state action, but because the Missouri court's action appears, on the surface at least, to be entirely consistent with the Equal Protection Clause. The Missouri court simply applied Missouri's racially neutral contract and property law to a private dispute over a private agreement. Neither the court nor Missouri's lawmakers initiated any discrimination or apparently intended to discriminate against blacks in either the creation or application of Missouri law. Missouri law provided for the enforcement of many types of contractual restrictions on the use and disposition of land as long as the restrictions met various racially neutral and constitutionally innocuous requirements.[82] Missouri law provided enforcement not only of covenants prohibiting occupancy by blacks but also covenants prohibiting occupancy by whites and covenants unrelated to race.[83] Any racial discrimination, then, was in the private contract among the landowners, not Missouri law or its application. Neither Missouri law nor the Missouri court treated citizens differently on the basis of race. The Missouri court's application of Missouri law to enforce the covenant thus appeared to have been entirely race-neutral.

The United States Supreme Court nonetheless held the Missouri court's enforcement of the covenant unconstitutional without articulating any basis for the ruling. Most of the opinion addresses the contention that judicial enforcement of the common law is state action, a point that is difficult to contradict.[84] With little discussion of the discrete substantive issue of whether the law and its application are constitutional, the opinion concludes that the enforcement of the common law in this case violates equal protection.[85] The *Shelley* Court made no effort to distin-

80. CONSTITUTIONAL LAW, *supra* note 66, at 1491.

81. *Shelley*, 334 U.S. at 8-23.

82. *See, e.g.*, Williams v. Carr, 213 Mo. App. 223, 225-26, 248 S.W. 625, 626-27 (1923); Kenwood Land Co. v. Hancock Inv. Co., 169 Mo. App. 715, 722-23, 155 S.W. 861, 863-64 (1913).

83. *See* Murphy v. Timber Trace Ass'n, 779 S.W.2d 603, 607-08 (1989); *infra* note 87.

84. *See supra notes* 60-70 and accompanying text; *see also* CONSTITUTIONAL LAW, *supra* note 66, at 1491-92.

85. CONSTITUTIONAL LAW, *supra* note 66, at 1492.

guish the state's action of enforcing its common law and the plaintiff's action of entering a racially discriminatory restrictive covenant. Nor did the Court articulate how the state was constitutionally responsible for the plaintiff's racial discrimination.[86]

Three possible grounds exist to support the Court's conclusion that the Missouri court's enforcement of the covenant violated the Equal Protection Clause. The Supreme Court must have held: (1) that Missouri law or its application really was not racially neutral in some way that the Court did not articulate;[87] (2) that "judicial enforcement of private action transformed [the private conduct] into state action";[88] or (3) that the Equal Protection Clause does not permit the state to be racially neutral in the circumstances of the case but rather requires the state to prevent private discrimination.[89]

If the Court based its ruling on the first possibility—an unarticulated perception that Missouri law and its application were not really race-neutral—then the case is unexceptional. The Court in that case was simply applying conventional equal protection law, which forbids state law to treat blacks and whites differently without a compelling reason.[90]

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86. *See* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 29-30 (1959).

87. Professor Tribe, for example, suggests that Missouri property law was not neutral:

> Like other states, Missouri treats most restraints on the alienability of real estate as judicially unenforceable: to enforce any such restraint, a state court must first find that the *substance* of the restraining covenant is reasonable and consistent with public policy. Therefore, the issue is not whether *any* judicial enforcement of racially invidious private arrangements constitutes racially invidious state action, but whether a state may *choose* automatically to enforce restrictive covenants that discriminate against blacks *while generally regarding alienability restraints as anathema.* The real "state action" in *Shelley* was Missouri's facially discriminatory body of common and statutory law . . . . The state court's refusal to invalidate the racist covenant before it was simply the overt state act necessary to bring the state's legal order to the bar of the United States Supreme Court.

L. TRIBE, *supra* note 12, at 260 (emphasis in original) (citations omitted). Although this view of *Shelley* is analytically sound, evidence in the Court's opinion that the Court embraced this view as the basis of its ruling is sparse.

The *Shelley* Court did note that the plaintiff's contention that Missouri law stands ready to enforce covenants excluding whites did "not bear scrutiny." Shelley v. Kraemer, 334 U.S. 1, 21-22 (1948). The Court stated, "The parties have directed our attention to no case in which a court, state or federal, has been called upon to enforce a covenant excluding members of the white majority from ownership or occupancy of real property on grounds of race or color." *Id.* at 22. Although the Court went on to discount the relevancy of the plaintiff's argument on other grounds, *id.*, this statement suggests that the Court did suspect that the law, though neutral, perhaps was discriminatorily enforced.

88. Schneider, *supra* note 78, at 754; *see also* G. GUNTHER, *supra* note 78, at 1000-03; Choper, *supra* note 1, at 761; McCoy, *supra* note 72, at 792-93.

89. *See* L. TRIBE, *supra* note 1, at 1714-15.

90. The Court did note that no case had been found in which the courts enforced a covenant to exclude the white majority from occupying land. *Shelley*, 334 U.S. at 22.

If this was the basis for the Court's ruling, however, the Court's opinion certainly did not explain how Missouri treated blacks and whites differently. Furthermore, the Court found it irrelevant that the Missouri courts stood ready to "deny white persons rights of ownership and occupancy on grounds of race or color" as well as blacks.[91] If there is a generally applicable principle of constitutional law underlying the ruling, then,[92] it must be one of the latter two.

Yet if the Court based its ruling on either of the two remaining grounds, *Shelley* made a radical change not only in the state action doctrine but also in the substantive requirements of the Equal Protection Clause. Under these theories, whenever litigants assert a common law or statutory right to effectuate their own racially discriminatory purposes, judicial enforcement of the legal right would violate the Fourteenth Amendment, regardless of the bona fides and race-neutrality of the law, its purpose, and its application.[93] Indeed, "any case involving judicial enforcement of a private legal right to do something that the state could not do without violating the [F]ourteenth [A]mendment" would be unconstitutional state action under these theories.[94] Whenever one party to a private transaction "balks at consensual compliance [forcing] the other party to bring legal proceedings to enforce his alleged rights," the plaintiff's actions would be subject to constitutional scrutiny if judicial relief is awarded.[95] These theories, then, would effectively subject large portions of private life and private choice to direct constitutional (and, hence, federal judicial) control.[96] As Professor Choper has demonstrated persuasively, such wholesale regulation of private individuals' actions and motivations is contrary to the central thrust and purpose of the Fourteenth Amendment and indeed the Constitution.[97]

91. *Id.*

92. Some critics of the case contend that the ruling was result-oriented and devoid of "neutral principles" or general application. *See* Wechsler, *supra* note 86, at 29-31; *see also* McCoy, *supra* note 72, at 793.

93. *See* McCoy, *supra* note 72, at 792.

94. *Id.* at 792.

95. Choper, *supra* note 1, at 761.

96. G. GUNTHER, *supra* note 78, at 1002 ("Given the entanglements of private choices with law, a broad application of *Shelley* would in effect have left no private choices immune from constitutional restraints."); Schneider, *supra* note 78, at 753.

97. "Although [the Fourteenth Amendment's] major purpose was to augment the authority of the national government to secure certain constitutional rights, its primary thrust was to accomplish this goal by outlawing deprivations of these rights by state governments and their legal structures rather than by the impact of private choice." Choper, *supra* note 1, at 762; *see supra* notes 11-22, 32 and accompanying text.

Although such broad theories of state action are contrary to the basic thrust of the Amendment, Professor Choper notes, they are not necessarily "logically or analytically" flawed, and they are not in conflict with the language of the Fourteenth Amendment. Choper,

Perhaps for this reason, the Court has not given *Shelley* an expansive reading,[98] despite a substantial body of literature supporting such a broad theory of state action.[99] Indeed, the Court seldom cites the case even when it is relevant, largely leaving it as an isolated anomaly.[100] Under current doctrine, therefore, substantive civil law and its judicial enforcement are state action subject to the Fourteenth Amendment like any other law. The law and its enforcement, however, violate the Fourteenth Amendment only if the law or enforcement itself violates the Amendment.

C. State Inaction: The Denial of Judicial Relief or Other State Intervention as State Action

Just as the creation and judicial application of law to grant judicial relief in civil litigation is state action, the state's decision to deny judicial or other intervention in private affairs is state action.[101] Legislatures deny relief for particular types of private claims, for example, by defining

supra note 1, at 761. Indeed, a broad application of *Shelley* does not require a reading of the Equal Protection Clause that imposes true affirmative obligations on states to prevent racial discrimination. It does not require, for example, that the state affirmatively act to prevent private racial discrimination or perhaps even to provide judicial relief for any private wrong. Thus, a state could constitutionally refuse to intervene whenever a landowner seeks to eject trespassers. The state in such an instance simply would leave the parties in a state of nature to resolve their dispute as best they can using their own devices within the bounds of other applicable law. Once the state establishes judicial and law enforcement machinery and decides to create a remedy for trespass whereby it forcibly intervenes to resolve the dispute, however, the state has acted affirmatively. The state is obligated to undertake such action—the creation of judicial and law enforcement machinery and the creation of judicial remedies—without denying anyone equal protection of the laws. One can argue that the Equal Protection Clause requires the state to design its judicial and law enforcement machinery in such a way that it is not used as a tool of private discrimination. This could be accomplished simply by refusing the customary judicial relief whenever the plaintiff's claim is motivated by racial discrimination.

Although such an interpretation of the Equal Protection Clause may be logically defensible in some ways, it runs contrary to the purpose and scope of the Fourteenth Amendment and the Constitution because it amounts to constitutional regulation of private individual choice. *Id.* at 761-65; *see infra* notes 120-30 and accompanying text.

98. *See* G. GUNTHER, *supra* note 78, at 1002-03.

99. *E.g.*, R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 15, at 171-72; Chemerinsky, *supra* note 1, at 524-26; Haber, *Notes on the Limits of* Shelley v. Kraemer, 18 RUTGERS L. REV. 811 (1964); Henkin, *supra* note 15, at 473, 490-91; Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208, 209 (1957).

100. *See* G. GUNTHER, *supra* note 78, at 1002-03; Chemerinsky, *supra* note 1, at 526; McCoy, *supra* note 72, at 792-93; Schneider, *supra* note 78, at 754. *But see* McCoy, *supra* note 72, at 793 n.34 (discussing the Court's reliance on *Shelley* in a minor part of its decision in Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179 (1972)).

101. Governments can forcefully intervene in private affairs in innumerable ways to protect individuals from harm inflicted by private entities. They do so by making certain conduct criminal and punishing those who engage in the conduct. They regulate private entities to assure that they do not subject others to unreasonable risks of harm. They afford civil judicial

or redefining the elements of a cause of action, by imposing statutes of limitation, or by completely eliminating otherwise viable rights of action. Legislatures also refuse to intervene in private affairs to protect individuals from privately inflicted harm by refusing to make certain conduct criminal or refusing to regulate it. Common law courts likewise deny relief to entire classes of civil claims by defining the elements of the cause of action in a certain way, by imposing heightened burdens of proof, and by refusing to recognize certain causes of action. Regardless of which governmental branch makes the decision, the decision to deny relief, which is made by the state's official policy-making bodies, unquestionably is state action.[102]

Regardless of its form, this decision is simply a decision not to intervene in particular types of private disputes.[103] Some states, for example, recognize a cause of action for negligent infliction of emotional distress without requiring contemporaneous physical impact while others do not.[104] Whether acting by statute or by common law, the states that recognize the tort decided to intervene when a private plaintiff proves that a private defendant's negligence caused the plaintiff to suffer emotional distress.[105] These states force the defendants to compensate the victims of their "wrongdoing." Other states have decided that they will not intervene to transfer the cost of such conduct to the defendants, leaving the harm of such conduct where it falls.[106] Legislatures and appellate courts have made this decision for a variety of reasons.[107] Trial courts then implement the decision by dismissing complaints for failure to state

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relief such as injunctions to halt harmful private conduct or award damages to force private entities to compensate the victims of their harmful conduct.

102. *See, e.g.*, Reitman v. Mulkey, 387 U.S. 369, 392-93 (1967) (Harlan, J., dissenting) (Although Justice Harlan dissented from the Court's conclusion that California's constitutional amendment violated equal protection, he acknowledged that "[t]here is no question that the adoption of [the amendment by which the state asserted neutrality on racial discrimination in housing and denied judicial relief from such discrimination] constituted 'state action' within the meaning of the Fourteenth Amendment."); *see also* Goodman, *Professor Brest on State Action and Liberal Theory, and a Postscript to Professor Stone*, 130 U. PA. L. REV. 1331, 1337 (1982).

103. Flagg Bros. v. Brooks, 436 U.S. 149, 165-66 (1978).

104. *See* W. KEETON, PROSSER AND KEETON ON TORTS § 54 (Cumm. Supp. 1988); 1 J. DOOLEY, MODERN TORT LAW: LITIGATION AND LIABILITY § 15.06 (1982).

105. *See* Penick v. Mirro, 189 F. Supp. 947 (E.D. Va. 1960); Wallace v. Coca-Cola Bottling Plants, Inc., 269 A.2d 117 (Me. 1970); W. KEETON, *supra* note 104.

106. W. KEETON, *supra* note 104, § 54.

107. Various states have refused to afford relief for negligent infliction of emotional distress in the absence of physical impact for one or more of the following reasons: (1) proof of harm and causation are difficult to establish; (2) emotional distress cannot be measured accurately; and (3) affording relief for such conduct would cause an immense increase in litigation. *Id.* §§ 12, 54.

a claim, entering summary judgments against the plaintiff, or directing a verdict against the plaintiff. The denial of judicial relief in any given private dispute, therefore, is simply the state's decision not to intervene; and it is state action.[108]

If uniformly applied to all litigants, a state's decision to deny relief and to leave private disputants to their own devices does not, as a general rule, raise any constitutional problems. The state generally has no constitutional obligation to intervene in private disputes either to protect individuals from harm inflicted by other private entities or to force the wrongful private entities to compensate the victims of their "wrongdoing."[109] Certainly most people expect the state to provide such protection from or compensation for at least the more flagrant private wrongs, and voters quickly would elect officials that would pass statutes providing such protection and judicially enforced compensation if the state did not already provide it. But the Constitution does not require the state to provide such protection or compensation.[110] The state may constitutionally leave its citizens in a state of nature to fend for themselves with respect to most if not all instances of allegedly wrongful private conduct.[111] In other words, the Constitution permits the state to remain

108. *See, e.g.*, Reitman v. Mulkey, 387 U.S. 369, 392 (1966) (Harlan, J., dissenting).

109. DeShaney v. Winnebago County Dep't Social Servs., 489 U.S. 189, 195 (1989) ("nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors"); Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982); Goodman, *supra* note 102, at 1340 ("most [judges] are apt to recognize that affirmative duties of protection, if any there be, are the exception rather than the rule"). *But see* Chemerinsky, *supra* note 1, at 523; Gerhardt, *supra* note 35 (arguing that the Fourteenth Amendment creates positive rights that require governmental intervention).

110. *See* P. KAUPER, *supra* note 17, at 129-30.

111. *See DeShaney*, 489 U.S. at 195-96. Judge Posner has written:

> There is no constitutional right to be protected by the state against being murdered by criminals or madmen. It is monstrous if the state fails to protect its residents against such predators but it does not violate the due process clause of the Fourteenth Amendment or, we suppose, any other provision of the Constitution. The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order.

Bowers, 686 F.2d at 618.

Certainly one can debate the merits of intervening or not intervening, but that debate should be addressed to the state's policy-making bodies, its legislature, or its common law courts. The fact that nearly everyone supports the state's intervention to judicially enforce compensation for certain well-established civil causes of action does not make such intervention a constitutional obligation of the state. Such state intervention is well-entrenched not because of the Constitution, but because there is consensus that states should provide such assistance, and the states' policy-making bodies in turn have translated that consensus into well-established statutory or common law rights of action. *Cf.* P. KAUPER, *supra* note 17, at 129-30 (the "rights" that an individual has vis-à-vis other individuals are the product of common law and legislation—not of the Constitution).

neutral in private disputes, to deny judicial relief or other intervention to plaintiffs in those disputes, and to leave the harms of private conduct where they fall.

The state's decision to deny relief in any given private dispute, therefore, is unlikely to violate the Fourteenth Amendment. When the state decides not to intervene, it takes no property and it does not restrict liberty. Rather, it leaves the private disputants as it finds them. One of the disputants may have taken the other's property or restricted the other's liberty, but the state's refusal to intervene in the dispute on the basis of such conduct is not itself a deprivation or restriction.[112] Standing by while another commits a wrong, while perhaps morally objectionable and poor government policy, is not the same as committing the wrong oneself. Because the state itself does not deprive anyone of life, liberty, or property when it refuses to intervene in a given private dispute, the state cannot be said to deprive anyone of such interests without due process of law.

Likewise, a state's decision to decline intervening in a certain type of private dispute cannot violate equal protection if the state applies the decision uniformly to all litigants and the decision is not motivated by intent to discriminate. Certainly a state could not intervene to afford judicial relief to white citizens who were victims of battery but not afford such relief to black citizens.[113] But a state's consistent decision not to recognize and afford judicial relief for the tort of battery for any litigant would not violate equal protection.[114] The state's consistent decision not

112. *See DeShaney*, 489 U.S. at 195-96; Flagg Bros. v. Brooks, 436 U.S. 149, 164-66 (1978); *Reitman*, 387 U.S. at 392-95 (Harlan, J., dissenting); *Bowers*, 686 F.2d at 618 (Posner, J.). *Flagg Bros.* is discussed further *infra* notes 131-51 and accompanying text.

113. *DeShaney*, 489 U.S. at 197 n.3 ("The State may not . . . selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).").

114. Such a decision with respect to the tort of battery, of course, is so unlikely as to be purely hypothetical because of the near universal consensus supporting state intervention to prevent battery or to force those who commit battery to compensate their victims for the harm inflicted. Indeed, while the issue has never been squarely raised before the courts, some commentators and even some courts have suggested that certain civil causes of action (such as battery perhaps) are so ancient and so much a part of our ideas about what governments should do, that failure to provide these causes of action and the accompanying judicial intervention in private disputes may violate the Fourteenth Amendment. *See Flagg Bros.*, 436 U.S. at 170 (Stevens, J., dissenting); Goodman, *supra* note 120, at 1337 n.20 ("If all laws authorizing one person summarily to seize another's property were constitutional, the protectiveness of the due process clause . . . would be severely compromised.").

A state's decision not to intervene in other types of disputes such as claims of negligent infliction of emotional distress, however, is quite likely and realistic. *See supra* notes 103-08 and accompanying text. Few would argue that such a decision violates the Fourteenth Amendment. Indeed, several states have made that decision. *See supra* notes 106-07.

to intervene in particular types of private disputes, while state action, is almost always constitutional.

A number of influential commentators, however, disagree, arguing that the Fourteenth Amendment significantly restricts the state's discretion to refuse state intervention and to deny judicial relief.[115] The plaintiff in a civil lawsuit, they note, claims some right that has been restricted or destroyed by the defendant's challenged practice. Unable to stop the defendant's challenged practice on his own, the plaintiff seeks state assistance in preserving his "right" or interest by filing a civil action against the defendant. The litigants' interests thus are in conflict, and the state must decide whether to afford relief to the plaintiff or to leave the defendant victorious.[116] By refusing to intervene to afford the plaintiff relief from the defendant's challenged practice, the argument goes, the state gives a preference to the challenged conduct of the defendant over the alleged "right" of the plaintiff to be free from the challenged conduct. When a litigant challenges a private act under the Fourteenth Amendment, therefore, "the complainant is claiming that the state has deprived him of some right by granting a legal preference to the challenged practice."[117] State action accordingly is always present in the state's decision, these commentators argue, and the Court must determine whether the state's decision violates the Fourteenth Amendment. These commentators also argue that to determine the constitutionality of the state's action of refusing to intervene on behalf of the plaintiff,

> the [United States Supreme] Court must determine whether the Constitution dictates a preference for one right above the other. To resolve this conflict it would seem that the Court must balance the relative merits of permitting the challenged practice to continue against the limitation which it imposes on the asserted right.[118]

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115. For various formulations of this and similar theories, *see* R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 15, at 194-98; Brest, *State Action and Liberal Theory: A Casenote on* Flagg Brothers v. Brooks, 130 U. PA. L. REV. 1296 (1982); Chemerinsky, *supra* note 1; Glennon Jr. & Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221; Haber, *supra* note 99; Henkin, *supra* note 15; Horowitz, *supra* note 99, at 209; Quinn, *State Action: A Pathology and a Proposed Cure*, 64 CALIF. L. REV. 146 (1976); Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961).

