Is Abandoning State Action Asking Too Much of the Constitution?

By SCOTT E. SUNDBY*

Professor Friesen has made a convincing case that either as a question of original intent or of textual interpretation the requirement of state action under the California Constitution is an open one.[1] She has presented the issue primarily as a policy choice and it is in that vein that I will pursue the discussion of whether state action should be required under the constitution. Specifically, I want to raise the question whether extending the California Constitution to include protection against private actors asks too much of the constitution.

I come to this question as one who wants to be convinced that state action should not be required, but has three general concerns or, in the great California tradition, propositions, that I believe need to be addressed:

> First, the state action doctrine reflects a legitimate distinction between government and private conduct and the dangers each poses to constitutional rights.
>
> Second, extending constitutional protections to private actions not only expands the judiciary's power to find constitutional violations, it also changes the judiciary's role within the framework of constitutional decisionmaking.
>
> Third, applying the constitution to private actions changes the constitution's role from regulator of governmental behavior to moral arbitrator of private disputes.

I should note at the outset that one could agree with each of these propositions and still conclude that the balance of advantages and disadvantages favors extending the constitution's protections to private actions.

---

* Associate Professor, University of California, Hastings College of the Law. I would like to thank Professors Mary Kay Kane and David Faigman for providing helpful comments and suggestions on an earlier draft.

1. *See* Friesen, *Should California's Constitutional Guarantees of Individual Rights Apply Against Private Actions?*, 17 HASTINGS CONST. L.Q. 111 (1989). The strongest argument against a state action requirement applies to the right of privacy in article 1, section 1. The justifications for passage of the right included concerns over both government and private intrusions. *See* White v. Davis, 13 Cal. 3d 757, 775, 533 P.2d 222, 234, 120 Cal. Rptr. 94, 106 (1975) (noting arguments in voter pamphlet included business use of personal information).

These are the issues and consequences of abandoning state action, however, that must be addressed before such a step is taken.

Proposition One: The state action doctrine reflects a legitimate distinction between government and private conduct and the dangers each poses to constitutional rights.

The state action doctrine has been attacked on a number of fronts as a basis for distinguishing whose conduct is subject to constitutional restraints. My first proposition is simply that, despite its shortcomings,[2] the state action doctrine makes a legitimate distinction between government and private action. One can argue over whether a line should be drawn at all or whether state action is the best line, but the doctrine's critics overstate their case to the extent that they characterize the doctrine as irrational and arbitrary.

The argument against state action takes several different forms. First, some have contended that state action is an illusory distinction because all violations of constitutional rights implicate the government. This argument contends that state action exists even when a private actor violates a constitutional right because the state becomes a party to the deprivation itself—an accessory after the fact—by allowing the private action to go unsanctioned.[3] Consequently, because state action is everywhere, the state action doctrine's flaw is that it really represents no line at all.

The difficulty with this first attack on state action is that it assumes the government's failure to supply a remedy for a grievance is tantamount to approval of the grievous act. The failure to intervene essentially becomes the equivalent of the government doing the act itself or being actively involved in its commission. Yet, the situation in which the state itself brings about the violation is not necessarily the same as when the state's "culpability" rests on its failure to provide a remedy after the fact.

2. The United States Supreme Court's development of the state action doctrine, for example, has been less than a model of consistency. *See* Black, *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967) (describing state action doctrine as a "conceptual disaster area").

3. *See* Chemerinsky, *Rethinking State Action*, 80 NW. U.L. REV. 503, 514-16, 521-25 (1985) (providing historical and positivist support for view that state's failure to provide a remedy constitutes state action); Note, *State Action: A Pathology and a Proposed Cure*, 64 CALIF. L. REV. 146, 155-59 (1976) (issue should be state "deprivation" not state "action"); *cf.* Shelley v. Kramer, 334 U.S. 1 (1948) (judicial enforcement of private racially restrictive covenants constitutes state action).

When the government acts or is significantly involved in another's actions, it sends a message of active approval and choice. Whatever the government's rationale in undertaking the act that results in the alleged violation, the state's responsibility for the decision to actively proceed is clear. When the government's role is one of refraining from entering a private dispute, on the other hand, the choice of nonintervention does not necessarily translate into condonation of the private act. At least where sound reasons exist for not recognizing a claim as a legal cause of action,[4] the government's refusal to recognize the claim as actionable is not a statement that either party is right or wrong, but a decision that such disputes are best resolved outside the legal system. Thus, it overstates the case to argue that the failure to provide a governmental remedy automatically makes the state a party to the private action. As one commentator has observed:

> [T]he . . . sweeping assertion that individuals engaged in ordinary activities on their own behalf, far removed from the business of government, are wielding the power of the state—as though those individuals wore uniforms and badges—merely because their conduct is not prohibited by state law or protected by the Constitution, is a notion disquietingly totalitarian, conspicuously artificial, and in no way deducible from positivism or any other legal or political doctrine.[5]

A second way of arguing that state action is an arbitrary line is to adopt the perspective of the individual whose rights are being violated. To the employee who is fired for expressing political beliefs contrary to

4. For a discussion of policy reasons for not recognizing constitutional claims against private actors, see *infra* notes 21-36 and accompanying text. General reasons for not recognizing a non-constitutional cause of action may include practical concerns such as the increased burden on the legal system as well as more theoretical beliefs that certain disputes are inappropriate for governmental resolution. The distinction between state intervention and nonintervention may prove unsatisfactory, however, if no legitimate reason for nonintervention exists; the refusal to provide a remedy now can be seen as an indirect decision on the merits of the private dispute.

The proposed distinction between intervention and nonintervention is meant only as a general proposition. Situations may exist in which the failure to act is equally culpable to actually carrying out the act. In the criminal law area, for example, an omission to act may be criminal if a special duty of care was owed to the victim. W. LA FAVE & A. SCOTT, CRIMINAL LAW 202-07 (2d ed. 1986). One might argue that the state always owes such a special duty to its citizens when constitutional values are involved. Such a view, though, requires a very broad perception of the government's reach into everyday affairs. Still, the possibility remains of finding certain specific settings in which state nonintervention will amount to state action because of a special duty or because the justifications for nonintervention are outweighed by the need to provide a remedy. *Cf.* Shelley v. Kramer, 334 U.S. 1 (1948) (judicial enforcement of private racially restrictive covenants constitutes state action).

5. Goodman, *Professor Brest on State Action and Liberal Theory, and a Postscript to Professor Stone*, 130 U. PA. L. REV. 1331, 1338-39 (1982).

those of her employer, her freedom of speech has been infringed whether the employer is the government or a private entity. Yet, under the state action doctrine, who can claim constitutional protection is based on the transgressor's identity rather than the nature of the acts. Thus, the employee's ability to assert a claim based on a constitutional violation will depend on the apparently fortuitous fact of whether her employer is the government.

This disparate treatment becomes less objectionable, however, if the identity of the transgressor affects the nature of the transgression itself. In other words, if the same action has different consequences if done by the government rather than by a private entity, and the difference argues more strongly for extending constitutional protections against governmental actions, then the concept of state action does represent a rational line. I believe that such a distinction between private and government conduct can be found if the question is asked from a societal rather than an individual perspective.[6] The distinction stems from two basic differences between the consequences of governmental and private actions.

First, the government poses a greater danger to the citizenry's constitutional rights because of the government's pervasiveness and resources. General Motors may be powerful, but it simply does not have the same potential as the government to stifle the exercise of constitutional rights. Again, it is important to distinguish the danger from individual and societal perspectives. Certainly, General Motors might suppress a particular employee's free speech right as effectively as the government, but the government poses the greater danger to society as a whole. This argument is not meant to ignore or downplay the political and economic power that corporations possess;[7] yet, absent some conspiratorial cooperation, the breadth of power wielded by corporations simply does not compare to that available to the state.[8] The government

6. One might argue that the perspective should be that of the aggrieved party and not a broader societal view. That issue, however, is a policy choice over what the constitution represents, an issue addressed later. *See infra* notes 21-23 and accompanying text. My only purpose at this juncture is to establish that state action does provide a rational distinction if one looks at the differences between private and governmental action from a societal perspective.

7. *Cf.* Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1131-33, 1134-35, 1138-39 (1980) (describing the economic power of modern corporations and consequences for state action); Summers, *The Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons from Labor Law*, 1986 U. ILL. L. REV. 689, 694 ("[t]he sovereign use of property rights by private collectives are [sic] a major threat to our constitutional values of personal freedoms.").

8. If corporate power should expand to such an extent that corporations and businesses exercise control over the populace comparable to that of the state, state action can be broadly defined to include acts of corporations licensed by the state. *See* Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion Through Economic*

not only has the ability to affect more than a limited sector of the populace through its actions, it has both economic power, in the form of taxes, grants, and control over social welfare programs, and physical power, through law enforcement agencies, which are capable of coercion far beyond that of the most powerful private actors. Consequently, if one views state action as an attempt to draw a line based on the greatest power to affect citizens' lives, state action is not an irrational line.[9]

Second, an individual generally has greater choice and alternatives in dealing with private actors than when dealing with the government. When the government acts, often few alternatives are available for recourse. Individuals denied welfare benefits, business licenses, or the opportunity to participate in the electoral process have no realistic alternatives. If a private actor denies a person his or her constitutional rights, however, other options are usually available. One can work for a different employer, lease from a different landlord, or find a different forum in which to express one's views. The alternatives often may be onerous in the private arena, but they are not foreclosed. Moreover, if alternatives do not materialize and private actors are placing unacceptable restrictions on others' liberties, the government can provide a legislative remedy; for example, laws can be passed prohibiting discrimination in the workplace or controlling the use of invasive techniques such as polygraphy testing.[10] In contrast, when the state itself acts to violate

Power, 100 U. PA. L. REV. 933, 942-46 (1952). Such an approach would require a radical change in current state action doctrine, but would allow constitutional protections to be extended consistent with a concern over collective tyranny rather than simply as a means to fill in holes in the law of torts.