116. The defendant ordinarily is victorious if the state stays out of the dispute, because the defendant is satisfied with the status quo and the plaintiff is trying to change it. The plaintiff's recognition that the defendant will prevail in the absence of state intervention is what prompts the plaintiff to initiate litigation to invoke the assistance of state power.

117. R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 15, at 196.

118. *Id.* For various formulations of this and similar approaches to state action, see the articles cited *supra* note 109. For a concise survey of these arguments, see Choper, *supra* note 1, at 760-61; Thompson, *supra* note 34, at 9-13, 22-23. Professor Choper summarizes one of the earlier articles proposing this type of approach as follows:

If a private social club excludes blacks, for example, these commentators contend that the Court should determine the constitutionality of the club's conduct by deciding whether the excluded blacks' interest in being free from racial discrimination is more important than the club members' interest in choosing the people with whom they associate.[119]

The difficulty with these approaches to "state action" is that they conflict with the central function of the Fourteenth Amendment and indeed most of the Constitution.[120] As discussed above, the central function of the Constitution is to regulate and limit the activities of governments, leaving "the regulation of the myriad relationships that occur between one individual and another"[121] to federal and state legislation and state common law.[122] "Although [the Fourteenth Amendment's] major purpose was to augment the authority of the national government to secure certain constitutional rights," Professor Choper writes, "its primary thrust was to accomplish this goal by outlawing deprivations of these rights by state governments and their legal structures rather than by the impact of private choice."[123]

Yet the all-encompassing theories of state action advocated by commentators result in direct constitutional regulation of private conduct

> [I]n their influential article advocating this approach, Karst and Van Alstyne urged that in adjudicating these problems the courts should (1) identify the "multiplicity of interests which compete for respect in each case," (2) assess the impact that alternative judicial decisions would have on these interests, (3) determine the effect of federal intervention "on the policy of encouraging local responsibility," and then (4) ultimately balance and select the "values for constitutional preference."

Choper, *supra* note 1, at 763 (quoting Van Alstyne & Karst, *supra* note 114, at 7-8, 58).

119. *See* Glennon Jr. & Nowak, *supra* note 115, at 241-43 (discussing Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972)). Indeed, Professors Glennon and Nowak argue that the Court actually uses this approach in deciding state action cases but then obscures its decisions by applying "formalistic state action tests" in its opinions. *Id.* at 260.

120. Choper, *supra* note 1, at 761-65. After reviewing various formulations of this approach to state action, Professor Choper states:

> The difficulty with both the state permission-toleration and judicial enforcement theories of state action is not that they fail, either logically or analytically, "to satisfy the demand for 'neutral,' general principles of adjudication" or "to promise consistent application to foreseeable situations." Nor are they at war with the language of the fourteenth amendment, which requires only that the state neither "deprive" any person of due process nor "deny" equal protection—consequences that literally may occur through state inaction as well as through state action.

Id. at 761-62 (citations omitted).

121. *Id.* at 762.

122. *See supra* notes 11-18 and accompanying text.

123. Choper, *supra* note 1, at 762; *see* Graglia, *Do We Have an Unwritten Constitution?—The Privileges and Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 83, 88 (1989). *But see supra* note 34.

and private relationships.[124] According to these theories, the Constitution dictates which litigants' interests are superior in at least some private litigation and mandates the state to rule in favor of the litigant whose interests are "constitutionally favored."[125] If the plaintiff's interests are constitutionally superior, then the Constitution requires the state to intervene and to award relief.[126] Moreover, it is the litigants' private conduct, rather than any state action or inaction,[127] that makes state intervention a constitutional requirement under these theories. The relative constitutional merits of the disputants' private conduct dictate that the state grant relief; denying relief would favor the defendant's "constitutionally inferior" interests.[128] Such a constitutional requirement, based as it is on the relative merits of the disputants' private conduct, is a constitutional prohibition on the defendant's private conduct. There is no difference in saying that the Constitution prohibits individuals from doing "x" and saying that the Constitution requires the state to enjoin individuals from doing "x" when asked to do so in civil litigation.[129] This constitutional regulation of private conduct is completely at odds with the central themes of the Constitution and the Fourteenth Amendment.[130]

124. Indeed, one commentator expressly stated that "the fundamental question presented by every state action case is, broadly expressed, whether and under what circumstances we as private citizens must conform to the standards we set for our government . . . . Put another way, under what conditions should an otherwise private individual or entity be held accountable to the Bill of Rights and the fourteenth and fifteenth amendments?" Thompson, *supra* note 35, at 22.

125. *See* Glennon Jr. & Nowak, *supra* note 115, at 230-31.

126. *Id.*

127. The Constitution requires such intervention under these theories even though a decision by the state not to intervene would not itself deny anyone life, liberty, property, or equal protection of the laws.

128. Glennon Jr. & Nowak, *supra* note 115, at 230-32.

129. Likewise, saying that the Constitution forbids the state to favor the defendant's "right" or interest is the same as saying that the Constitution requires the state to grant state-enforced judicial relief.

130. Goodman, *supra* note 102, at 1336. Professor Goodman writes:

> The recognition of affirmative governmental duties to regulate private conduct, though consistent perhaps with the letter of the state action requirement, is in derogation of its basic philosophy: that the conflicting interests of nongovernmental actors should, in general at least, be resolved through the democratic political process (or through legislatively reversible common-law adjudication) rather than through judicial application of the fourteenth amendment.

Id.

This recognition of affirmative governmental duties would be contrary to the governmental structure created by and embodied in the Constitution even if the dictates of the Fourteenth Amendment were precise. As the history of fourteenth amendment litigation demonstrates, however, the dictates of the Due Process Clause are open-ended and subject to wide-ranging interpretations even when applied to governments. The requirements of due process inevitably

Although the Supreme Court did not focus directly on the state's decision not to intervene, the Court apparently confirmed the constitutionality of such state inaction[131] in *Flagg Bros. v. Brooks.*[132] Brooks, the plaintiff in *Flagg Bros.*, was evicted from her apartment and a city marshal arranged for her possessions to be stored by the defendant Flagg Brothers in its warehouse.[133] A dispute subsequently arose between Brooks and Flagg Brothers regarding Brooks's failure to pay the charges that Flagg Brothers claimed were due for the storage. After a series of letters failed to resolve the dispute, Flagg Brothers notified Brooks that it intended to sell Brooks's possessions pursuant to the New York Uniform Commercial Code[134] to cover the charges. That statute provides that a warehouseman may enforce a warehouseman's lien by selling the goods subject to the lien in any commercially reasonable sale after notifying all

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would be even more ambiguous if applied to the relative merits of competing private interests. One wonders, for example, whether the law governing the tort of invasion of privacy would become entirely a matter of constitutional definition under this theory, given the Court's recognition of a constitutional right of privacy. Professor Choper warns:

> [T]hese theories eviscerate the Fourteenth Amendment's restriction on the authority of the national government vis-à-vis the states regarding the regulation of the myriad relationships that occur between one individual and another. These approaches require that all private activity, except that small amount which is beyond all governmental control, conform to federal constitutional standards.
>
> Thus, at the initiative of any litigant who is offended by another person's behavior, these theories would subject to the scrutiny of federal judges, under substantive constitutional standards customarily developed for measuring the actions of government, all sorts of private conduct. . . . Further, . . . these theories would delegate to federal judges the power to implement the vague mandate of the Due Process Clause in speaking the final word about the validity of virtually all transactions between individuals.

Choper, *supra* note 1, at 762. The role of Congress, state legislatures, and state courts in weighing the relative merits of competing private interests would be usurped by the federal courts balancing those same interests as a matter of constitutional interpretation subject only to the check of the constitutional amendment process.

131. "Inaction" is an imprecise term to apply to the state's conduct in such instances. The state is not literally inactive in such instances but rather makes an affirmative decision to remain neutral and to deny judicial intervention in the dispute before it. The state cannot remain passively neutral because a plaintiff eventually will seek relief in the state's courts, and the state then must decide whether to intervene. If no plaintiff ever sought the state's intervention, the constitutionality of the state's decision not to intervene would never arise.

132. 436 U.S. 149 (1978); *see* R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 15, at 197 n.8.

133. *Flagg Bros.*, 436 U.S. at 153. Brooks included the city marshal as a defendant in her complaint alleging that the marshal led her to believe that she had no choice but to let Flagg Brothers store her possessions. Brest, *supra* note 115, at 1304-05 (quotes pertinent portions of Brooks' complaint). The parties, however, dismissed the marshal from the case by consent. 436 U.S. at 157. Moreover, Brooks apparently did not assert the association between Flagg Brothers and the city marshal as grounds for applying the Fourteenth Amendment to Flagg Brothers' actions. Brest, *supra* note 115, at 1305 n.32.

134. N.Y. U.C.C. § 7-210 (McKinney 1964) (current version at N.Y. U.C.C. § 7-210 (1990)) (quoted in *Flagg Bros.*, 436 U.S. at 151-52 n.1).

persons having a claim or interest in the goods. Brooks then filed a section 1983[135] action against Flagg Brothers seeking damages and an injunction against the threatened sale.[136] Brooks contended that the sale of her goods without a hearing was state action and violated the Due Process Clause of the Fourteenth Amendment. She argued, among other things,[137] that the sale of her property was state action because "the State has authorized and encouraged it [the sale] in enacting § 7-210."[138]

The Court held that Flagg Brothers' sale of Brooks' belongings was not state action subject to the Fourteenth Amendment. Writing for the Court, Chief Justice Rehnquist acknowledged that the impact of state law on private action sometimes makes the state responsible for the private action and subjects the action to the restraints of the Fourteenth Amendment. For example, the "State is responsible for the . . . act of a private party when the State, by its law, has compelled the act."[139] Chief Justice Rehnquist added, however, that the "Court has never held that a State's mere acquiescence in a private action" converts the private act into state action.[140] Earlier cases "clearly rejected . . . the imposition of Fourteenth Amendment restraints on private action by the simple device of characterizing the State's inaction as 'authorization' or 'encouragement.' "[141] Acting through its legislature, New York merely decided not to intervene in this type of dispute; the state decided not to interfere with a warehouseman's private decision[142] to sell goods to recover storage costs.[143] The state's decision not to act at all did not "authorize" or "encourage" Flagg Brothers' threatened sale; it merely permitted the sale

135. 42 U.S.C. § 1983 (1988). This statute creates civil liability for injuries caused by deprivation of rights secured by the Constitution.

136. *Flagg Bros.*, 436 U.S. at 153.

137. Brooks argued that Flagg Brothers' actions were subject to the Fourteenth Amendment both because New York by enacting § 7-210 had delegated to Flagg Brothers the governmental function of enforcing binding dispute resolution and because the statute authorized and encouraged the sale. Chief Justice Rehnquist's treatment of Brooks' government function argument is discussed *infra* notes 249-61 and accompanying text.

138. *Flagg Bros.*, 436 U.S. at 164.

139. *Id.* (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 170 (1970)). Chief Justice Rehnquist also cites Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), in which the Court held that state law could not constitutionally compel a private club to comply with its own discriminatory by-laws. *Flagg Bros.*, 436 U.S. at 177.

140. *Flagg Bros.*, 436 U.S. at 164.

141. *Id.* at 164-65 (citing *Moose Lodge No. 107*, 407 U.S. at 190).

142. Chief Justice Rehnquist noted that Flagg Brothers did nothing more than what it would tend to do in the absence of state law on the subject: "dispose of respondents' property in order to free up its valuable storage space" and to recover some portion of the unpaid accrued costs of storing the property. *Flagg Bros.*, 436 U.S. at 162 n.12.

143. *Id.* at 166.

and refused to prohibit it.[144] The Court held that the statute's existence did not transform Flagg Brothers' actions into state action.[145]

Although the opinion focused on the issue of whether Flagg Brothers was a state actor,[146] it suggests that Chief Justice Rehnquist views the enactment of section 7-210 as state action and that he perceives the statute as being entirely consistent with the Fourteenth Amendment.[147] He notes that a legislative decision not to intervene and to deny judicial relief in particular types of disputes is no different from a judicial decision to the same effect.[148] He also apparently acknowledges that such decisions are state action subject to the restraints of the Fourteenth Amendment:

> If New York had no commercial statutes at all, its courts would still be faced with the decision whether to prohibit or to permit the sort of sale threatened here the first time an aggrieved bailor came before them for relief. A judicial decision to deny relief would be no less an "authorization" or "encouragement" of that sale than the legislature's decision embodied in this statute. It was recognized in the earliest interpretations of the Fourteenth Amendment "that a State may act through different agencies,—either by its legislative, its executive, or its judicial authorities; and the prohibi-

144. *See* Goodman, *supra* note 102, at 1337-39. The notion that " 'What the state authorizes, the state does' may reflect a confusion between two senses in which a state can be said to 'authorize' private action: delegation and permission." *Id.* at 1338.

145. *Flagg Bros.*, 436 U.S. at 164-66.

146. L. TRIBE, *supra* note 1, at 1712 ("Justice Rehnquist began his state action inquiry for the *Flagg Brothers* majority by focusing not on the governmental *rules* implicated by the particular right asserted by Ms. Brooks, but on whether public or private *actors* were responsible for her injury."); *cf.* R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 15, at 197 n.8.

For a succinct but insightful discussion of the "difference between the proposition . . . that a statutory or decisional rule permitting private conduct is state action and the [related] proposition . . . that the conduct so permitted is state action," see Goodman, *supra* note 102, at 1340. (Professor Goodman agrees with the former proposition and not the latter.)

147. *See* Goodman, *supra* note 102, at 1337. Professor Goodman "doubt[s] that Justice Rehnquist meant to deny" that the statute was state action. *Id.* He writes:

> Except for a single footnote sentence, Justice Rehnquist's discussion of the state action issue focuses exclusively on the behavior of the self-helping creditor, not on the statute. In that sentence he states that "[i]t would intolerably broaden . . . the notion of state action . . . to hold that the mere existence of a body of property law . . . whether decisional or statutory, itself amounted to 'state action' even though no state process or state officials were ever involved in enforcing that body of law." [*Flagg Bros.*, 436 U.S. at] 160 n.10. This language, in context, can be read as denying not that the statute was state action, but merely that it was action sufficient to implicate the state in the private conduct it authorized, or that it was otherwise unconstitutional.
>
> The very fact that Rehnquist qualified his assertion by conceding that the case might be different if the statute had authorized a breach of the peace, *see id.* 160 n.9, suggests that he may have been addressing the ultimate question of constitutionality rather than the preliminary question of state action.

Goodman, *supra* note 102, at 1337 n.20. *But see* Brest, *supra* note 115, at 1301, 1315.

148. *Flagg Bros.*, 436 U.S. at 165.

tions of the amendment extend to all action of the State. . . ."[149]

By enacting section 7-210, New York

> merely announced [legislatively] the circumstances under which its courts will not interfere with a private sale. Indeed, the crux of respondents' complaint is not that the State *has* acted, but that it has *refused* to act. This statutory refusal to act is no different from an ordinary statute of limitations whereby the State declines to provide a remedy for private deprivations of property after the passage of a given period of time.[150]

Chief Justice Rehnquist certainly viewed the state's codified policy decision not to intervene in such disputes to be state action, but he perceived the constitutionality of such a decision unquestionable.[151] Thus viewing the constitutionality of the statute as beyond contradiction, Chief Justice Rehnquist apparently turned to Brooks' only remaining avenue of consti-

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149. *Id.* (quoting Virginia v. Rives, 100 U.S. 313, 318 (1880)).

150. *Id.* at 166 (emphasis in original); *see also* Texaco, Inc. v. Short, 454 U.S. 516 (1982) (discusses the constitutionality of statutes of limitation).

151. Chief Justice Rehnquist analogized § 7-210 to statutes of limitation, which he plainly viewed as state action that is nonetheless constitutional. *Flagg Bros.*, 436 U.S. at 166. In *Texaco, Inc. v. Short*, Chief Justice Rehnquist joined in Justice Stevens' opinion for the Court, which upheld an Indiana statute against due process attack. The statute in *Short* provided that a severed mineral interest that is not used for twenty years automatically lapses and reverts to the current surface owner unless the mineral owner files a statement of claim within the twenty-year period. The Court upheld the statute against due process attack without considering whether it constituted state action. *Short*, 454 U.S. at 530-31.

Relying on *Short*, Chief Justice Rehnquist also would have upheld the statute attacked in Tulsa Professional Collection Servs., Inc. v. Pope, 485 U.S. 478 (1988), in which the Court struck down an Oklahoma statute that barred claims against the estate of a deceased debtor if they were not presented to the estate's executor within two months of the publication of notice of the commencement of probate proceedings. *Id.* at 492-94 (Rehnquist, C.J., dissenting). For additional discussion of *Pope*, see *infra* notes 329-41 and accompanying text.

Indeed, Chief Justice Rehnquist appears to use the term "state action" to refer not to an act done by or attributable to the state, but to an act done by or attributable to the state *that unconstitutionally deprives* an individual of life, liberty, property, or equal protection of the laws. In *Pope*, for example, he states: "Why there is 'state action' in [*Pope*], but not in [*Short*], remains a mystery . . . ." *Pope*, 485 U.S. at 493. In fact, there was no holding in *Short* that "state action" in the literal sense was lacking. *Short* simply held that the statute, which was a state act, was constitutional because the statute itself did not deprive mineral owners of property without due process of law. *Short*, 454 U.S. at 531-38. Although the mineral owners lost their property, the loss resulted from their own inaction and the operation of a duly enacted and constitutionally sound statute limiting the duration of certain property interests. *Id.* at 530-31. Likewise, there is no question that the enactment of the Oklahoma "non-claim statute" in *Pope* was state action, but the statute, Chief Justice Rehnquist contended, only defined the duration of a creditor's property interest in a right of action. *Pope*, 485 U.S. at 492-94. While Chief Justice Rehnquist views the enactment of a statute to be state action, he merely views statutes that prospectively define property interests as manifestly constitutional. When a plaintiff has lost property and attacks such a statute, Chief Justice Rehnquist describes the case as lacking "state action" if the statute is either constitutional or does not cause the property loss. He does not mean that the statute is not subject to the restrictions of the Fourteenth Amendment.

tutional attack, her argument that Flagg Brothers' conduct was itself state action.

The state's inaction, or more accurately, the state's decision not to intervene in private disputes or otherwise interfere with private conduct, is state action in the literal sense. It is a decision made by the state's courts and legislatures, and that decision is subject to the restraints of the Fourteenth Amendment. This decision, however, is unlikely to violate the Due Process Clause except in those rare circumstances in which the state has an affirmative constitutional obligation to protect individuals from privately inflicted harm, if any such circumstances exist.[152] Likewise, the state's decision not to interfere with certain private conduct does not violate the Equal Protection Clause if it is uniformly applied to all individuals.

D. Governmentally Regulated Private Conduct as State Action

Whether enacted as legislation, established by judicial decision, or promulgated by executive agencies, direct governmental regulation of private conduct is state action subject to the Fourteenth Amendment.[153] The Amendment's applicability becomes more difficult, however, when a litigant challenges on constitutional grounds not the regulations but the actions of a private entity that is subject to the regulations. Challenges to governmentally regulated private conduct have forced the Court to decide whether and under what circumstances a private entity's actions constitute state action when the private entity's activities are subject to governmental regulation.[154]

Several decisions during the last twenty years clearly state that the actions of a private entity are not state action subject to the Fourteenth Amendment just because the entity is subject to general state regulation, even if the regulations are pervasive.[155] *Jackson v. Metropolitan Edison*

152. *See supra* notes 111, 114.

153. Government regulation may take the form of specific directives compelling individuals to behave in certain ways, or it may take the form of sanctions or incentives to induce individuals to behave in certain ways. The direct operation of such regulations is state action in the same way that the overt acts of government officials are state action. *See supra* notes 46-59 and accompanying text. The regulations are created by the government's official policy-making bodies or by government agencies created by and acting pursuant to the policies of the official policy-making bodies. They also are enforced by government enforcement officials. The direct operation of governmental regulation of private activities, therefore, plainly is state action in the purest sense.

154. *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 178-79 (1972).

155. Rendell-Baker v. Kohn, 457 U.S. 830, 841-42 (1982); Blum v. Yaretsky, 457 U.S. 991, 1004 (1982); *Jackson*, 419 U.S. at 350-51; *Moose Lodge No. 107*, 407 U.S. at 176-77.

Co.,[156] one of the most often cited decisions articulating this rule,[157] applied the rule to an electric utility's actions. The plaintiff in *Jackson* alleged that the defendant electric utility violated the Due Process Clause by disconnecting her electric service for nonpayment of her bill without providing a hearing.[158] Conceding that the state subjected the utility to "extensive and detailed" regulation, the Court held that "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment."[159] Although the actions of such heavily regulated industries perhaps will be more readily deemed state action, the Court continued, the general regulatory scheme alone does not suffice to make them so. Rather, there must be "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."[160] In the context of treating governmentally regulated private entities as state action,[161] this nexus requirement means that the governmental regulations must in some way involve the state directly in the challenged activity.[162]

Rendell-Baker v. Kohn[163] may be the Court's most trouble-free application of this rule.[164] The defendants in that case were a private

156. 419 U.S. 345.

157. *See, e.g.*, *Blum*, 457 U.S. at 1004.

158. The plaintiff contended that the Due Process Clause entitled her to notice, a hearing, and an opportunity to pay any amounts found to be due before the company could terminate her service. She sought an injunction requiring the defendant company to provide electric service until it afforded her those procedures. She also sought damages for the previous termination of service. *Jackson*, 419 U.S. at 347-48.

159. *Id.* at 350.

160. *Id.* at 351.

161. The "nexus" requirement likely applies to any theory of state action. *See* McCoy, *supra* note 72, at 817-26.

162. If the Court were to apply the Fourteenth Amendment to private business enterprises solely because they are subject to state regulation, the Court in effect would be substituting "a court-made scheme of federal constitutional regulation" for the state's regulatory scheme. Burke & Reber, *supra* note 2, at 1093. This result would transfer regulatory authority not only from the state to the federal government, but from state political entities to the federal judiciary. *Id.*

163. 457 U.S. 830 (1982).

164. Even *Jackson*'s application of the rule was problematic. The Court either rejected or did not address arguments that the state in fact was involved directly with the challenged conduct. The defendant utility submitted a tariff to the regulatory agencies. This tariff described the termination procedure that the *Jackson* plaintiff later challenged. By taking no action regarding the termination provision, the state regulatory agency arguably approved the provision that went into effect 60 days after the tariff was filed. *Jackson*, 419 U.S. at 370 (Marshall, J., dissenting); *see also* Phillips, *supra* note 1, at 704. Although a state's failure to prohibit private conduct is entirely constitutional in most contexts, *see supra* notes 109-14 and accompanying text, such a conspicuous failure to regulate "a particular practice becomes an affirmative state action rather than simple inactivity" when it occurs in the context of a perva-

school and its officials. The school specialized in helping students with difficulties completing public high school. State agencies referred most of the students to the school, and state funds accounted for most of the school's budget.[165] In addition, a variety of governmental agencies extensively regulated a wide range of the school's activities.[166] Nonetheless, the Court held that the school's discharge of the plaintiff, a counselor at the school, was not state action because the state's extensive regulations did not regulate such personnel matters as the discharge of counselors.[167] The Court therefore deems private conduct to be state action on the basis of state regulation only if the state's regulations involve the state in or directly impact upon the challenged activity itself.[168]

Although it is unclear precisely what level or type of regulatory involvement is necessary to make private conduct state action, private conduct apparently constitutes state action at least when the state compels the private conduct.[169] In *Peterson v. Greenville*,[170] for example, the Court held that the state was responsible for a restaurant owner's decision not to serve blacks, because a city ordinance required racial segregation in public eating places.[171] Because the restaurant's management "did precisely what the city law required," the initiative for the discrimi-

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sive regulatory scheme such as that imposed on an electric utility. McCoy, *supra* note 72, at 813. Professor McCoy explains:

> As a practical matter, . . . state prohibition [of private conduct] is the exception; freedom of the individual to choose among a wide range of courses of conduct, even those considered undesirable by most people, is the conceptual norm. . . . On the other hand, the public utility company is routinely subject to detailed and pervasive state regulation in all aspects of its operation, including the most central element of its existence, the profit margin. For the utility company, restriction of its range of choices by the state is commonly perceived as the norm rather than the exception; in a sense, regulation is the conceptual "state of nature" for a utility company that enjoys a state-protected monopoly. . . . In the context of such a [pervasive] regulatory scheme, a decision not to prohibit a utility from engaging in a particular practice becomes an affirmative state action rather than simple inactivity. Unlike the usual case of legislative inaction, such selective regulatory inaction may represent a violation of the fourteenth amendment.

Id. at 812-13.

165. *Rendell-Baker*, 457 U.S. at 832.

166. *Id.* at 848-51 (Marshall, J., dissenting).

167. *Id.* at 841-42. *But see id.* at 846-47 (Marshall, J., dissenting) (arguing that the state did regulate personnel matters).

168. Blum v. Yaretsky, 457 U.S. 991, 1004 (1982); *Rendell-Baker*, 457 U.S. at 839, 841; *Jackson*, 419 U.S. at 350-51.

169. *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 178-79 (1972) (regulation requiring private clubs to adhere to their by-laws held to violate the Equal Protection Clause as applied to Moose Lodge No. 107 because its by-laws called for racial discrimination in its guest policies).

170. 373 U.S. 244 (1963).

171. *Id.* at 247-48.

nation came from the state. The Court concluded that such state imposed segregation clearly violated the Equal Protection Clause.[172]

Although no recent decisions have held private conduct to be state action on the basis of state regulation, state regulation of private conduct apparently may still result in private conduct's being deemed state action. The Court has never overruled *Peterson* and continues to cite it with approval.[173] The Court's opinions, however, concentrate on defining the limits of the state action by regulation theory. In *Blum v. Yaretsky*,[174] the Court stated that "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."[175] These opinions indicate that the Court will treat private conduct as state action if the state compels the conduct or significantly encourages the conduct in some way. Because no recent decision has found state action based on such regulatory involvement, however, it is difficult to predict what level of involvement might satisfy the Court's test.[176]

Indeed, the *Blum* decision raises doubt that any regulation short of a specific directive to perform the challenged action or to make the challenged decision will suffice to treat the activity as state action. The plaintiffs in *Blum* were Medicaid patients who were involuntarily discharged from nursing homes or transferred from one level of nursing home care to another.[177] They alleged that the decisions of their nursing homes to

172. *Id.* at 248. The Court also found state action based on lesser state involvement in several other "sit-in" cases in the early 1960s. For a review of these decisions and their state action analysis, see Burke & Reber, *supra* note 2, at 1082-84.

173. *See Moose Lodge No. 107*, 407 U.S. at 173.

174. 457 U.S. 991 (1982).

175. *Id.* at 1004; *see also* Rendell-Baker v. Kohn, 457 U.S. 830, 840-41 (1982); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974) (finds no state action on the ground that the state in no way put its "imprimatur" on the challenged practice of the defendant); *Moose Lodge No. 107*, 407 U.S. at 176-77 ("However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage [the private defendant's] racial discrimination.").

176. *Cf.* Phillips, *supra* note 1, at 704, 715-16 (discussing the Court's decisions in *Jackson* and *Blum*, notes that the nexus between the state regulation and the challenged activity apparently "must be close indeed").

177. *Blum*, 457 U.S. at 995. The Medicaid program, established by 42 U.S.C. § 1396 (1976 ed. & Supp. IV) (current version at 42 U.S.C. § 1396 (1990)), provides federal funding to states that reimburse certain medical costs incurred by the poor. In order to receive federal funds under Medicaid, participating states must assist eligible persons needing "skilled nursing facilities." 42 U.S.C. §§ 1396a(a)(13)(B), 1396d(a)(4)(A). The program provides additional funds to states that also assist poor persons needing "intermediate care facility services." 42 U.S.C. § 1396d(a)(15); *see* § 1396d(c), (f). New York chose to participate in both parts of the program. *Blum*, 457 U.S. at 993-94. It thus

discharge or transfer them violated the Due Process Clause because they were not provided notice or an opportunity for a hearing.[178] The nursing homes made the transfer decisions only because New York and federal Medicaid regulations require periodic assessment of whether Medicaid recipients are receiving the appropriate level of care. The regulations required the nursing homes to " 'maintain a discharge planning program to . . . document that the facility has made and is continuing to make all efforts possible to transfer patients to the appropriate level of care or home as indicated by the patient's medical condition or needs.' "[179] Moreover, the nursing homes are subject to sanctions if they fail to assign Medicaid patients to the level of care the State deems appropriate.[180] As Justice Brennan points out[181] and the Court concedes,[182] the purpose of all these regulations and procedures, including the multiple levels of nursing home care, the need assessments, and the transfer decisions, is to control and reduce the cost of the Medicaid program to the state. The nursing homes would not make the assessments or initiate the transfers but for the state regulations requiring them to do so to serve the state objective of controlling Medicaid costs.[183]

The Court nonetheless held that the nursing homes' decisions to transfer the plaintiffs to another level of care was not state action because the "decisions ultimately turn on medical judgments made by private parties according to professional standards that are not established by the

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> provides Medicaid assistance to eligible persons who receive care in private nursing homes, which are designated as either "skilled nursing facilities" (SNFs) or "health related facilities" (HRFs). The latter provide less extensive, and generally less expensive, medical care than the former. . . . [F]ederal regulations require each nursing home to establish a utilization review committee (URC) of physicians . . . [who must] periodically assess[ ] whether each patient is receiving the appropriate level of care, and thus whether the patient's continued stay in the facility is justified. . . . If the URC determines that the patient should be discharged or transferred to a different level of care, . . . it must notify the state agency responsible for administering Medicaid assistance.

Id. at 994-95.

The named plaintiffs in *Blum* challenged URC decisions to transfer them to lower level care facilities, but a consent decree resolved the dispute with respect to such transfers initiated by URCs. The remaining issue that the Supreme Court addressed was "whether there is state action and a constitutional right to a pre-transfer evidentiary hearing in a patient transfer to a higher level care facility and/or a patient transfer initiated by the facility or its agents [as distinguished from one initiated by a URC]." *Id.* at 997-98 (citations omitted).

178. *Blum*, 457 U.S. 993.

179. *Id.* at 1018 (Brennan, J., dissenting) (quoting 10 N.Y. COMP. CODES R. & REGS. tit. 10, § 416.9(d)(1) (1980)). Also quoting this regulation, the majority acknowledged this state-imposed duty of the nursing homes. *Id.* at 1006-10.

180. *Id.* at 1018 (Brennan, J., dissenting); *see also id.* at 1010-11.

181. *Id.* at 1018, 1026-27 (Brennan, J., dissenting).

182. *Id.* at 1008 n.19.

183. *Id.*; *see also id.* at 1015, 1018-19, 1029 (Brennan, J., dissenting).

State."[184] Thus, "while the State commands the *making of some decision*, . . . sets general criteria for that decision," and imposes sanctions for making the decision incorrectly, "it still is not responsible for the *specific decision made*, which inevitably turns on an independent medical judgment."[185] If the state's regulatory role in *Blum* was insufficient to make the nursing homes' transfer decisions state action, it is difficult to imagine any state regulatory involvement or encouragement short of a specific directive to make a specific decision or perform a specific act that would result in a finding of state action.

Whatever level of state regulatory involvement is required to deem the action of a regulated entity state action, state action exists only because of the state regulatory involvement. Unless the private conduct is an exclusive function of the sovereign[186] or is one of those exceptional, if existent, private activities that the state has an affirmative constitutional duty to prevent,[187] the private entity is free to engage in the challenged conduct on its own initiative.[188] In effect, therefore, the state regulation—not the private conduct pursuant to the regulation—is the state action.[189] This distinction significantly affects the remedy that is appropriate when such state action is found to exist and to violate the Fourteenth Amendment. A plaintiff certainly should be entitled to damages caused by the impact of the unconstitutional regulation. Any prospective injunction, however, should prohibit only the enforcement of the unconstitutional regulation. The private entity should not be enjoined from engaging in the challenged conduct because the conduct is not state action if performed at the sole initiative of the private entity free from the influence of the offending regulation.[190]

In summary, private activities or decisions are state action under the Fourteenth Amendment at least when state regulations specifically compel the challenged action or decision. In articulating the test for determining when such state regulation will subject private action to the

184. *Id.* at 1008.

185. Phillips, *supra* note 1, at 715-16 (emphasis in original).

186. *See infra* notes 220-67 and accompanying text.

187. *See supra* notes 109-14 and accompanying text.

188. *See* McCoy, *supra* note 72, at 811.

189. *Id.*

190. *Id.* Professor McCoy has noted that although the "Court has never unambiguously enjoined private activity as a violation of the fourteenth amendment solely on the ground that the state had required . . . the activity," the Court seems to accept the assumption that such a result is possible. *Id.* at 809. Nonetheless, the "Court conspicuously failed to implement the assumption when the opportunity arose near the end of the *Moose Lodge* opinion. . . . [T]he Court merely enjoined enforcement of the regulation, leaving the licensee free to act as it chose." *Id.* at 811 (citing Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179 (1972)).

restraints of the Fourteenth Amendment, the Court has indicated that some lower level of state involvement in the challenged conduct—such as significant encouragement—might suffice.[191] The Court's application of the tests, however, leave little room for any lower level of involvement. Whatever level of regulatory involvement is necessary, the Court should only award damages and enjoin the regulation's enforcement if state action is found to exist as a result of state regulation. The private entity's actions are not by themselves state action, and the private entity generally remains free to engage in the challenged conduct in the absence of state influence.

E. Joint Participation with State Officials as State Action

Several Supreme Court opinions recognize a "joint participation" or "symbiosis" theory of state action.[192] Under this theory, state action exists if the state becomes so intertwined with a private enterprise that it is deemed to be a partner or joint participant in the enterprise. Because this approach to state action, more than any other, depends upon "sifting [the] facts and weighing [the] circumstances"[193] of each case to evaluate the cumulative impact of all the ties between the state and the private entity, the boundaries of this theory are unclear.[194]

The Court originated the joint participation theory in *Burton v. Wilmington Parking Authority*.[195] In *Burton*, a privately operated restaurant refused to serve the plaintiff because of his race. The plaintiff claimed that the restaurant's discrimination violated the Equal Protection Clause of the Fourteenth Amendment. Although the state was not involved in the restaurant's decision not to serve the plaintiff, the Court held that the restaurant's discrimination was state action because of the state's close ties to the restaurant.[196] The Court based this conclusion on the cumulative effect of the state's ties to the restaurant as opposed to any single determinative fact. "The State ha[d] so far insinuated itself into a position of interdependence with [the restaurant], that it must be recognized as a joint participant in the challenged activity."[197] The restaurant was

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

192. *See* Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982); Lugar v. Edmonson Oil Co., 457 U.S. 922, 941-42 (1982); *Blum*, 457 U.S. at 1010-11; Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357-58 (1974); *Moose Lodge No. 107*, 407 U.S. at 172-74.

193. Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

194. *See* McCoy, *supra* note 72, at 809 n.98; *cf. Burton*, 365 U.S. at 728 (Harlan, J., dissenting).

195. 365 U.S. 715. Chief Justice Rehnquist later named the theory "symbiosis" in *Moose Lodge No. 107*, 407 U.S at 175.

196. *Burton*, 365 U.S. at 723-26.

197. *Id.* at 725.

located in a parking building owned and operated by the Wilmington Parking Authority, a state agency, and it leased its space from the Parking Authority. The land was purchased and the building constructed with public funds.[198] In fact, the Parking Authority leased part of the building to commercial enterprises like the restaurant specifically to provide sufficient capital to finance the parking facility.[199] Moreover, the restaurant and the Parking Authority received mutual benefits from their relationship. While the parking facility provided convenient parking for the restaurant's patrons, the restaurant increased demand for the parking facility.[200] Any improvements made by the restaurant enjoyed the Parking Authority's tax exemption. Perhaps most importantly, the Court determined that the Parking Authority benefitted from the restaurant's racial discrimination and that the "profits earned by discrimination" were indeed "indispensable" to the Parking Authority's financial success.[201] The Court held that

> addition of all these activities, obligations and responsibilities of the Authority, the benefits mutually conferred, together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn.[202]

Perhaps because of the theory's ambiguity, the Court has not really used it to find state action since deciding *Burton*.[203] The Burger Court's state action decisions discuss *Burton* often at length, but they distinguish it and find no state action.[204] Although the Court's refusal to find state action on the basis of *Burton* appears to be correct in many of the Burger Court's decisions, the Court's failure to find state action in *Blum v. Yaretsky*[205] casts doubt on the theory's viability.

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198. *Id.* at 723.
199. *Id.* at 719.
200. *Id.* at 724.
201. *Id.*
202. *Id.*
203. McCoy, *supra* note 72, at 808. The Court has cited and discussed *Burton* in most of its state action decisions, but in most it has not found state action to exist in the challenged conduct. *See* Blum v. Yaretsky, 457 U.S. 991, 1010 (1982); Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357-58 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172-74 (1972). The Court did cite *Burton* approvingly in Reitman v. Mulkey, 387 U.S. 369, 375, 379-80 (1967), in which it found state action present, but the Court did not base its state action finding on the *Burton* symbiosis theory of state action. *Id.* at 380. The Court also decided Evans v. Newton, 382 U.S. 296 (1966), in a manner similar to *Burton*. *See id.* at 301.
204. *See, e.g.*, *Jackson*, 419 U.S. at 358-59; *Moose Lodge No. 107*, 407 U.S. at 172-74.
205. 457 U.S. 991 (1982).

Blum best illustrates the Burger Court's reluctance to apply the joint participation theory of state action. The plaintiffs in *Blum* contended that their nursing homes' decisions to transfer them to a lower level of care violated due process because the homes made the decisions without giving the plaintiffs adequate notice or hearing.[206] The plaintiffs argued that the nursing homes' decisions were state action because of the close ties and symbiotic relationship between the state and the nursing homes.[207] In addition to licensing and regulating the facilities, the state's Medicaid program[208] paid the medical expenses of more than ninety percent of the patients in the facilities.[209] Because the Medicaid patients could not afford the homes' services themselves, the facilities, to a considerable extent, owed their economic existence, or at least much of their financial success, to the state funding program. The state also benefitted from the nursing homes' activities, including specifically the challenged transfer decisions. The nursing homes transfer patients only because Medicaid regulations require them periodically to assess the medical need of their patients and to transfer them to the appropriate level of care.[210] The assessment and transfer take place solely to control and reduce the cost of the state's Medicaid program.[211] The nursing homes thus receive additional patients and income because of the Medicaid program, and the state receives a system of cost control administered by the private nursing homes at the state's insistence. Although the relationship between the state and the nursing homes is similar to that between a regulatory agency and a regulated industry, the state funding, the mutual benefits, and the state-required need assessment and transfer decisions make the state at least as much of a joint participant in the challenged decisions of the nursing homes as the Parking Authority was in *Burton*.

The Court, however, held that state action did not exist under the joint participation theory.[212] Without reviewing the aggregate impact of the many contacts between the state and the nursing homes, the Court simply stated:

> As we have previously held, privately owned enterprises providing services that the State would not necessarily provide, even though

206. *Blum*, 457 U.S. at 996.
207. *Id.* at 1010-11.
208. For a brief summary of this program, see *supra* note 177.
209. *Blum*, 457 U.S. at 1011.
210. *Id.* at 1008 n.19; *see also id.* at 1015, 1018-19, 1029 (Brennan, J., dissenting).
211. *Id.* at 1008 n.19; *see also id.* at 1014-17, 1026-27 (Brennan, J., dissenting).
212. The Court also rejected other theories of state action as inapplicable. It held that the state's regulation of the nursing homes, including its requirement that they make the challenged need assessments and transfer decisions, did not make the transfer decision state action. *Id.* at 1004; *see supra* notes 177-85 and accompanying text.

> they are extensively regulated, do not fall within the ambit of *Burton*. . . . That programs undertaken by the State result in substantial funding of the activities of a private entity is no more persuasive than the fact of regulation of such an entity in demonstrating that the State is responsible for decisions made by the entity in the course of its business.[213]

The Court ignored the state's symbiotic relationship with the nursing homes and the fact that the challenged decision was made at the insistence of the state solely for its own benefit.[214] Although the facts in *Blum* appear to fit into *Burton*'s state action theory, the Court firmly refused to use that theory.[215]

Despite the Burger Court's reluctance to apply or faithfully analyze *Burton*'s joint participation theory of state action, the Court has not overruled *Burton*.[216] Even Chief Justice Rehnquist's opinions discuss the joint participation theory sometimes at length before holding it inapplicable.[217] The theory thus remains applicable at least to cases with facts specifically paralleling those in *Burton*. The joint participation theory also remains available for later Courts to resurrect as a basis for finding state action whenever a majority of Justices find sufficient "factual bits and pieces" to make *Burton*'s "vague generalization."[218] Indeed, several

213. *Blum*, 457 U.S. at 1011. The decisions challenged in *Blum* were hardly made "in the course of [the nursing home's] business." The challenged transfer decisions were made pursuant to state regulatory requirements to serve the state's policy interest of controlling the costs of its Medicaid program. *Id.* at 1026-27 (Brennan, J., dissenting). The nursing homes would not have made the transfer decisions if the plaintiffs had been paying their own costs. If a paying patient requests to stay at a facility that provides a high level of care, one must assume that the private, profit-seeking facility would be most happy to oblige, even if the facility did not believe the patient needed the level of care it provided. As the Court concedes in another part of its opinion, the transfer decision takes place solely at the state's insistence to serve the state's interest. *Id.* at 1008 n.19.

214. *See id.* at 1008; *see also id.* at 1014-17 (Brennan, J., dissenting); *supra* notes 208-11 and accompanying text.

215. As the Court had done in several previous cases, it refused to evaluate the ties between the state and the nursing homes in the aggregate. It instead analyzed the various contacts seriatim. Schneider, *supra* note 1, at 1164-66; *see* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349-64 (1974) (Douglas, J., dissenting).

216. The *Blum* Court came the closest to explicitly criticizing the joint participation theory. The Court characterized the plaintiff's argument as "the rather vague generalization that such a relationship exists between the State and the nursing homes it regulates that the State may be considered a joint participant in the homes' discharge and transfer decisions." *Blum*, 457 U.S. at 1010. Relying as it does on "sifting facts and weighing circumstances," Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961), that sort of "vague generalization" is precisely what the Court relied upon in *Burton*.

217. *See, e.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 174-77 (1972).

218. *See* R. ROTUNDA, J. YOUNG & J. NOWAK, *supra* note 14, at 184-85; McCoy, *supra* note 71, at 809 n.98.

Justices have resurrected the theory.[219]

F. Assumption of State Powers: The Government Function Theory of State Action

Each of the state action theories discussed to this point require some governmental involvement. The difficulty in applying the Fourteenth Amendment to these latter cases lies not in the absence of official activity but in distinguishing the state's actions from the private conduct to which it relates. These applications of the state action doctrine, therefore, do not depart substantially from the state action doctrine that originated in the *Civil Rights Cases*.[220]

In a line of decisions beginning with *Marsh v. Alabama*,[221] however, the Supreme Court recognized a government function theory of state action that radically departs from earlier notions of state action. Under this theory, private entities are subject to fourteenth amendment restraints when they undertake functions or assume powers that the government ordinarily performs or exercises.[222] Unlike the state action theories discussed above, the government function doctrine permits the application of the Fourteenth Amendment to private conduct in which there is no official involvement.

Marsh, the first case that clearly applied the government function theory,[223] arose from the attempts of a Jehovah's Witness to distribute religious literature on the sidewalks of Chickasaw, Alabama, a company town owned by Gulf Shipbuilding Corporation. After she refused to stop distributing the literature and to leave the town, company officials had her arrested for trespassing.[224] State courts convicted her, and she appealed to the United States Supreme Court. The Supreme Court reversed her conviction. The Court first noted that the First and Fourteenth Amendments prohibit a state or municipality from stopping the distribution of literature as the Gulf Shipbuilding Corporation had

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219. *See infra* notes 425-36 and accompanying text.

220. 109 U.S. 3 (1883).

221. 326 U.S. 501 (1946).

222. *See* McCoy, *supra* note 72, at 796; Phillips, *supra* note 1, at 690-91.

223. Seeds of a government function theory of state action may be found in several of the earlier *White Primary Cases*, in which the Court opened up black participation in party primaries, but "it made its first definite appearance" in *Marsh*. Phillips, *supra* note 1, at 690-91 & n.36. For a discussion of the *White Primary Cases* in this context, see Schneider, *supra* note 78, at 746-52, in which Professor Schneider analyzes the state action rulings in Nixon v. Herndon, 273 U.S. 536 (1927), Nixon v. Condon, 286 U.S. 73 (1932), Smith v. Allwright, 321 U.S. 649 (1944), and Terry v. Adams, 345 U.S. 461 (1953).

224. *Marsh*, 326 U.S. at 503-04.

done.[225] The values underlying these two Amendments, the Court indicated, apply to the actions of Gulf Shipbuilding in its company town with the same force that they apply to any other town.[226] The Court determined that the town functioned no differently from any other town and then stated that: "Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free."[227] Because Gulf Shipbuilding Corporation assumed the essentially "public function" of operating an entire town including streets, sewers, residential buildings, and a business block freely accessible and open to the public,[228] the Court held the First and Fourteenth Amendments prohibited the town's corporate managers from "[curtailing] the liberty of press and religion" of the town residents.[229]

During the twenty years following *Marsh*, the Court relied on *Marsh* and its reasoning to apply constitutional restrictions to private conduct in several other contexts. In *Terry v. Adams*,[230] the Court found that primary elections held by private political associations constituted state action subject to the Fifteenth Amendment.[231] Although no opinion commanded a majority of the *Terry* Court, several Justices apparently based their decision on the premise that the private political association assumed the traditional government function of conducting elections for public office, thereby subjecting itself to constitutional restraints.[232] The Court held in *Evans v. Newton*[233] that the operation of a public park is a government function and, therefore, that the private op-

225. *Id.* at 504.

226. *See id.* at 507-09.

227. *Id.* at 507.

228. Significantly, the company assumed these governmental roles on its own initiative. The state had no role in the company's undertaking these functions other than not intervening to regulate or stop it. The state certainly did not affirmatively or formally delegate the tasks to the company. The Court applied the Fourteenth Amendment to the company's activities, therefore, entirely on the basis of the company's independent actions without regard to the lack of state involvement.

229. *Id.* at 502, 508. *Marsh* may be interpreted as holding that the state court's involvement in the Jehovah's Witness trespass conviction was the state action that violated the Fourteenth Amendment. Subsequent judicial readings as well as most academic interpretations of *Marsh*, however, focus on the actions of Gulf Shipbuilding Corporation in assuming a role normally performed by the government as the determinative factor implicating the Fourteenth Amendment. *See* Flagg Bros. v. Brooks, 436 U.S. 149, 158-59 (1978); G. GUNTHER, *supra* note 78, at 988-89; McCoy, *supra* note 72, at 797 n.44; Phillips, *supra* note 1, at 692 & n.44.

230. 345 U.S. 461 (1953).

231. *Id.*

232. McCoy, *supra* note 72, at 797; *see* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974).

233. 382 U.S. 296 (1966).

eration of a segregated park violated the Equal Protection Clause.[234] In *Amalgamated Food Employees v. Logan Valley Plaza*,[235] the Court's most far-reaching application of the government function doctrine, the Court held that a shopping center is "the functional equivalent to the business district of Chickasaw involved in *Marsh*" and thus is subject to certain first and fourteenth amendment restraints.[236] By undertaking the function of maintaining common areas, parking lots, and driveways in shopping centers, which were replacing downtown business districts throughout the country, the Court reasoned, the shopping center owners assumed a function traditionally performed by municipal governments.[237] The Court accordingly held that the First Amendment prohibited the owners from excluding members of the public seeking to exercise first amendment rights on the shopping center premises, at least when the ideas they wished to convey were related to the shopping center.[238]

No Supreme Court decision since *Logan Valley* has used the government function theory to apply the Fourteenth Amendment to private conduct. Indeed, the Court restricted the potentially broad application of the government function theory espoused in *Logan Valley*. *Lloyd Corp. v. Tanner*[239] limited *Logan Valley*, and *Hudgens v. NLRB*[240] then overruled it, holding that a shopping center's refusal to permit the distribution of literature on its premises is *not* state action subject to the Fourteenth Amendment.[241] The Court further clarified the government function theory in *Jackson v. Metropolitan Edison Co.*[242] and *Flagg Bros. v. Brooks*.[243]

234. *Id.* at 302. *But see* Flagg Bros. v. Brooks, 436 U.S. 149, 159 n.8 (1978) (Writing for the Court, Chief Justice Rehnquist expresses doubt that *Newton* intended to establish "that the operation of a park for recreational purposes is an exclusively public function.").

235. 391 U.S. 308 (1968).

236. *Id.* at 318.

237. *See id.* at 319.

238. *Id.* at 319-20.

239. 407 U.S. 551 (1972).

240. 424 U.S. 507 (1976).

241. The Court in *Hudgens* distinguished privately owned and operated shopping centers from the company town in *Marsh*. Unlike the shopping centers in *Logan Valley*, *Lloyd Corp.*, and *Hudgens*, the Court noted, the private business corporation in *Marsh* assumed "all of the attributes of a state-created municipality[,] . . . performing the full spectrum of municipal powers and [standing] in the shoes of the State." *Hudgens*, 424 U.S. at 519. For additional discussion of the Court's treatment of the government function doctrine in *Hudgens* and *Lloyd Corp.*, see McCoy, *supra* note 72, at 799-800 ("A literal reading of *Hudgens* and *Lloyd* indicates that the private party must assume all of the functions of a municipal or state government before it would be subject to the Fourteenth Amendment in the performance of those functions.").

242. 419 U.S. 345 (1974).

243. 436 U.S. 149 (1978).

In *Jackson*, the Court explained that in order for the government function theory to subject the activities of a private defendant to the Fourteenth Amendment, the private entity must "exercise . . . powers traditionally exclusively reserved to the State."[244] The Court explained that a private entity is not subject to the restraints of the Fourteenth Amendment just because its activities are " 'affected with the public interest.' "[245] Likewise, " 'the fact that government has engaged in a particular activity does not necessarily mean that an individual entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions.' "[246] The Court then held that Metropolitan Edison's provision of electric power was not state action under the government function theory even though its enterprise was "affected with the public interest" and even though many municipal governments operate electric utilities.[247] The operation of an electric utility and the provision of electric power to consumers, the Court noted, are "not traditionally the exclusive prerogative of the State."[248] The utility's decision to terminate a customer's service without providing a hearing, therefore, was not state action under the government function doctrine and was not subject to fourteenth amendment due process constraints.

The Court addressed the government function theory at greater length in *Flagg Bros.*, again focusing on the theory's exclusivity requirement. As discussed above,[249] Brooks, the plaintiff in *Flagg Bros.*, contended that the defendant Flagg Brothers' sale of her belongings without a hearing violated the Fourteenth Amendment. She argued that Flagg Brothers was imposing a resolution to their dispute and such dispute resolution is traditionally an exclusive function of government.[250] Flagg Brother's threatened sale, she argued, thus was state action under the government function theory and violated the Fourteenth Amendment.[251]

The Court held that Flagg Brothers' proposed sale of Brooks' property pursuant to the state law was not state action under the government function theory.[252] The Court noted that *Marsh v. Alabama*[253] and

244. *Jackson*, 419 U.S. at 352.
245. *Id.* at 353.
246. *Id.* at 354 n.9 (quoting Evans v. Newton, 382 U.S. 296, 300 (1966)).
247. *Id.* at 353.
248. *Id.*
249. *See supra* notes 132-38 and accompanying text.
250. Flagg Bros. v. Brooks, 436 U.S. 149, 157 (1974).
251. *Id.* at 168 (Stevens, J., dissenting).
252. The Court also rejected Brooks' argument that Flagg Brothers' actions were state action because they were authorized or encouraged by the state's enacting N.Y. U.C.C. § 7-210 (McKinney 1964), pursuant to which Flagg Brothers sold her belongings. *See supra* notes 138-51 and accompanying text.

Terry v. Adams,[254] the Court's only prior applications of the government function theory that remained viable,[255] "have in common the feature of exclusivity. . . . [T]he elections held by the Democratic Party and its affiliates were the only meaningful elections in Texas, and the streets owned by the Gulf Shipbuilding Corp. were the only streets in Chickasaw . . . ."[256] In contrast, the Court stated, "the proposed sale by Flagg Brothers under § 7-210 is not the only means of resolving [the] purely private dispute" between Brooks and Flagg Brothers.[257] The *Flagg Bros.* Court apparently held that in order for a private entity's activities to be deemed state action under the government function theory, the activity must be one traditionally undertaken exclusively by the sovereign *and* it must substantially displace the government's traditional role in that activity.[258] Flagg Brothers' sale of Brooks' belongings met neither of these requirements. While Flagg Brothers' sale of Brooks' belongings may

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253. 326 U.S. 501 (1946).

254. 345 U.S. 461 (1953).

255. The Court noted that Amalgamated Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968), had been overruled and expressed doubt that Evans v. Newton, 382 U.S. 296 (1966), was based on a government function theory. *Flagg Bros.*, 436 U.S. 159 & n.8.

256. *Flagg Bros.*, 436 U.S. at 159-60.

257. *Id.* at 160.

258. McCoy, *supra* note 72, at 801; *see also Flagg Bros.*, 436 U.S. at 159-64. Some commentators have noted that Chief Justice Rehnquist's opinion in *Flagg Bros.* "seems to waver between two rather different conceptions of 'exclusivity.' " Phillips, *supra* note 1, at 707 n.128; *see also* Schneider, *supra* note 78, at 778-79. Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), established the requirement that the function must be one that has been "traditionally exclusively reserved to the state" in the sense that only the government performed the function or exercised the power in question. *Id.* at 352-53. The Court continued to impose this requirement in *Flagg Bros.*, 436 U.S. at 148-60. The *Flagg Bros.* opinion, however, also discusses "exclusivity" in the sense that "the private actor provides the 'exclusive' forum, channel, or means for exercising a particular constitutional right." Phillips, *supra* note 1, at 707 n.128; *see Flagg Bros.*, 436 U.S. at 159-60.

Rather than "wavering" between two conceptions of "exclusivity," Chief Justice Rehnquist added a requirement for the invocation of the government function theory. Not only must the function assumed by the private actor be one "traditionally exclusively reserved to the State," *Jackson*, 419 U.S. at 352, but the private actor's performance of the function must also replace the state's performance of it. *See* McCoy, *supra* note 72, at 801. Thus, even though the operation of elementary and secondary schools has become a traditional, arguably exclusive governmental function, operators of parochial schools are not subject to the Fourteenth Amendment. Under the government function doctrine, parochial schools do not operate to the exclusion of governmentally operated public schools. If, however, a county were to close down its public schools and pay for its citizens to attend local parochial schools instead, the parochial schools then might be subject to fourteenth amendment restrictions under the government function doctrine. *Compare Jackson*, 419 U.S. at 354 n.9 (noting that parochial schools are not necessarily subject to the Fourteenth Amendment even though they perform a function "clothed with the public interest") *with Flagg Bros.*, 436 U.S. at 163-64 (suggesting that states and municipalities have administered education with a relatively great degree of exclusivity such that, under some circumstances, private educational institutions might be deemed state action under the government function doctrine).

have constituted a resolution to the parties' private dispute, a function that government traditionally performs, various other private remedies traditionally were available for resolving debtor-creditor disputes.[259] The state law resolution, therefore, was not a function that traditionally has been the exclusive prerogative of government. Likewise, various judicial remedies still existed for bailors in Brooks' position.[260] Flagg Brothers' assumption of the dispute resolution function could not be said to displace the state's role in resolving private disputes. Because Flagg Brothers' sale of Brooks' belongings pursuant to section 7-210 did not meet these exclusivity requirements, the Court held that it was not state action under the government function theory and thus could not violate the Fourteenth Amendment.[261]

Although the Court has not used the government function theory to hold a private entity subject to the restraints of the Fourteenth Amendment since 1968, the Court's discussions of the theory in more recent cases indicate that the theory remains viable.[262] The Court has restricted its application since the theory's broadest articulation in *Amalgamated Food Employees v. Logan Valley Plaza,*[263] but the Court apparently would apply the theory if presented with a case that meets the theory's

259. *Flagg Bros.*, 436 U.S. at 160. Writing for the Court, Chief Justice Rehnquist notes, for example, that Brooks could have sought at the time she authorized the storage of her belongings "a waiver of Flagg Brothers' right to sell her goods" to be included as part of the original bailment contract. *Id.*

260. *Id.* "The challenged statute itself," the Court noted, "provides a damages remedy against the warehouseman for a violation of its provisions." *Id.* Likewise, the Court noted, a bailor such as the appellee in the companion case to *Flagg Bros.* who claims that she never authorized Flagg Brothers to store her property, can "replevy her goods at any time under state law." *Id.*

261. Chief Justice Rehnquist's opinion said that New York's "system of rights and remedies, recognizing the traditional place of private arrangements in ordering relationships in the commercial world, can hardly be said to have delegated to Flagg Brothers an exclusive prerogative of the sovereign." *Id.* Chief Justice Rehnquist perceived that disputes between debtors and creditors and bailors and bailees were historically subject to a range of both private methods of resolution and a variety of judicial remedies. Flagg Brothers' actions to "resolve" privately its dispute with Brooks did not usurp a function that was traditionally the exclusive role of government and did not replace the full range of state remedies. They accordingly could not constitute state action under the government function theory.

A difficulty in applying the government function doctrine to *Flagg Bros.* lies in the Court's and commentators' acceptance of Brooks's argument that Flagg Brothers performed a function of dispute resolution. In fact, the state resolved the dispute that Brooks had with Flagg Brothers when it passed N.Y. U.C.C. § 7-210 (McKinney 1964); Brooks simply disliked the state's resolution. The state basically sides with the warehouseman permitting the sale of bailors' property without intervention. The state then leaves the bailor only a remedy for damages if the warehouseman violates the statutory provisions.

262. *See Flagg Bros.*, 436 U.S. 149; *Jackson*, 419 U.S. 345.

263. 391 U.S. 308 (1968).

new, more restrictive requirements.[264] Indeed, the Court noted in *Flagg Bros.* that "there are a number of state and municipal functions not covered by our election cases or governed by the reasoning of *Marsh* [*v. Alabama*][265] which have been administered with a greater degree of exclusivity by States and municipalities than has the function of so-called 'dispute resolution' [before the Court in *Flagg Bros.*]."[266] In summary, the Court likely would subject private activities to fourteenth amendment restraints if: (1) the activities constitute a function that traditionally has been performed only by government; and (2) the private entity's assumption of the function substantially replaces the government's traditional performance of the function.[267]

264. Rather than rejecting the theory outright, the Court merely has found the theory inapplicable to the cases before it. *See, e.g., Flagg Bros.*, 436 U.S. at 160; *Jackson*, 419 U.S. at 353. The Court's opinions discuss the theory at length, refining rather than discarding it. *See Flagg Bros.*, 436 U.S. at 160; *Jackson*, 419 U.S. at 353.

265. 326 U.S. 501 (1946).

266. *Flagg Bros.*, 436 U.S. at 163. The Court listed some examples of such functions as

> education, fire and police protection, and tax collection. We express no view as to the extent, if any, to which a city or State might be free to delegate to private parties the performance of such functions and thereby avoid the strictures of the Fourteenth Amendment. The mere recitation of these possible permutations and combinations of factual situations suffices to caution us that their resolution should abide the necessity of deciding them.

Id. at 164-65.

267. Even if these requirements are met, however, all of the private entity's actions would not be subject to the Fourteenth Amendment. Only those actions that are part of the performance of the traditionally exclusively governmental function would be subject to the Amendment. McCoy, *supra* note 72, at 818-20. As Professor McCoy explains:

> [T]he company town owner in *Marsh v. Alabama* was held to be acting as the state, not in some abstract universal sense with respect to all individuals in all contexts, but only in its dealings with those seeking to exercise freedom of speech in the town's common areas. Only with respect to those plaintiffs and their specific interest did the Court declare that the company had assumed a traditional role of state government vis-à-vis its citizens. . . . It seems too clear to warrant argument, however, that the *Marsh* holding did not mean that the town's company owner was acting as the state subject to the restrictions of the Fourteenth Amendment in its manufacturing and sales practices. The critical difference is that in its dealings with the consumers of those activities, the company did not occupy the role of the state in a traditional state-citizen relationship.

Id. at 819.

This limitation on the application of state action theories to hold private actors bound to the Fourteenth Amendment is not limited to the government function theory. There must be a nexus between the defendant's specific activity that the plaintiff challenges and the theory of state action by which the defendant can be said to be a state actor for fourteenth amendment purposes. *See generally* McCoy, *supra* note 71.

III. State Action Decisions of the Rehnquist Court

The Rehnquist Court has decided four major state action cases.[268] The Court's decisions and the dissenting opinions in three of those cases reflect shifts in the state action doctrine.[269] This section analyzes these three cases to shed light on the Rehnquist Court's direction in its development of state action doctrine.

A. *San Francisco Arts and Athletics, Inc. v. United States Olympic Committee*[270]

The Amateur Sports Act of 1978 grants the United States Olympic Committee (USOC), a federally chartered nonprofit corporation, the exclusive right to use the word "Olympic" and various Olympic symbols for commercial purposes.[271] San Francisco Arts and Athletics, Inc. (SFAA), a nonprofit California corporation, sought to hold an event billed as the "Gay Olympic Games." To help finance the event, SFAA sold shirts, buttons, and other merchandise bearing the phrase "Gay Olympic Games."[272] After SFAA refused to stop using the word "Olympics," the USOC filed an action in federal court to enjoin SFAA's use of the word. Among its several defenses,[273] SFAA contended that the USOC's refusal to grant it a license to use "Olympics" violated the Fifth Amendment.[274] SFAA noted that the USOC licensed the use of the word "Olympics" to organizations sponsoring the "Special Olympics" and the "Junior Olympics."[275] Therefore, SFAA argued, the USOC's refusal to permit the word's use for the "Gay Olympic Games" denied SFAA equal protection of the laws.[276]

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268. NCAA v. Tarkanian, 488 U.S. 179 (1988); West v. Atkins, 487 U.S. 42 (1988); Tulsa Professional Collection Servs. v. Pope, 485 U.S. 478 (1988); San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987).

269. The Court had little disagreement about the second case, *West*, 487 U.S. 42, because it concerned the activities of a prison doctor who performed his function as an independent contractor. Because of a prison doctor's unique role, the Court held unanimously that his conduct was state action.

270. 483 U.S. 522 (1987).

271. *See* 36 U.S.C. § 380 (1988); *San Francisco Arts & Athletics,* 483 U.S. at 526.

272. *San Francisco Arts & Athletics,* 483 U.S. at 526.

273. In addition to its equal protection argument, SFAA contended: (1) that the Amateur Sports Act granted the USOC only a traditional trademark and that SFAA could therefore use the word because such use would not create confusion regarding any relation of the USOC to SFAA's planned "Gay Olympic Games"; and (2) that Congress's granting exclusive rights to the word violated the First Amendment. The Court rejected these contentions in a seven to two majority. *Id.* at 528-40.

274. *Id.* at 542.

275. *Id.* at 542 n.22.

276. Although the Equal Protection Clause of the Fourteenth Amendment expressly applies only to the states, the Court construes the fifth amendment Due Process Clause, which is

With a majority of only five Justices,[277] the Court held that the USOC's refusal to grant SFAA permission to use the word "Olympics" was not state action and thus could not violate the Fifth Amendment.[278] In an opinion similar to the many Burger Court opinions refusing to find state action,[279] Justice Powell rejected in laundry list fashion the possible bases for finding state action. He stated that the USOC could not be a state actor simply because it received a corporate charter, because the federal government statutorily regulates it, or because Congress granted it exclusive rights to use the word "Olympic."[280]

With little more discussion, the Court rejected the dissent's contention that the USOC's actions were state action under the government function theory. Although the USOC clearly serves "a national interest," Justice Powell wrote, " '[t]he fact [t]hat a private entity performs a function which serves the public does not make its acts [governmental] action.' "[281] The opinion noted that the conduct and coordination of amateur sports has long been performed entirely by private entities.[282] In fact, Congress enacted the Amateur Sports Act to alleviate " 'the disorganization and the serious factual disputes that seemed to plague amateur sports in the United States' "[283] by authorizing the USOC to coordinate those traditionally private activities. Because the USOC's activities traditionally were performed by private entities rather than the government, the Court held that the USOC plainly was not a state actor under the government function doctrine.[284]

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applicable only to the federal government, to require the federal government to afford all citizens equal protection of the laws. *Id.* at 542 n.21.

277. Chief Justice Rehnquist and Justices Scalia, Stevens, and White joined Part IV of Justice Powell's opinion, which addressed the state action issue. Seven Justices, including Justices Blackmun and O'Connor in addition to the aforementioned Justices, joined the remainder of the opinion.

278. *San Francisco Arts & Athletics,* 483 U.S. at 542-47.

279. *Compare* Rendell-Baker v. Kohn, 457 U.S. 830, 839-43 (1982), *and* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352-59 (1974), *with San Francisco Arts & Athletics,* 483 U.S. 522.

280. *San Francisco Arts & Athletics,* 483 U.S. at 543-44.

281. *Id.* at 544 (quoting *Rendell-Baker,* 457 U.S. at 842).

282. *Id.* at 544-45.

283. *Id.* at 544 (quoting H.R. REP. NO. 1627, 95th Cong., 2d Sess. 8 (1978)).

284. The Court's treatment of the exclusivity requirement of the government function theory focuses on the fact that the coordination of amateur sports has never been a function performed only by the government. The opinion did not address the other aspect of "exclusivity" that Chief Justice Rehnquist discussed in Flagg Bros. v. Brooks, 436 U.S. 149 (1978): the apparent requirement that the activity of the purported governmental actor be the only outlet for such activity. The *Flagg Bros.* Court held that Flagg Brothers did not serve an "exclusively" governmental function partly because Flagg Brothers' sale of the plaintiff's belongings was not the only mechanism available to resolve their dispute. *Id.* at 159-60; *see supra* note 257-61. The USOC's activities satisfy this "exclusivity" concept because one must go through

Justice Powell also wrote that "[m]ost fundamentally, this Court has held that a government 'normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement . . . that the choice must in law be deemed to be that of the [government].' "[285] The Court reasoned that because the record contained no evidence that the government had coerced or encouraged the USOC's challenged decision to disallow SFAA's use of the word "Olympics," that decision was not state action.[286] The Court did not make clear whether this coercion-encouragement requirement was an independent theory of state action, whether it applied to the government function theory of state action, or whether it applied to all the state action theories.[287]

Finally, the Court rejected in a footnote the dissent's finding that the government was a joint participant in the USOC's actions.[288] Apparently applying the coercion-encouragement requirement,[289] the Court found that nothing in the record "demonstrate[d] that the Federal Government can or does exert any influence" over the USOC's actions to license or prevent use of the word "Olympics."[290] "[T]his type of 'close nexus between the [Government] and the challenged action of the [USOC]' " is required in order for the USOC to be deemed a joint participant with the government.[291]

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the USOC to participate in the Olympics or various other international competitions over which the USOC has jurisdiction. Even if the USOC's actions in conducting and coordinating American competition in international athletics were deemed to be state action, however, that result would not mean necessarily that all actions of the USOC are state action. *See supra* note 267; McCoy, *supra* note 72, at 819.

285. *San Fransisco Arts & Athletics*, 483 U.S. at 546 (quoting Blum v. Yaretsky, 457 U.S. 991, 1004 (1982)).

286. *Id.* at 547.

287. Application of this requirement to all theories of state action would radically curtail the state action doctrine. The requirement plainly would preclude application of the symbiosis theory as it was conceived in Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961), because the Wilmington Parking Authority certainly did not coerce or encourage the Eagle Cafe's decision not to serve blacks. The requirement would eliminate the concept of the government function theory expressed in Marsh v. Alabama, 326 U.S. 501 (1946), because the state of Alabama did not coerce or encourage Gulf Shipbuilding Corporation's decision to prohibit Jehovah's Witnesses from distributing literature in the streets of its company town.

288. *San Francisco Arts & Athletics*, 483 U.S. at 547 n.29.

289. *See supra* note 286 and accompanying text.

290. *San Francisco Arts & Athletics*, 483 U.S. at 547 n.29. The USOC could have decided to permit everyone or no one to use its symbols. It decided without government influence to license its symbols to only a few entities and to prohibit the symbols' use by such entities as the SFAA.

291. *Id.* (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974)).

Not surprisingly,[292] Justices Brennan and Marshall dissented from the Court's state action ruling. Writing for himself and Justice Marshall, Justice Brennan declared that the USOC's decision to prohibit SFAA's use of "Olympics" was state action on two independent grounds. First, he found that the USOC is a governmental actor because it performs "important governmental functions."[293] Conceding that conduct is not a state function just because it serves the public, Justice Brennan noted that "[t]he Court has repeatedly held . . . that 'when private individuals or groups *are endowed by the State* with powers or functions *governmental* in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations.' "[294] Finding that a private entity's actions constitute state action is even more "appropriate when the function performed is 'traditionally the exclusive prerogative' of government."[295]

Justice Brennan found that the USOC performed several traditional government functions that justify the Fifth Amendment's application to the USOC's actions. The USOC represents the United States to the world community. By statute, it is the exclusive coordinating body for amateur athletic activity in the United States relating to international amateur athletic competition.[296] Pursuant to this statutory authority, the USOC appoints particular organizations as the "national governing body" for particular sports.[297] The USOC also resolves disputes between various amateur sports participants and organizations relating to international competition.[298] Based on these functions, Justice Brennan determined that "the USOC has been endowed by the Federal Government with the exclusive power to serve a unique national, administrative, adjudicative, and representational role."[299]

The second reason that Justices Brennan and Marshall found the USOC's conduct to be state action was that the government was a joint participant in the USOC's actions. Moreover, Justices O'Connor and

292. Justices Brennan and Marshall dissented from most of the Burger Court's refusals to find state action. *See, e.g.*, Blum v. Yaretsky, 457 U.S. 991 (1982); Rendell-Baker v. Kohn, 457 U.S. 830 (1982); *Jackson*, 419 U.S. 345; Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1974). *But see* Polk County v. Dodson, 454 U.S. 312 (1981).

293. *San Francisco Arts & Athletics*, 483 U.S. at 548 (Brennan, J., dissenting).

294. *Id.* at 549 (Brennan, J., dissenting) (emphasis in original) (quoting Evans v. Newton, 382 U.S. 296, 299 (1966)).

295. *Id.* (quoting *Jackson*, 419 U.S. at 353).

296. 36 U.S.C. § 375(a)(1) (1988) (quoted in *San Francisco Arts & Athletics*, 483 U.S. at 554).

297. *San Francisco Arts & Athletics*, 483 U.S. at 554 (citing 36 U.S.C. § 375(a)(4)).

298. *Id.* (citing 36 U.S.C. §§ 375(a)(5), 382(b)).

299. *Id.* at 555 (Brennan, J., dissenting).

Blackmun joined the dissent on this point.[300] The dissenters found that the federal government and the USOC have the symbiotic relationship that resulted in a finding of state action in *Burton v. Wilmington Parking Authority*.[301] Through the Amateur Sports Act, Congress bestowed on the USOC extensive power and financial resources, including exclusive rights to the word "Olympics" and various Olympic symbols. Congress's purpose in granting those rights to the USOC was to fund its activities.[302] The USOC, meanwhile, gives Congress precisely what it sought: effective coordination and administration of American competition in international amateur athletics.[303]

B. *NCAA v. Tarkanian*[304]

After conducting an investigation and a hearing, the National Collegiate Athletic Association (NCAA)[305] found that the University of Nevada, Las Vegas (UNLV), violated NCAA rules governing the recruitment of student athletes. Many of the alleged violations implicated UNLV's successful basketball coach, Jerry Tarkanian. The NCAA proposed a series of sanctions including probation from participation in postseason tournaments and televised games.[306] In addition, the Committee requested that UNLV "show cause why additional penalties should not be imposed if it failed to discipline Tarkanian by removing him completely from the University's intercollegiate athletic program during the [two year] probation period."[307] UNLV notified Tarkanian that he would in fact be severed from its athletic program for two

300. Writing for herself and Justice Blackmun, Justice O'Connor stated: "Largely for the reasons explained by Justice Brennan, . . . I believe the United States Olympic Committee and the United States are joint participants in the challenged activity . . . ." *Id.* at 548 (O'Connor, J., dissenting).

301. 365 U.S. 715 (1961). The Court ignored *Burton* except in the dissent. *San Francisco Arts & Athletics*, 483 U.S. at 556 n.12 (Brennan, J., dissenting). *Burton* is discussed *supra* notes 195-202 and accompanying text.

302. *San Francisco Arts & Athletics*, 483 U.S. at 557.

303. *Id.* at 557-59.

304. 488 U.S. 179 (1988).

305. The NCAA is an unincorporated association of nearly all private and public colleges and universities in the United States that operate major athletic programs. Its policies are determined at annual conventions, and it is governed by a Council. *Tarkanian*, 488 U.S. at 183. The NCAA has a multitude of rules governing the eligibility, admission, financial aid, and recruiting of student athletes by its member institutions. Its bylaws provide for a Committee on Infractions to enforce these rules.

306. *Id.* at 186.

307. *Id.*

years.[308]

Tarkanian filed an action in Nevada state court seeking to enjoin his suspension and alleging that UNLV's actions violated the Fourteenth Amendment by depriving him of property and liberty without due process of law.[309] Following procedural fights and several appeals, Tarkanian added the NCAA as a defendant, alleging that the NCAA's actions also violated the Amendment. The Nevada Supreme Court held that the NCAA and UNLV were state actors and that both violated due process.[310] The state supreme court affirmed the trial court's injunction forbidding the NCAA or UNLV to enforce the sanctions against Tarkanian and forbidding the NCAA to conduct any further proceedings against UNLV.[311] The NCAA petitioned the United States Supreme Court for certiorari, and the Court granted the petition.

By a five to four majority,[312] the Supreme Court held that the NCAA's conduct was not state action and that the NCAA did not act under color of state law. The Court rejected Tarkanian's argument that UNLV had delegated to the NCAA the state function of adopting rules to govern UNLV's athletic program. The Court stated that UNLV, a state university, "without question is a state actor."[313] The Court further noted that UNLV's actions against Tarkanian were influenced by the rules and findings of the NCAA.[314] The Court ruled, however, that the university's participation in the creation of the NCAA's rules and its adoption of the NCAA's standards did not transform the NCAA's actions into state action. The Court found that the source of the rules was the NCAA's "collective membership," which is composed of numerous private institutions and public institutions in other states.[315] Moreover, the Court determined that UNLV retained authority not only to reject the rules but also to avoid the suspension of Tarkanian.[316] UNLV's exercise of that authority simply carried costs that UNLV preferred not to

308. Before removing Tarkanian, UNLV appealed the decision of the Committee on Infractions to the NCAA's governing Council, but the Council approved the Committee's recommendations. *Id.*

309. *Id.* at 187.

310. *Id.* at 189-90.

311. *Id.* at 188-89.

312. Chief Justice Rehnquist and Justices Blackmun, Scalia, and Kennedy joined Justice Stevens's opinion for the Court.

313. *Tarkanian*, 488 U.S. at 192.

314. *Id.* at 193.

315. *Id.*

316. Indeed, after conducting his own hearing to determine whether the university should apply the NCAA's proposed sanctions, the university's vice-president advised the president that the university had three options:

bear: additional NCAA sanctions.[317] The Court thus held that "[n]either UNLV's decision to adopt the NCAA's standards nor its minor role in their formulation is a sufficient reason for concluding that the NCAA was acting under color of Nevada law when it promulgated standards governing athlete recruitment, eligibility, and academic performance."[318]

The Court also rejected Tarkanian's argument that the NCAA's enforcement proceedings and sanctions resulted from a delegation of state power by UNLV. The Court recognized that "a state may delegate authority to a private party and thereby make that party a state actor."[319] The Court found that UNLV gave no power to the NCAA and that the NCAA imposed sanctions only on UNLV, not Tarkanian.[320] Moreover, the NCAA's sanctions and possible sanctions against UNLV involved only UNLV's continued participation in NCAA competition.[321] The NCAA could not mandate UNLV to take any action against Tarkanian, and it could do nothing to Tarkanian directly.[322] UNLV retained full authority to act as it deemed appropriate toward Tarkanian. UNLV simply chose to abide by the sanctions rather than risk further sanctions. The NCAA thus was not a state actor.

The Court also rejected Tarkanian's contention that the UNLV and the NCAA were joint participants in the challenged act.[323] The Court pointed out that UNLV and the NCAA actually were adversaries throughout the proceedings. Because their interests did not coincide, the Court held that the relationship did not meet the requirements established in *Burton v. Wilmington Parking Authority*[324] for the symbiosis or joint participation theory of state action.[325]

"1. Reject the sanction requiring us [UNLV] to disassociate Coach Tarkanian from the athletic program and take the risk of still heavier sanctions, *e.g.*, possible extra years of probation.

"2. Recognize the University's delegation to the NCAA of the power to act as ultimate arbiter of these matters, thus reassigning Mr. Tarkanian from his present position—though tenured and without adequate notice—even while believing that the NCAA is wrong.

"3. Pull out of the NCAA completely on the grounds that you will not execute what you hold to be their unjust judgments."

Id. at 187 (quoting the appendix to the appellate briefs).

317. *Id.* at 198.

318. *Id.* at 195.

319. *Id.*

320. *Id.* at 195-97.

321. *Id.* at 187, 198; *see supra* note 316.

322. *Id.* at 198 n.18.

323. *Id.* at 196-97 n.16.

324. 365 U.S. 715 (1961).

325. *Tarkanian*, 488 U.S. at 196-97 n.16.

The four dissenting Justices[326] would have held the NCAA to be a state actor. Writing for Justices Brennan, Marshall, and O'Connor, Justice White argued that the NCAA was a state actor because it "acted jointly with UNLV in suspending Tarkanian."[327] He noted that the suspension resulted from violations of NCAA rules that UNLV embraced in its agreement with the NCAA. UNLV also agreed that the NCAA would conduct hearings concerning any violations of the rules and the NCAA in fact conducted the hearings that led to Tarkanian's proposed suspension. UNLV also agreed with the NCAA that the NCAA's findings would be binding.

> In short, it was the NCAA's findings that Tarkanian had violated NCAA rules, made at NCAA-conducted hearings, all of which were agreed to by UNLV in its membership agreement with the NCAA, that resulted in Tarkanian's suspension by UNLV. On these facts, the NCAA was "jointly engaged with [UNLV] officials in the challenged action."[328]

The dissent thus would have ruled the NCAA to be a state actor subject to the Fourteenth Amendment.

C. *Tulsa Professional Collection Services, Inc. v. Pope*[329]

The defendant, Joanne Pope, was the executrix of her husband's estate. The plaintiff, Tulsa Professional Collection Services, filed proceedings against her seeking payment for medical care received by her husband during his long stay at the hospital prior to his death. Pope raised Oklahoma's "nonclaim statute" as a defense. That statute requires "claims 'arising upon a contract' . . . to be presented to the executor or executrix of the estate within 2 months of the publication of a notice advising creditors of the commencement of probate proceedings."[330] Tulsa Professional conceded that it did not present its claim within two months of the executrix's publication, but it contended that the provision of notice to creditors by publication alone deprived it of property without due process of law.[331] After the Oklahoma Supreme Court rejected this

326. Justices Brennan, Marshall, and O'Connor, dissenting in *Tarkanian*, also joined the dissent in San Francisco Arts & Athletics v. United States Olympic Comm., 483 U.S. 522 (1987), in which Justice Blackmun was the fourth dissenter. In *Tarkanian*, Justice White was the fourth dissenter and wrote the dissenting opinion.

327. *Tarkanian*, 488 U.S. at 200.

328. *Id.* at 202 (White, J., dissenting) (quoting Dennis v. Sparks, 449 U.S. 24, 27-28 (1980)).

329. 485 U.S. 478 (1988).

330. *Id.* at 479 (quoting OKLA. STAT. tit. 58, § 333 (1981)).

331. *Id.* at 479, 483.

contention, the United States Supreme Court granted certiorari to consider the question.

A nearly unanimous Court[332] held that the probate court's involvement made that court responsible for Tulsa Professional's loss and that due process required personal notice by mail. The Court first determined that neither the private use of "state sanctioned private remedies" nor "the mere running of a general statute of limitation" is state action that implicates due process.[333] Yet because of the probate court's "involvement with the nonclaim statute," the Court held that the Due Process Clause was implicated.

> The probate court is intimately involved throughout, and without that involvement the time bar is never activated. The nonclaim statute becomes operative only after probate proceedings have been commenced in state court. The court must appoint the executor or executrix before notice, which triggers the time bar, can be given. Only after this court appointment is made does the statute provide for any notice; § 331 directs the executor or executrix to publish notice "immediately" after appointment. . . . Finally, copies of the notice and an affidavit of publication must be filed with the court. § 332. It is only after all of these actions take place that the time period begins to run, and in every one of these actions, the court is intimately involved. This involvement is so pervasive and substantial that it must be considered state action subject to the restrictions of the Fourteenth Amendment.[334]

The Court held that "by virtue of the [nonclaim] statute, the probate proceedings themselves" deprived Tulsa Professional of its property.[335] The Court then applied the balancing test of *Mullane v. Central Hanover Bank and Trust Co.*[336] to hold that due process requires that creditors receive individual notice by mail.[337]

Chief Justice Rehnquist dissented. He concluded that the statute operated like a "self-executing" statute of limitation and thus was entirely consistent with the Due Process Clause.[338] The fact that probate

332. Justice Blackmun concurred in the result without a separate opinion, and Chief Justice Rehnquist was the lone dissent. For a discussion of Chief Justice Rehnquist's dissenting opinion, see *infra* notes 338-41 and accompanying text.

333. *Pope*, 485 U.S. at 485 (citing Flagg Bros. v. Brooks, 436 U.S. 149 (1978) and Texaco, Inc. v. Short, 454 U.S. 516 (1982)).

334. *Id.* at 487.

335. *Id.* at 488.

336. 339 U.S. 306 (1950).

337. *Pope*, 485 U.S. at 490.

338. Chief Justice Rehnquist relied on Texaco, Inc. v. Short, 454 U.S. 516 (1982), in which "the Court upheld against challenge under the Due Process Clause an Indiana statute providing that severed mineral interests which had not been used for a period of 20 years lapsed and reverted to the surface owner unless the mineral owner filed a statement of claim in the appro-

court proceedings had to be implemented before an executor could be appointed and notice published did not, in Chief Justice Rehnquist's opinion, implicate the probate court in the "deprivation."[339] Chief Justice Rehnquist held that the nonclaim statute's operation, which by itself was entirely constitutional under *Short*, "deprived" the creditor of his cause of action—not the probate court.[340] Because the probate court did not deprive the plaintiff creditor of its cause of action, Chief Justice Rehnquist concluded, the Due Process Clause did not require the creditor to receive personal notice of the probate court's proceedings.[341]

D. Summary

The Court's decisions in these three cases do not alter significantly the existing state action theories.[342] The Court's opinions and the dissenting opinions apply the theories as articulated in earlier cases and find them applicable or inapplicable based on the facts of each case. These cases are important nonetheless because they reflect shifts in various Justices' acceptance of certain state action theories and the liberality with which they apply the theories. Part IV analyzes this development.[343]

IV. State Action Models of the Rehnquist Court

Despite the emergence of a conservative "working majority" on most issues,[344] the three state action cases of the Rehnquist Court dis-

priate county office." *Pope*, 485 U.S. at 492 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist's view that statutes of limitation and nonclaim statutes satisfy due process whenever they are self-executing is consistent with his theory of state inaction. A statute of limitation's or nonclaim statute's self-executing nature limits the circumstances in which the state will intervene to assist a creditor in obtaining a debt from a debtor or debtor's estate. Such non-discretionary statutes limit the availability of state assistance to a specific time period. Lessees, for example, can invoke state power to protect their possession of property only for a certain period of time (the term of their leases). By enacting the statute and thereby limiting the circumstances under which the state will intervene, the state merely defines the extent of the creditor's property interest. The creditor's property, his cause of action, is simply smaller than it would be if the state defined it differently. *Cf. supra* notes 131-52 and accompanying text (discussing Flagg Bros. v. Brooks, 436 U.S. 149 (1978)).

339. *Pope*, 485 U.S. at 493-94 (Rehnquist, C.J., dissenting).

340. *Id.*

341. *Id.*

342. The Court's statement in San Francisco Arts & Athletics v. United States Olympic Comm., 483 U.S. 522 (1987), that state action exists only if the government coerces or significantly encourages the challenged decision, *id.* at 546, would alter existing state action theories if broadly applied. *See supra* note 287. Justice Powell's opinion for the Court, however, did not address the scope of this requirement which was adopted from the Court's decision in Blum v. Yaretsky, 457 U.S. 991 (1982). *See supra* notes 285-87 and accompanying text.

343. Specifically, see *infra* notes 426-34, 437-61 and accompanying text.

344. *See* Howard, *supra* note 4, at 69.

cussed in Part III reveal that a wide range of views on the state action doctrine persist on the Court. The extreme views of the state action doctrine that were present on the Burger Court continue to be represented. Chief Justice Rehnquist continues to apply a strict vision of the state action doctrine, seldom finding state action under any theory.[345] Justice Marshall, and until recently, Justice Brennan, continues to apply an expansive vision of the state action doctrine to find state action under a variety of theories in nearly every case before the Court.[346]

The Rehnquist Court cases reveal, however, an emerging modification of the state action doctrine that lies between these extremes. In addition to Chief Justice Rehnquist's and Justice Marshall's well developed views on the state action doctrine, the opinions and votes in the Court's state action cases reveal a third distinct model of the state action doctrine. I have labeled these three models according to their adherents: the Rehnquist model, the Marshall/Brennan model, and the O'Connor model.[347] Although each of these models accepts the state action theories and the structure of the state action doctrine described in Part II, they differ in how stringently they apply various state action theories.[348]

A. The Rehnquist Model

The Rehnquist model of the state action doctrine is the most restrictive of the three. For the most part, it is the prevailing doctrine embodied in the Court's majority opinions.[349] Chief Justice Rehnquist after all was the architect of the Burger Court's contraction of the state action doctrine, writing most of the Burger Court's key state action opinions.[350] Chief Justice Rehnquist discusses and purports to accept all of the state action theories described earlier.[351] Yet he almost never applies them to

345. *See supra* notes 277-91, 312-25, 338-41 and accompanying text.

346. *See supra* notes 292-303, 326-28 and accompanying text.

347. The choice of a label for the "O'Connor Model" is explained in note 427 *infra*.

348. Because some Justices have written more state action opinions and participated in more state action decisions than others, the picture of some models is more complete than others.

349. Ironically, the Burger Court's state action decisions embrace the Rehnquist model most clearly. The Rehnquist model currently prevails because doctrinal changes reflected in recent Rehnquist Court cases are only beginning to emerge.

350. Chief Justice Rehnquist wrote the opinion of the Court in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1922), Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), Flagg Bros. v. Brooks, 436 U.S. 149 (1978), and Blum v. Yaretsky, 457 U.S. 991 (1982). He also wrote a dissenting opinion in Tulsa Professional Collection Servs. v. Pope, 485 U.S. 478 (1988). Indeed, because Chief Justice Rehnquist has authored so many of the Court's state action opinions, the picture of the Rehnquist model of the state action doctrine is the most clear and complete.

351. *See supra* text accompanying note 45.

find state action to exist. He generally distinguishes earlier cases that apply particular state action theories and thus finds the theories inapplicable to the cases before him. His opinions construct a restrictive model of the state action doctrine that seldom treats private conduct as state action.

1. *Settled Concepts of State Action*

Several aspects of the state action doctrine are so well settled that all members of the Court accept them, including adherents of the restrictive Rehnquist model. First, all of the Justices would find the overt conduct of state officials carrying out official state policy to be state action. Such official activity is the paramount example of pure state action, which must be subject to the Fourteenth Amendment to give the Amendment any practical meaning.[352] Second, all the Justices adhere to the longstanding rule that the conduct of a state official who abuses his authority to act contrary to official state policy is nonetheless state action.[353] Finally, the entire Court deems the judicial application of substantive law to grant civil judicial remedies[354] to be state action subject to the Fourteenth Amendment.[355]

2. *State Inaction as State Action*

Perhaps the most controversial substantive aspect of Chief Justice Rehnquist's model of state action[356] for commentators is his conviction that pure, consistent state inaction is not state action, or at least is not state action that violates due process and equal protection restraints.[357]

352. *See Ex Parte* Virginia, 100 U.S. 339, 347 (1880); *see also supra* note 46 and accompanying text.

353. *See supra* notes 47-54 and accompanying text.

354. *See supra* notes 60-100 and accompanying text.

355. *See id. But cf.* Flagg Bros. v. Brooks, 436 U.S. 149, 164-65 (1978) (Chief Justice Rehnquist suggests that a specific rule of law, standing alone, is not state action that violates the Due Process Clause). There is dubious viability of the proposition perhaps applied in Shelley v. Kraemer, 334 U.S. 1 (1948), that state enforcement of a private legal right makes the private action underlying that right state action. For the reasons discussed *supra* notes 87-97, this proposition is fraught with problems and has been the subject of many attacks. *See, e.g.*, G. GUNTHER, *supra* note 78, at 1002; McCoy, *supra* note 72, at 793; Wechsler, *supra* note 86, at 29-31. Nonetheless, Chief Justice Rehnquist, writing for the Court, relied on this proposition to enjoin state enforcement of a regulation in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), that required licensees to abide by their by-laws.

356. Other aspects of the Rehnquist model are controversial, but the controversy lies less in Chief Justice Rehnquist's substantive interpretation of state action doctrine than in his strict application of the doctrine.

357. Some of Chief Justice Rehnquist's statements suggest that the mere formulation of state law—especially laws by which the government expresses its intent not to intervene in specified private activity—is not, without more, state action. The better interpretation, how-

Pure state inaction is the state's decision not to intervene in certain types of private conduct or privately inflicted harm.[358] Chief Justice Rehnquist's opinion in *Flagg Bros.* held that such a decision by the state does not "authorize or encourage" the challenged private activity so as to make the private conduct attributable to the state.[359] This holding implies that the state's decision not to intervene in a private dispute, while subject to the Fourteenth Amendment, cannot violate it.[360] Under the Rehnquist model, then, the state may constitutionally leave private entities in a state of nature with respect to any private behavior even if that behavior harms people in some way.[361]

3. *The Government Function Theory, the Conduct of Regulated Entities, and the Joint Participation Theory*

The Rehnquist model receives its most heated attacks on the Court for its application of the government function, regulated entities, and joint participation theories of state action. Chief Justice Rehnquist purports to accept these theories, but he has never used them to find state action.[362] Moreover, his opinions for the Court have added requirements for the application of these theories, making them more restrictive.[363] Vigorous dissents attack Chief Justice Rehnquist's formulation of the theories and his application of them as formulated.

Several of Chief Justice Rehnquist's opinions expressly state that government regulation of private activity under some circumstances can result in the private activity's being deemed state action.[364] He has suggested that state action exists if the state coerces or substantially encourages the private conduct.[365] His application of this approach, however, indicates that nothing short of actual state compulsion of the challenged

ever, is that such statements of law are state action but are unlikely to violate the Due Process Clause because no property or liberty is taken. Indeed, Chief Justice Rehnquist seems to use the phrase "state action" to refer not simply to government conduct (to which the Fourteenth Amendment surely applies) but to government conduct that deprives someone of property or liberty, thus creating the issue of whether the deprivation takes place without due process of law. *See supra* note 151.

358. *See supra* notes 101-08 and accompanying text.

359. *Flagg Bros.*, 436 U.S. at 164-65; *see supra* notes 131-51 and accompanying text.

360. *See supra* notes 146-51 and accompanying text.

361. *See* DeShaney v. Winnebago County Social Servs. Dep't, 489 U.S. 189 (1989); *see supra* notes 106-11 and accompanying text.

362. *See, e.g.*, Chief Justice Rehnquist's opinions for the Court in Blum v. Yaretsky, 457 U.S. 991 (1982); *Flagg Bros.*, 436 U.S. 149; Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); *see also supra* notes 156-62, 164, 174-85, 244-61.

363. *See supra* notes 244-61 and accompanying text.

364. *See supra* notes 141-52 and accompanying text.

365. *See supra* note 175.

act will result in the private conduct's being deemed state action.[366]

Chief Justice Rehnquist also purports to accept the symbiosis or joint participation theory of state action,[367] but he applies such a strict version of the theory that it lacks meaning. Most of Chief Justice Rehnquist's state action opinions discuss *Burton v. Wilmington Parking Authority*,[368] some at length, but they always distinguish *Burton* rather than follow it.[369] Chief Justice Rehnquist also applies the theory differently from the way it was conceived. Rather than evaluating the cumulative impact of all the ties between the state and the private actor who performed the challenged conduct,[370] Chief Justice Rehnquist considers the various ties separately, finding each insufficient to warrant a finding of state action.[371] Chief Justice Rehnquist's refusal to find state action on the basis of the joint participation theory in several cases, most notably *Blum v. Yaretsky*,[372] casts doubt over his acceptance of the joint participation theory.[373]

Chief Justice Rehnquist recognizes the government function theory of state action, but he interprets and applies that theory very strictly as well.[374] He discusses *Marsh v. Alabama*[375] and the White Primary Cases[376] approvingly in several opinions,[377] and he has never suggested that the government function theory is not viable in some form. Yet his opinions emphasize the exclusivity requirement of the government function theory[378] and apply an increasingly restrictive version of that requirement.[379] Consequently, Chief Justice Rehnquist has never found

366. *See supra* notes 177-85 and accompanying text (discussing Chief Justice Rehnquist's opinion in Blum v. Yaretsky, 457 U.S. 991 (1982)).

367. *See supra* note 192.

368. 365 U.S. 715 (1961).

369. *See Blum*, 457 U.S. at 1010-11; Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357-58 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172-74 (1972).

370. *See Burton*, 365 U.S. 715.

371. *See* Schneider, *supra* note 1, at 1160.

372. 457 U.S. 991 (1982).

373. *See supra* notes 205-15 and accompanying text.

374. Writing for the Court, Chief Justice Rehnquist discusses the government function theory but finds it inapplicable in Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), Flagg Bros. v. Brooks, 436 U.S. 149 (1978), and *Blum*, 457 U.S. 991. For a discussion of the treatment of the government function theories in *Jackson* and *Flagg Bros.*, see *supra* notes 244-61 and accompanying text.

375. 326 U.S. 501 (1946).

376. Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932).

377. *See Flagg Bros.*, 436 U.S. at 158-64.

378. *See supra* notes 246-61 and accompanying text.

379. *See supra* note 258.

the theory applicable to any case that he has decided.[380]

Blum demonstrates the restrictiveness of these three theories of state action under the Rehnquist model. The activities of the nursing homes in *Blum* and their ties to the state produce sound arguments for a finding of state action under each of these theories. Writing for the Court, however, Chief Justice Rehnquist rejected each theory with a minimum of discussion and analysis.[381]

B. *The Marshall Model*[382]

The Marshall model of the state action doctrine applies the Fourteenth Amendment to private conduct more freely than either of the other two models. It embraces the settled concepts of state action,[383] and it would deem a wide array of ostensibly private conduct to be state action with a minimum level of state involvement.[384] Justice Marshall would accept all the state action theories,[385] and would formulate and apply them liberally to find state action.[386]

380. *See supra* notes 244-61 and accompanying text (discussing the Court's opinions in *Flagg Bros.*, 436 U.S. 149, and Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), both of which were written by Chief Justice Rehnquist).

381. For a discussion of the argument supporting a finding of state action under the "regulated entity" theory and Chief Justice Rehnquist's treatment of that argument, see *supra* notes 177-85 and accompanying text. For a discussion of the argument supporting the application of the joint participation theory and Chief Justice Rehnquist's rejection of that argument, see *supra* notes 205-15 and accompanying text. The nursing homes' transfer decisions in *Blum* also served a government function. The sole purpose of the transfers was to serve the state function of controlling the cost of the Medicaid program to the state. *See supra* notes 181-83, 210-11 and accompanying text. The transfers also had the practical effect of determining the level of public assistance a citizen received under the program. Chief Justice Rehnquist nonetheless concluded that the government function theory did not apply to the nursing homes' actions. Blum v. Yaretsky, 457 U.S. 991, 1011-12 (1982).

382. This model could just as appropriately be labelled the Brennan model or the Marshall-Brennan model: Justices Marshall and Brennan voted together on most of the state action decisions in which they both participated. *See, e.g.*, San Francisco Arts & Athletics v. United States Olympic Comm., 483 U.S. 522 (1987); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). Moreover, Justice Brennan was part of the Warren Court majority in such cases as Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961), which formulated the broader state action theories. I labelled this model the "Marshall Model" only because of Justice Brennan's recent resignation from the Court.

383. *See supra* notes 352-55 and accompanying text.

384. Indeed, Justices Marshall and Brennan both would have found state action in every major state action case before the Court during their tenure, except Polk County v. Dodson, 454 U.S. 312 (1981). *See, e.g.*, NCAA v. Tarkanian, 488 U.S. 179 (1988); West v. Atkins, 487 U.S. 42 (1988).

385. *See infra* notes 387-424 and accompanying text.

386. *Id.*

1. *State Inaction*

Justice Marshall has not addressed significantly the theory that state inaction with respect to a private dispute is state action.[387] Justice Marshall concurred in Justice Stevens' dissenting opinion in *Flagg Bros.*[388] in which Justice Stevens held that the state's acquiescence in Flagg Brothers' sale made the sale state action.[389] Justice Marshall thus apparently agrees with the acquiescence-inaction theory and its ramifications. Justice Stevens's opinion also relied on the government function theory, however, and Justice Marshall may have based his position more on that theory than the acquiescence-inaction theory. Indeed, Justice Marshall wrote his own brief dissenting opinion in *Flagg Bros.* in which he attacked the majority's formulation and application of the government function theory.[390] Justice Marshall's view of the acquiescence-inaction theory of state action is thus ambiguous. Although he probably agrees with the concept of acquiescence-inaction, he seldom uses or addresses this theory because he would find state action relying upon other state action theories.[391]

2. *The Government Function Theory*

Justice Marshall would formulate the government function theory much more broadly than the Court, including Chief Justice Rehnquist, has done. He would not require that a function be "traditionally the exclusive prerogative of government" in order for the government function theory to apply.[392] He concedes that "a finding of government action is *particularly* appropriate when the function performed is 'traditionally the exclusive prerogative of government,' " but he contends that the Court has never limited the application of the government function theory to such circumstances.[393] Justice Marshall would find that a private entity performs a government function when "the activity in question is of such public importance" that governments *invariably* perform the activity themselves *or* permit private entities to perform it subject to extensive regulation.[394] Justice Marshall also would hold private

387. *But see* DeShaney v. Winnebago County Social Servs. Dep't, 489 U.S. 189 (1989) (Brennan, J., joined by Marshall, J., dissenting).

388. Flagg Bros. v. Brooks, 436 U.S. 149, 168 (Stevens, J., dissenting).

389. *Id.* at 166.

390. 436 U.S. at 166-68 (Marshall, J., dissenting).

391. Compare Justice Marshall's dissenting opinion in *Flagg Bros.* to Justice Stevens'.

392. San Francisco Art & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 549-50 n.1 (1987) (Brennan, J., joined by Marshall, J., dissenting).

393. *Id.* at 549 & n.1 (emphasis added) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974)).

394. *Jackson*, 419 U.S. at 371-72 (Marshall, J., dissenting).

entities to be performing a government function when they "*are endowed by the State* with powers or functions *governmental* in nature."[395]

Justice Marshall's application of the government function theory in *Jackson* and *San Francisco Arts & Athletics* demonstrates his more liberal conception of the theory. In *Jackson,* Justice Marshall conceded that an enterprise is not state action just because it is "affected with the public interest."[396] He also conceded that the provision of electric utility service is not traditionally performed exclusively by government. He stated, however, that governments traditionally have found utility service to be so important that they "invariably" subject private companies providing such service to pervasive regulation if the states do not provide the service themselves.[397] "In my view," he wrote,

> utility service is traditionally identified with the State through universal public regulation or ownership to a degree sufficient to render it a "public function." . . . [W]hen the activity in question is of such public importance that the State invariably either provides the service itself or permits private companies to act as state surrogates in providing it, much more is involved than just a matter of public interest. In those cases, the State has determined that if private companies wish to enter the field, they will have to surrender many of the prerogatives normally associated with private enterprise and behave in many ways like a government body. And when the State's regulatory scheme has gone that far, it seems entirely consistent to impose on the public utility the constitutional burdens normally reserved for the State.[398]

In *San Francisco Arts & Athletics,* Justices Marshall and Brennan perceived the USOC to be performing several government functions pursuant to specific grants of authority from Congress. Congress designated the USOC as the United States' "exclusive representative" to the International Olympic Committee, hence making it exclusively responsible for the United States representation at the Olympic Games.[399] Justice Bren-

395. *San Francisco Arts & Athletics,* 483 U.S. at 548-49 (Brennan, J., joined by Marshall, J., dissenting) (emphasis in original) (citing Evans v. Newton, 382 U.S. 296, 299 (1966)).

396. *Jackson,* 419 U.S. at 372 (Marshall, J., dissenting).

397. *Id.*

398. *Id.* at 371-72.

399. *San Francisco Arts & Athletics,* 483 U.S. at 550 (Brennan, J., joined by Marshall, J., dissenting). Justice Brennan recognized that Congress empowered the USOC "to represent the United States as its national Olympic committee," 36 U.S.C. § 375 (1982), and that the rules of the International Olympic Committee provide that National Olympic Committees shall be " 'the sole authorities responsible for *the representation of their respective countries* at the Olympic Games.' " *San Francisco Arts & Athletics,* 483 U.S. at 550 n.2, (quoting International Olympic Committee Rule 24(B) (emphasis added by Justice Brennan)). Justice Brennan also argued at some length that "Olympic participation is inescapably nationalist [and political]." *Id.* at 550-55.

nan contended that such exclusive international representation in an "inescapably nationalist" forum is a role traditionally reserved to the government.[400] Congress also bestowed on the USOC, he notes, "unprecedented administrative authority over American athletic organizations relating to international competition."[401] The USOC became the "coordinating bod[y]" for American international competition in amateur sports,[402] with the authority to designate organizations as the "national governing body" for particular sports[403] and to resolve disputes between private amateur sports organizations.[404] Because "the USOC [was] endowed by the Federal Government with the exclusive power to serve a unique national, administrative, adjudicative, and representational role," Justice Brennan reasoned that the USOC was analogous to the company town in *Marsh v. Alabama*[405] and the private political parties in *Terry v. Adams*.[406] "Like those entities," he concluded, "the USOC is a private organization on whom the Government has bestowed inherently public powers and responsibilities. Its actions, like theirs, ought to be subject to constitutional limits."[407]

In addition, once the Marshall model finds a private entity's activities to be a government function, it applies constitutional restrictions to a broader range of the private entity's activities than the Rehnquist model does. Upon finding that a private entity is engaged in a government function, Justice Marshall would subject all of the entity's actions to constitutional restraints—not just those that are a government function.

In *San Francisco Arts & Athletics*, Justices Marshall and Brennan found a wide range of the USOC's activities to be government functions, but they did not discuss whether the challenged conduct—licensing the use of the word "Olympic"—was a government function. Licensing the use of words is not a traditionally government function, because private enterprises that own trademark and similar rights historically make the decision whether and when to license the marks' use to others purely as a private business decision.[408] Yet Justices Brennan and Marshall would apply fourteenth amendment restrictions to the USOC's decision not to permit SFAA's use of its Olympic symbols based on the USOC's other

400. *San Francisco Arts & Athletics*, 483 U.S. at 550.

401. *Id.* at 553.

402. 36 U.S.C. § 375(a)(1) (1982).

403. *Id.* § 375(a)(4).

404. *San Francisco Arts & Athletics*, 483 U.S. at 554 (Brennan, J., joined by Marshall, J., dissenting); *see* 36 U.S.C. § 375(a)(5), 382(b).

405. 326 U.S. 501 (1946).

406. 345 U.S. 461 (1953).

407. *San Francisco Arts & Athletics*, 483 U.S. at 555-56.

408. *See id.* at 547.

activities and powers.[409] When a litigant challenges the constitutionality of a private entity's actions, therefore, Justices Brennan and Marshall would subject the conduct to constitutional scrutiny if the entity performs a government function. It would be irrelevant that the challenged conduct was not a government function and did not take place in performing the government function.[410]

3. *Governmentally Regulated Conduct*

Justice Marshall would have treated the conduct of state-regulated entities as state action in several cases.[411] Although the role that the state regulation played in his analysis varies, his conclusions clearly are based in part on the existence and content of the state regulations.[412] He certainly would agree with Chief Justice Rehnquist's view that private conduct compelled by state regulation is state action subject to constitutional restraints.[413] He also would agree that private conduct is subject to the Fourteenth Amendment when the state significantly encourages the conduct.[414] Justice Marshall is more willing, however, to find that state regulations provide the involvement or encouragement to the chal-

409. *See id.* at 550-54 (Brennan, J., joined by Marshall, J., dissenting) (discusses the USOC's role as international representative of the United States, coordinator of American amateur athletics and adjudicator of disputes among amateur athletics organizations).

410. This position reflects a more general disagreement with the Rehnquist model. Underlying, but not clearly articulated in Chief Justice Rehnquist's opinions, is the requirement that a "nexus . . . exist between the plaintiff's state action theory and the challenged activity." McCoy, *supra* note 72, at 818 (exploring the meaning, theoretical foundation, and scope of the "nexus" requirement imposed by Chief Justice Rehnquist in Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974)). Thus, if the plaintiff seeks to have the defendant treated as the state on the basis of the state's regulation of the defendant, as the *Jackson* plaintiff did, then Chief Justice Rehnquist would require "state regulatory involvement in the challenged activity." McCoy, *supra* note 72, at 818; *see also Jackson*, 419 U.S. at 351. If the plaintiff seeks to use the government function theory, she must demonstrate that the challenged conduct was part of the government function. McCoy, *supra* note 72, at 819-21.

411. *See, e.g.*, Blum v. Yaretsky, 457 U.S. 991 (1982) (Brennan, J., joined by Marshall, J., dissenting); Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (Marshall, J., joined by Brennan, J., dissenting); *Jackson*, 419 U.S. 345 (Marshall, J., dissenting); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (Brennan, J., joined by Marshall, J., dissenting).

412. *See, e.g.*, *Rendell-Baker*, 457 U.S. at 846 (Marshall, J., dissenting); *Blum*, 457 U.S. at 1019-27 (Brennan, J., joined by Marshall, J., dissenting); *Jackson*, 419 U.S. at 368-70 (Marshall, J., dissenting); *Moose Lodge No. 107*, 407 U.S. at 184-89.

413. *See Moose Lodge No. 107*, 407 U.S. at 189 (Brennan, J., joined by Marshall, J., dissenting); *Jackson*, 419 U.S. at 368-70 (Marshall, J., dissenting).

414. Indeed, Justice Brennan wrote in *Moose Lodge No. 107* that the " 'existence of efforts by the State, through legislation or otherwise, to authorize, encourage, or otherwise support racial discrimination in a particular facet of life constitutes illegal state involvement in those pertinent private acts of discrimination that subsequently occur.' " *Moose Lodge No. 107*, 407 U.S. at 190 (Brennan, J., joined by Marshall, J., dissenting) (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 202 (1970) (separate opinion of Brennan, J.)).

lenged private conduct necessary to deem the activities of the regulated private entity to be state action.[415] Indeed, Justice Brennan's dissenting opinion in *Moose Lodge No. 107*, which Justice Marshall joined, suggests that pervasive, detailed state regulation alone may justify applying constitutional restraints to a regulated private entity's actions.[416] Justices Brennan's and Marshall's discussion of state regulatory involvement in private activity, however, generally overlaps or is part of their application of other state action theories, particularly the joint participation theory.[417]

4. *The Joint Participation-Symbiosis Theory*

Unlike Chief Justice Rehnquist, Justice Marshall freely and liberally applies the joint participation-symbiosis theory developed in *Burton v. Wilmington Parking Authority*.[418] This formulation of the theory's standard is no different from that of Chief Justice Rehnquist's. He asks whether the "Government 'has so far insinuated itself into a position of interdependence with [the private entity] that it must be recognized as a joint participant in the challenged activity.' "[419] Justice Marshall's application of the theory, however, differs radically from Chief Justice Rehnquist's, as his differing results attest. Unlike the Rehnquist model, the Marshall model more readily considers the cumulative impact of all the ties between the state and the private entity rather than considering each fact individually.[420] The Marshall model also considers factors that relate to other state action theories and the applicability of other theories in

415. *See Moose Lodge No. 107*, 407 U.S. at 190 (Brennan, J., joined by Marshall, J., dissenting).

416. *See generally id.* at 184-90 (Brennan, J., joined by Marshall, J., dissenting). Quoting the District Court, Justice Brennan stated: " 'We believe the decisive factor is the uniqueness and the all-pervasiveness of the regulation by the Commonwealth.' " *Id.* at 186 (Brennan, J., dissenting). " 'It would be difficult . . . to consider the state neutral in an area which is so permeated with state regulation and control.' " *Id.* at 189.

417. *See, e.g., Moose Lodge No. 107*, 407 U.S. at 184-85 (Brennan, J., joined by Marshall, J., dissenting); *Jackson*, 419 U.S. at 361 (Marshall, J., dissenting). Justice Marshall also relied on the state's regulatory involvement in *Jackson* to conclude that utilities are subject to fourteenth amendment restraints under the government function theory. *Id.* at 372.

418. *Compare* Justice White's opinion in NCAA v. Tarkanian, 488 U.S. 179, 199-203 (1988), which Justice Marshall joined, *with* the Court's opinion, which Chief Justice Rehnquist joined.

419. San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 556 (1987) (Brennan, J., joined by Marshall, J., dissenting) (quoting Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961)).

420. *See* Schneider, *supra* note 1, at 1164-65; *cf. Jackson*, 419 U.S. at 360, 362-63 (Douglas, J., dissenting).

assessing the state's relationship to the private entity.[421] Applying the theory in this fashion, Justice Marshall would have held the challenged conduct to be state action in nearly every state action decision in which he participated.[422]

Justice Marshall's version of the joint participation theory also differs from Chief Justice Rehnquist's in that he asks only whether the state has insinuated itself into the private entity's operations—not whether it was directly involved in the challenged conduct. He concedes that the state's involvement directly in the challenged conduct may be a relevant inquiry when the state's involvement is limited.[423] "But where the State has so thoroughly insinuated itself into the operations of the enterprise [as it did in *Jackson*] it should not be fatal if the State has not affirmatively sanctioned the particular practice in question."[424]

C. The O'Connor Model

The O'Connor model is the newest of the three state action models discussed in this Article. Opinions from the early 1970s and before reflect both the Rehnquist and Marshall models,[425] but the O'Connor model emerged only in the recent state action cases of the Rehnquist Court.[426] The O'Connor model is a hybrid middle position between the Rehnquist model and the Marshall model. While it more readily finds private conduct to be state action than does the Rehnquist model, it does not embrace all of the state action theories as freely and liberally as the Marshall model.[427]

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421. *See, e.g.*, Blum v. Yaretsky, 457 U.S. 991, 1027-28 (1982) (Brennan, J., joined by Marshall, J., dissenting).

422. *See, e.g.*, *Tarkanian*, 488 U.S. at 199-203 (White, J., joined by Brennan, J., and Marshall, J., dissenting); Tulsa Professional Collection Servs. v. Pope, 485 U.S. 478, 485-88 (1988); *San Francisco Arts & Athletics*, 483 U.S. at 446-59 (Brennan, J., joined by Marshall, J., dissenting); Blum v. Yaretsky, 457 U.S. 991, 1027-28 (1982) (Brennan, J., joined by Marshall, J., dissenting); Rendell-Baker v. Kohn, 457 U.S. 830, 847-48 (1982) (Marshall, J., joined by Brennan, J., dissenting); *Jackson*, 419 U.S. at 366-71 (Marshall, J., dissenting); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 184-90 (1972) (Brennan, J., joined by Marshall, J., dissenting).

423. *Jackson*, 419 U.S. at 369-70 (Marshall, J., dissenting).

424. *Id.* at 370 (Marshall, J., dissenting).

425. Chief Justice Rehnquist's opinion for the Court and Justice Marshall's dissent in *Jackson* demonstrate clearly the Rehnquist and Marshall models.

426. *See Pope*, 485 U.S. 478; *Tarkanian*, 488 U.S. 179 (White, J., joined by O'Connor, J., and others, dissenting); *San Francisco Arts & Athletics*, 483 U.S. 522 (O'Connor, J., dissenting).

427. Labelling this new middle approach the "O'Connor model" is perhaps imprecise but no less precise than other labels. Justice O'Connor apparently embraced the Rehnquist model early in her tenure on the Court. She joined Chief Justice Rehnquist's opinion for the Court in Blum v. Yaretsky, 457 U.S. 991 (1982), and she joined then-Chief Justice Burger's opinion for the Court in Rendell-Baker v. Kohn, 457 U.S. 830 (1982). Nonetheless, she appears to be playing a central role in the Court's current shift away from complete acceptance of the Rehn-

The O'Connor model follows the Rehnquist model's formulation and application of every state action theory except the joint participation-symbiosis theory. Like Chief Justice Rehnquist, Justice O'Connor has never found state action based on the government function theory.[428] In fact, while she and Justice Blackmun agreed with Justice Brennan's conclusion in *San Francisco Arts & Athletics* that the USOC was subject to the Fourteenth Amendment under the joint participation theory, they both expressly refused to join the part of Justice Brennan's opinion that found the USOC to be performing a government function.[429] Justice O'Connor also apparently agrees with Chief Justice Rehnquist's treatment of regulated entities.[430] Finally, Justice O'Connor has never confronted the state inaction issue such as the one in *Flagg Bros. v. Brooks*.[431] Her views on that state action theory, therefore, are unknown.[432]

Justice O'Connor departs from the Rehnquist model in her application of the joint participation theory. Although she joined Chief Justice Rehnquist and then-Chief Justice Burger in refusing to apply the theory in *Blum* and *Rendell-Baker*, she would have used it to find state action in *San Francisco Arts & Athletics* and *Tarkanian*.[433] The dissenting opinions in these cases reflect differences between the Rehnquist model's joint participation theory and the O'Connor model's joint participation theory. Like Justices Marshall and Brennan, Justice O'Connor considers

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quist model. Several Justices have participated in this trend: Justice White wrote the dissenting opinion for four Justices who would have found state action in *Tarkanian*; Justice Blackmun would have found state action in *San Francisco Arts & Athletics* along with three other Justices; and only Chief Justice Rehnquist dissented from the Court's finding of state action in *Pope*. Justices O'Connor, Marshall, and Brennan were the only members of the Court who would have found state action in all three cases. Moreover, Justice O'Connor wrote the opinion of the Court in *Pope* and a brief dissent in *San Francisco Arts & Athletics*.

428. *See Tarkanian*, 488 U.S. 179; *Pope*, 485 U.S. 478; *Blum*, 457 U.S. 991; *Rendell-Baker*, 457 U.S. 830.

429. *San Francisco Arts & Athletics*, 483 U.S. at 548 (O'Connor, J., dissenting).

430. Justice O'Connor joined Chief Justice Rehnquist's opinion for the Court in *Blum* in which the Court indicated that state-regulated private conduct is state action on the basis of the regulations only if the state compels or significantly encourages the private conduct. *Blum*, 457 U.S. at 1004. For additional discussion of Chief Justice Rehnquist's and the Court's treatment of the regulated-conduct-as-state-action theory, see *supra* notes 364-66, 155-85 and accompanying text, respectively. In light of Justice O'Connor's (and Justices Blackmun's and White's) increased willingness to find state action under the joint participation theory, she (and Justices Blackmun and White) may give some weight to the existence of a pervasive regulatory scheme in applying that theory.

431. 436 U.S. 149 (1978); *see supra* notes 95-140.

432. Justice O'Connor's opinion for the Court in Tulsa Professional Collection Servs., Inc. v. Pope, 485 U.S. 478 (1988), may reflect some departure from the Rehnquist model's treatment of state inaction, but any such departure was not explicit.

433. 483 U.S. at 548 (O'Connor, J., concurring in part and dissenting in part).

the cumulative relationship between the state and the private entity to determine if the state is a joint participant. She does not focus on whether the state was involved directly in the challenged decision. As the Court noted in *San Francisco Arts & Athletics*, for example, the federal government exerted no influence over and was not involved in the USOC's decision not to permit the SFAA's use of the word "Olympic" and other Olympic symbols. Because of other ties and the mutual benefits that flowed from the federal government's relationship to the USOC, Justice O'Connor and the other dissenters nonetheless would have found the state to be a joint participant in that decision.[434]

The O'Connor model, therefore, coincides to a great extent with the Rehnquist model, but broadens it by applying a more liberal version of the joint participation theory. Indeed, the O'Connor model applies the theory largely as it was articulated in *Burton v. Wilmington Parking Authority*.[435] The *Burton* Court did not require direct state involvement in the restaurant's decision not to serve blacks and the Court evaluated the cumulative effect of all the restaurant's ties with the state.[436] The O'Connor model reflects an effort to apply the Fourteenth Amendment to more private activity with less direct state involvement than the Rehnquist model affords without going as far as the Marshall model.

D. Interaction of the State Action Models in the Rehnquist Court's State Action Decisions

The Rehnquist model of state action commanded a solid majority the Burger Court. Chief Justice Rehnquist wrote for a majority of no less than six justices in *Blum v. Yaretsky*,[437] *Jackson v. Metropolitan Edison Co.*,[438] and *Moose Lodge No. 107 v. Irvis*,[439] and then-Chief Justice Burger wrote for the same six in *Rendell-Baker v. Kohn*.[440] Except for Jus-

434. *San Francisco Arts & Athletics*, 483 U.S. at 548 (O'Connor, J., dissenting). For additional discussion of the dissenters' application of a broader joint participation theory in *San Francisco Arts & Athletics* and *Tarkanian*, see *supra* notes 300-03, 326-28, and accompanying text. Justice O'Connor also applied a broad joint participation theory in her opinion for the Court in *Pope*. *See supra* notes 332-37 and accompanying text.

435. 365 U.S. 715 (1961).

436. *Id.* at 724. For a discussion of *Burton*, see *supra* notes 195-202 and accompanying text.

437. 457 U.S. 991 (1982).

438. 419 U.S. 345 (1974).

439. 407 U.S. 163 (1972).

440. 457 U.S. 830 (1982). Joining Chief Justice Rehnquist and then-Chief Justice Burger in these opinions were Justices Blackmun, Stevens, Burger, and Powell. Justice O'Connor joined the opinions in *Blum* and *Rendell-Baker*, replacing retiring Justice Stewart who joined the opinions in *Jackson* and *Moose Lodge No. 107*. Moreover, the Court's judgment in *Blum*

tice Douglas,[441] Justices Marshall and Brennan were the only Justices to dissent in *Blum*, *Rendell-Baker*, *Jackson*, and *Moose Lodge No. 107*. The Burger Court's near-complete adherence to the Rehnquist model is most evident in *Blum*. Chief Justice Rehnquist, writing for a solid majority, refused to find state action despite sound arguments under several theories that state action existed.[442]

One would have expected the Rehnquist Court to continue applying a restrictive state action doctrine or to restrict it further. Although three of the Rehnquist model's most loyal adherents, then-Chief Justice Burger and Justices Powell and Stewart, are no longer on the Court, their replacements are all Reagan appointees.[443] President Reagan took immense care to find politically conservative, non-judicially-activist selections.[444] The Rehnquist model, therefore, could have continued to command a majority of seven Justices, leaving Justices Brennan and Marshall as lone dissenters as they were in *Blum* and *Rendell-Baker*.

Despite the addition of the Reagan appointees, or perhaps because of them, the Rehnquist Court's recent state action cases demonstrate an erosion in the Rehnquist model's dominance.[445] Although the Marshall model still commands the vote of only Justice Marshall,[446] the O'Connor model has attracted the votes of at least two and as many as eight Justices.[447] The Justices' increased acceptance of the O'Connor model reflects the Court's movement toward a less restrictive state action doctrine.

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and *Rendell-Baker* carried a majority of seven Justices when Justice White concurred in the judgment but not the Court's opinion.

441. Justice Douglas, who left the Court in 1975, dissented in *Jackson* and *Moose Lodge No. 107*.

442. *See supra* note 381 and accompanying text. The only break in the Rehnquist model's solid dominance came in Flagg Bros. v. Brooks, 436 U.S. 149 (1978), when Justices Stevens and White dissented, leaving a majority of only five, and Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982). *Flagg Bros.* concerned the difficult problem of the state refusing to act. *See supra* notes 131-51 and accompanying text. *Lugar* concerned the issue of whether a litigant using state attachment procedures acts under color of state law within the meaning of 42 U.S.C. § 1983 (1981); it did not actually concern the issue of whether the plaintiff's deprivation resulted from state action.

443. President Reagan appointed Justices O'Connor, Scalia, and Kennedy.

444. *See*, Davis, *Power on the Court: Chief Justice Rehnquist's Opinion Assignments*, 74 JUDICATURE 66, 66-67 (1990).

445. *See infra* notes 448-61 and accompanying text.

446. *See supra* notes 382, 440-42 and accompanying text.

447. In San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987), Justices O'Connor and Blackmun joined the portion of Justice Brennan's opinion that found state action on the basis of the joint participation theory. The decisions of Justices White, O'Connor, Brennan, and Marshall in NCAA v. Tarkanian, 488 U.S. 179 (1988), also fit the O'Connor model. Justice O'Connor wrote for all the Justices except Chief Justice Rehnquist in Tulsa Professional Collection Servs., Inc. v. Pope, 485 U.S. 478 (1988).

Although a majority of the Court declined to find state action in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*[448] and *NCAA v. Tarkanian*,[449] these cases demonstrate the Rehnquist model's weakening hold on the Court. Four Justices dissented and would have found state action in each case. In addition to Justices Brennan and Marshall, Justices O'Connor and Blackmun found state action in *San Francisco Arts & Athletics* under the joint participation theory.[450] Likewise, in *Tarkanian*, Justices O'Connor and White joined with Justices Marshall and Brennan to find that the activities of the NCAA were state action under the joint participation theory.[451] Although the O'Connor model did not command a majority of the Court in either *San Francisco Arts & Athletics* or *Tarkanian*, together the cases reveal that five Justices accept the O'Connor model and are willing to find state action on the basis of the model's more liberal joint participation theory.[452]

Although *Tulsa Professional Collection Services, Inc. v. Pope*[453] is not a standard state action case, it demonstrates further erosion in the Rehnquist model's command of the Court. Using analysis similar to the joint participation theory, eight Justices rejected Justice Rehnquist's analysis. Writing for the Court, Justice O'Connor agreed with Justice Rehnquist that the running of a statute of limitation is not "sufficient to implicate due process."[454] Yet she identified the issue in the case as whether "the State's involvement in the nonclaim statute is substantial enough to implicate the Due Process Clause."[455] Just as she and Justice Brennan reviewed the relation between the USOC and the federal gov-

448. 483 U.S. 522 (1987).

449. 488 U.S. 179 (1988).

450. *See San Francisco Arts & Athletics*, 483 U.S. at 548 (O'Connor, J., joined by Blackmun, J., dissenting).

451. *Tarkanian*, 488 U.S. at 199-203 (White, J., dissenting). The issue in *Tarkanian* actually was whether the NCAA acted under color of state law for purposes of 42 U.S.C. § 1988 (1981) rather than whether its conduct was state action under the Fourteenth Amendment. The dissenters, however, did not distinguish the two issues and relied on state action precedent.

452. *See supra* notes 300-03, 326-28 and accompanying text.

453. 485 U.S. 478 (1988).

454. *Id.* at 485-86. This statement is troublesome. Justice O'Connor cannot mean that a statute of limitation is not state action subject to the Fourteenth Amendment. Like any statute duly enacted by the legislature, a statute of limitation must be state action. *See supra* note 60 and accompanying text. Justice O'Connor may mean that a statute of limitation does not of its own self-executing operation violate due process. If so, she agrees with Chief Justice Rehnquist's view that the state is free to define the creditor's property interest in a cause of action regardless of the values involved. *See supra* note 338.

455. *Pope*, 485 U.S. at 486.

ernment in *San Francisco Arts & Athletics,*[456] she reviewed the relation between the probate court and the operation of the nonclaim statute in *Pope.*[457] She concluded that the probate court's "involvement [in the operation of the nonclaim statute] is so pervasive and substantial that it must be considered state action subject to the restrictions of the Fourteenth Amendment."[458] In other words, the probate court's "involvement" in the running of the statute made it a joint participant in the statute's deprivation of the plaintiff creditor's cause of action. The plaintiff was thus entitled to personal notice of the court's proceedings.[459]

These cases indicate that Chief Justice Rehnquist may be alone in fully embracing the restrictive model of state action he constructed during the Burger Court years. The solid majority of six that the Rehnquist model commanded on the Burger Court is clearly gone. Although the expansive Marshall model continues to appeal only to Justice Marshall, the O'Connor model is gaining wide support on the Court. The O'Connor model, which generally follows the Rehnquist model's restrictive approach, adds a liberal joint participation theory of state action. Although the Justices vary in their application of the O'Connor model's joint participation theory,[460] these cases demonstrate the willingness of these Justices to examine all of the ties between the state and the cause of a particular deprivation to determine if the state is a joint participant in the deprivation, thus implicating the Due Process Clause. To that extent, these cases reflect a definite movement away from the restrictive Rehnquist model of the state action doctrine.[461]

456. 483 U.S. 522 (1987). For a discussion of *San Francisco Arts & Athletics* and Justices O'Connor's and Brennan's analysis of the case, see *supra* notes 270-303 and accompanying text. Justices O'Connor and Brennan examined the relationship between the federal government and the USOC to determine if the federal government was sufficiently involved in the challenged decision of the USOC to treat the decision as state action.

457. *Pope*, 485 U.S. at 487-88.

458. *Id.* at 487 (Justice O'Connor's analysis on this issue is discussed *supra* at notes 332-37 and accompanying text). This sentence too is troublesome. It would be a striking conclusion indeed if the actions of a state probate court were *not* state action subject to the Fourteenth Amendment. Justice O'Connor presumably means that the probate court and its proceedings caused the deprivation of the plaintiff creditor's cause of action because of the court's "involvement" in the running of the statute.

459. *See supra* notes 336-37 and accompanying text.

460. Justice Blackmun, for example, would have found the state to be a joint participant in *San Francisco Arts & Athletics* but not in *Tarkanian. See supra* notes 300, 312. Justice White would have reached the opposite results in both cases. *See supra* notes 277, 326. Justices Scalia, Kennedy, and Stevens found the requisite state involvement only in *Pope. See supra* notes 277, 312, 332-37 and accompanying text.

461. Although the appointment of Justice Souter to replace Justice Brennan undoubtedly will impact this movement, the nature and extent of Justice Souter's impact is impossible to predict. Justice Souter's opinions on the court of appeals and his earlier writing provide no

V. Conclusion

The Fourteenth Amendment's state action requirement serves to contain federal judicial power and the application of constitutional standards of behavior in the boundaries set by the Constitution.[462] The Constitution does not regulate private conduct,[463] and it affords federal courts only narrowly confined power to articulate positive law regulating private conduct.[464] The state action requirement prevents federal courts from directly regulating private activities in the guise of enforcing the Fourteenth Amendment, when the Constitution intended the representative branches—of both state and federal governments—to have exclusive authority to regulate private activities.[465]

The state action theories create exceptions to the general operation of the state action requirement and the general scheme of the Constitution. They allow the federal courts to apply fourteenth amendment restrictions to ostensibly private conduct based on the government's involvement in the conduct or the governmental nature of the conduct.[466] They do so for a sound reason: to assure that governments do not circumvent fourteenth amendment restrictions by acting with or through private entities. The application of the state action theories nonetheless results in the federal courts directly regulating private conduct, something the Constitution ordinarily leaves for the representative

insight into his views on state action issues. One of course would not expect Justice Souter to find state action as liberally as Justice Brennan did, *see supra* notes 382-86, but a more precise prediction would be impossible to substantiate. After all, one would not have expected President Reagan's appointees to relax the state action doctrine. *See supra* notes 445-60 and accompanying text.

A state action case that is currently pending before the Court, Edmonson v. Leesville Concrete Co., 895 F.2d 218 (5th Cir. 1990), *cert. granted,* 111 S. Ct. 41 (1990), should give some indication of Justice Souter's impact on the state action issue. The issue in that case is whether the ruling in Batson v. Kentucky, 476 U.S. 79 (1988), applies to civil trials between private litigants. *Batson* held that a government prosecutor's use of peremptory challenges to exclude jurors on the basis of race violates the Fourteenth Amendment. In *Edmonson,* the Court apparently must decide whether a private litigant's use of peremptory challenges in a civil trial is state action such that it violates the Amendment. For a discussion of this state action issue see *Edmonson,* 860 F.2d 1308 (held private litigant's discriminatory use of peremptory challenges is state action that violates the Fourteenth Amendment), *rev'd on reh'g en banc,* 895 F.2d 218 (5th Cir. 1990) (found no state action); Fludd v. Dykes, 863 F.2d 822 (11th Cir. 1989) (found state action); Thomas v. Diversified Contractors, Inc., 551 So. 2d 343 (Ala. 1989) (found state action); Wright, *Litigating the State Action Issue in Peremptory Challenge Cases,* 13 AM. J. TRIAL ADVOC. 573 (1989).

462. *See supra* notes 33-38 and accompanying text.

463. *See supra* notes 11-18 and accompanying text.

464. *See supra* note 37.

465. *See supra* notes 13-18 and accompanying text.

466. See *supra* notes 39-267 for discussion of these theories.

branches of government to regulate.[467] Moreover, the Supreme Court's rulings under these theories are final because they are based on the Constitution. The state action theories through which the Court applies the Fourteenth Amendment to private conduct are thus a powerful and potentially dangerous departure from the Constitution's usual allocation of governmental power.

The Court must constantly maintain tight control over the state action theories to prevent their use to usurp the regulatory power over private conduct that the Constitution vested in representative political bodies. The judiciary may be greatly tempted to use these theories to regulate private conduct when the states and Congress have failed to do so or have done so in a manner that the courts consider imprudent or misguided. When the Constitution leaves these matters to the political branches of government, however, the Court must not intervene based on its disagreement with those branches' decisions. A law regulating or declining to regulate private activity is not unconstitutional just because it is a bad law. Loosely formulated and liberally applied state action theories are susceptible to such an inappropriate use not only by the Supreme Court,[468] but more importantly, by the lower federal courts following the Court's lead.[469]

The Rehnquist model of the state action doctrine, therefore, is well designed to serve the purposes and policies underlying the state action requirement. It recognizes that the state acts through and with private entities to achieve governmental objectives. The Rehnquist model accepts the state action theories as devices to assure compliance with the Fourteenth Amendment in such circumstances. The Rehnquist model, however, strictly limits the theories to assure that courts use the Fourteenth Amendment to control governmental action only, leaving the political branches to regulate private activities and relationships as the Constitution intended.

The Rehnquist model is nonetheless too restrictive because it fails to apply fourteenth amendment restraints to some actions and decisions that clearly are attributable to the state. Chief Justice Rehnquist's opinion for the Court in *Blum v. Yaretsky*[470] is a good example of this failure. In *Blum*, the state directed and encouraged the private entities to make

467. *See supra* notes 33-38 and accompanying text.

468. *See* Reitman v. Mulkey, 387 U.S. 369 (1967) (Harlan, J., dissenting).

469. *See, e.g.*, Fludd v. Dykes, 863 F.2d 822 (11th Cir. 1989); Edmonson v. Leesville Concrete Co., 860 F.2d 1308 (5th Cir. 1988), *rev'd on reh'g en banc*, 895 F.2d 218 (1990), *cert. granted*, 111 S. Ct. 41 (1990); Golden v. Biscayne Bay Yacht Club, 521 F.2d 344 (5th Cir. 1975), *rev'd on reh'g en banc*, 530 F.2d 26 (5th Cir. 1976).

470. 457 U.S. 991 (1982).

transfer decisions that served the state function of determining the level of public assistance each citizen received.[471] The Fourteenth Amendment's purpose to protect individuals from arbitrary governmental conduct should apply to such a decision,[472] even if the state delegates to a private entity the authority to make the final determination.[473]

While the Rehnquist model in most respects faithfully serves the purposes and values underlying the state action doctrine and the Fourteenth Amendment, then, it is too restrictive. Justice O'Connor's model loosens the state action doctrine to apply the Fourteenth Amendment to more ostensibly private conduct than the Rehnquist model allows. While the O'Connor model seeks a justified end, its choice of the joint participation theory to effect the desired expansion of state action is problematic.

The joint participation or symbiosis theory of state action lacks useable standards to guide future cases and provide consistent results. The theory has been criticized since its inception because the basis for finding state action under the theory has never been explained clearly. Justice Harlan criticized the Court's creation of the theory in *Burton v. Wilmington Parking Authority.*[474] He wrote:

> The Court's opinion, by a process of first undiscriminatingly throwing together various factual bits and pieces and then undermining the resulting structure by an equally vague disclaimer, seems to me to leave completely at sea just what it is in this record that satisfies the requirement of "state action."[475]

Indeed, when courts use the joint participation theory, they list all the ties between the government and the private entity's challenged conduct and then announce the entity's conduct to be state action, proclaiming the state a joint participant in the private entity's operations.[476] Such an approach provides little more guidance than saying that the private entity's conduct is state action because it ought to be deemed state action. The Court has never articulated precisely what relationship between the state and the private entity is required for this conclusion and why those

471. *Blum*, 457 U.S. at 1026 (Brennan, J., dissenting); *see supra* notes 177-85, 205-15, 381 and accompanying text.

472. Finding that the Fourteenth Amendment applies to the private entity's decision does not necessarily mean the decision in fact was arbitrary and violative of the Amendment. Rather, the court is merely required to review the decision to determine whether it was so arbitrary as to violate due process.

473. *See supra* note 467 and accompanying text.

474. 365 U.S. 715 (1961).

475. *Id.* at 728 (Harlan, J., dissenting).

476. *Id.* at 722-24; Edmonson v. Leesville Concrete Co., 860 F.2d 1308 (5th Cir. 1988), *rev'd on reh'g en banc*, 895 F.2d 218, *cert. granted*, 111 S. Ct. 41 (1990).

relationships justify application of the Fourteenth Amendment to a private entity. By "sifting facts and weighing the circumstances," therefore, a court can list the unique ties between the state and any private actor and then hold arbitrarily that the actor's conduct is or is not state action.[477] The joint participation theory therefore fails to provide any "neutral theory of constitutional law"[478] that might serve as a guide in future cases involving different facts and relationships. It neither guides courts in applying the Fourteenth Amendment to governments' efforts to act with or through private entities nor prevents courts from intruding upon the political branches' exclusive authority to regulate private activity.

Three Justices' application of the joint participation theory in recent state action cases demonstrates this theory's unpredictability. Justice O'Connor, for example, found sufficient ties to deem the federal government a joint participant in the USOC's licensing decision in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*,[479] but she held that the state of New York was not a joint participant in the nursing homes' transfer decisions in *Blum v. Yaretsky*.[480] *Blum*, however, was a better case for the theory's application than *San Francisco Arts & Athletics*.[481]

The positions of Justices White and Blackmun in *Blum*, *San Francisco Arts & Athletics*, and *NCAA v. Tarkanian*[482] further demonstrate the difficulty of applying the joint participation theory. Justice Black-

477. *See* McCoy, *supra* note 72, at 809 n.98 (" 'Symbiosis' is such an open-ended notion that it seems to place little or no restraint on the judge's ability to assert that the facts of a particular case do or do not add up to 'symbiosis' with the state."); *cf.* R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 15, at 183 (The "symbiotic relationship" category of state action cases "is, in reality, a 'catch-all' which may have little, if any, substantive meaning.").

478. Wechsler, *supra* note 86, at 1. Writing in 1959, Professor Wechsler did not use the quoted phrase in discussing *Burton*. The phrase comes from the title of his paper delivered as the Oliver Wendell Holmes Lecture at the Harvard Law School in 1959 that, among other things, criticized several Supreme Court decisions for failing to apply "neutral principles of constitutional law." The state action case of Shelley v. Kraemer, 334 U.S. 1 (1948), was among the decisions Professor Wechsler criticized on this ground. *See* Wechsler, *supra* note 86, at 1, 29-31.

479. 483 U.S. 522 (1987).

480. 457 U.S. 991 (1982).

481. The nursing homes in *Blum* made the challenged transfer decisions entirely at the insistence of the state and entirely for the state's direct benefit. *See supra* notes 177-85, 205-15, 381 and accompanying text. In *San Francisco Arts & Athletics*, on the other hand, the government did not regulate the USOC's licensing decisions in any way, and the challenged decision only remotely inured to the government's benefit. *See supra* notes 288-91 and accompanying text. For discussions of the joint participation theory as applied to *Blum* and *San Francisco Arts & Athletics*, see *supra* notes 205-15, 288-91, 300-03 and accompanying text.

482. 488 U.S. 179 (1988).

mun found state action in *San Francisco Arts & Athletics* but not in *Tarkanian*. Justice White, meanwhile, found state action in *Tarkanian* but not in *San Francisco Arts & Athletics*.

Justice Harlan's criticism of the joint participation theory is thus justified. The theory lacks standards to guide decisions and does not stand on as solid a theoretical foundation as the other theories. Its use to expand the restrictive Rehnquist model is ill advised.

A better approach to correct the overly restrictive Rehnquist model is to employ a carefully expanded variant of the government function theory. The Court originally used the government function theory in *Marsh v. Alabama*[483] to apply the Fourteenth Amendment to the activities of a private entity that had *voluntarily* assumed a governmental role and displaced the government in some capacity.[484] The restrictive version of the government function theory devised by Chief Justice Rehnquist is well-suited for that kind of case.

As applied to a case like *Marsh*, the government function theory must be narrow, and the strict exclusivity requirements[485] formulated by Chief Justice Rehnquist are justified. The Court's application of the Fourteenth Amendment to a private entity in cases like *Marsh* comes closer to usurping the power of the representative branches of government than any other state action theory. Although the Constitution does not regulate directly or empower the federal courts to regulate directly a private corporation's activities,[486] the *Marsh* Court's application of the Fourteenth Amendment did just that. It applies the Constitution directly to the activities of a private entity entirely on the basis of the entity's own conduct. This power to sidestep the Constitution's preference that controlled majoritarian government—instead of federal courts—regulate private conduct must be limited.

The justification for the Court possessing and using that power is that the private entity, like the one in *Marsh*, essentially has become the government and, like all American governments, must conform its actions to fourteenth amendment restraints. A private entity "becomes" a government only when it performs a function that only governments perform and it is the only entity—governmental or otherwise—performing the function. The theory's justification breaks down if it is applied to functions that governments sometimes perform and sometimes leave to

483. 326 U.S. 501 (1946).

484. *See supra* note 229 and accompanying text.

485. For a discussion of these exclusivity requirements, see *supra* notes 244-61 and accompanying text.

486. *See supra* notes 13-18 and accompanying text.

the marketplace or to functions that are simultaneously provided by several entities. Chief Justice Rehnquist's exclusivity requirements thus prevent the Court from usurping the exclusive authority of the representative governmental bodies to regulate private conduct.

Those strict exclusivity requirements, however, serve no purpose when applied to a private entity's performance of a governmental function pursuant to express or implied state delegation. When the state expressly or perhaps impliedly authorizes or requires a private entity to act, at least minimal state involvement exists and the danger of the courts usurping representative authority over purely private conduct is less pronounced. The Court's decision to apply constitutional standards then depends not on the nature of the private conduct alone, but also on the state's delegation of authority. In such cases, it should be sufficient that the function is one ordinarily performed by the state—rather than one exclusively performed by the state.[487] If the state affirmatively delegates a function to a private entity, strict application of the exclusivity requirements prevents application of the Fourteenth Amendment to decisions and actions for which the state is directly responsible. When the state expressly[488] delegates the performance of a typically governmental function to a private entity, the state should not be free from responsibility for the manner in which the function is performed simply because the function is not one "exclusively" performed by government.

The Court should recognize a separate "delegation" variant of the government function theory. Applying this modified approach, the Court should apply the Fourteenth Amendment to actions of private entities when the actions are governmental in nature and are performed pursuant to express governmental directive or delegation. Courts should balance these two requirements in determining whether the Amendment applies. The more clearly the plaintiff's conduct constitutes a true government function, the less explicit and detailed the government "delegation" needs to be. Likewise, when the government "delegation" is a directive guided by detailed regulations, the function the private entity performs need not be so clearly a true "exclusively" governmental function. Although these standards do not provide absolute certainty and predictability, they provide substantially more guidance than the joint participation theory. Moreover, unlike the joint participation theory,

487. See San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 548-59 (1987) (Brennan, J., dissenting); Evans v. Newton, 382 U.S. 296, 299 (1966).

488. "Express" delegation means that the state expressly requires or authorizes a private entity to perform a particular function. It does not mean that the state explicitly recognizes that the function is governmental in nature.

their formulation is grounded in the purposes underlying the Fourteenth Amendment's state action requirement and the need for theories that allow ostensibly private conduct to fall subject to fourteenth amendment restraints.