9. The emphasis on the government's power is not meant to suggest that state action should be limited only to direct governmental acts. In fact, recognizing the pervasiveness of the government's reach perhaps argues most strongly for a broad definition of state action, sensitive to the many ways the state can influence, directly or indirectly, private behavior.

10. *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000; Civil Rights Act of 1968, 42 U.S.C. § 3601 (prohibiting discrimination in contexts such as housing and employment); Employee Polygraph Protection Act of 1988, 29 U.S.C. § 2001 (strictly regulating when private employers can utilize polygraph tests); Ordinance section 3300 A.5, San Francisco Police Code (prohibiting drug testing of employees except in narrowly defined circumstances); *cf.* New York State Club Ass'n, Inc. v. City of New York, 108 S. Ct. 2225 (1988) (upholding ordinance banning discrimination in clubs meeting certain criteria); Board of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537 (1987) (upholding state law barring discrimination by business establishments).

When the legislature does pass legislation governing private acts that parallels constitutional values, a strong argument can be made that interpretations of the statute should reflect the constitutional values at stake. *See* Summers, *supra* note 7, at 722-23. Using constitutional values to interpret statutory rights broadly is an issue distinct from whether the constitutional rights themselves should govern private acts. *Id.* at 694-96 (proper response to private threats to freedoms is legislation, not abandoning state action).

civil liberties, often the only recourse may lie with the judiciary enforcing the constitution.

The foregoing distinctions offer broad rationale for differentiating private and state conduct. Admittedly, the rationale are not perfect and do not work as well once the focus is narrowed to individual settings in which the state and private actors are bureaucrats who appear indistinguishable except that one enterprise is funded by the state and the other is not.[11] My point simply is that despite the anomalies, legitimate distinctions do exist between government and private actors when viewed from a broader perspective.[12] The remaining propositions address the question whether the state-private distinction in fact should be made.

Proposition Two: Extending constitutional protections to private actions not only expands the judiciary's power to find constitutional violations, it also changes the judiciary's role within the framework of constitutional decisionmaking.

Both opponents and supporters of the state action doctrine agree that if constitutional claims are allowed against private actors, the judiciary's power will be increased.[13] The courts would be obligated to balance

11. It is particularly in the employment context, however, that the state-private distinction appears most happenstance. Many jobs with similar or identical tasks are performed both in the public and private sectors. Given the similarities in everyday duties and the generic quality of office politics, it may appear arbitrary that one supervisor becomes a state actor because she works for a state agency while another bureaucrat remains free from constitutional restraints because she works for a private employer.

Even in this context, an argument can be made that to the extent a state enterprise is involved and, consequently, public monies are being spent, the state bureaucrat's actions do raise different societal concerns. As an individual I may disapprove of certain private employers' practices, but as a citizen-taxpayer I have a heightened concern where a government employer is involved, because my tax money is being used to support such a practice. *Cf.* Flast v. Cohen, 392 U.S. 83, 102 (1968) (taxpayer has standing to challenge expenditure of federal funds to aid religious schools as violating Establishment Clause of First Amendment). Moreover, when the government actively supports or engages in the conduct, the message is one of express approval rather than simply a decision to refrain from entering the dispute. *See supra* notes 4, 5 and accompanying text.

12. I must acknowledge that my view may be deviant given that, unlike Professor Chemerinsky's and Friesen's students, I was not surprised as a student to learn of the state action doctrine. *See* Chemerinsky, *supra* note 3, at 519 n.79; Friesen, *supra* note 1, at 128 & n.58. The source of this deviancy is beyond the scope of this Commentary. *See generally* S. FREUD, GENERAL PSYCHOLOGICAL THEORY (1963).

13. *See generally* Friesen, *supra* note 1, at 116-17; Choper, *Thoughts on State Action: The "Government Function" and "Power Theory" Approaches*, 1979 WASH. U.L.Q. 757, 763 (cautioning against expanding judiciary's power to include constitutional claims against private actors); Marshall, *Diluting Constitutional Rights: Rethinking "Rethinking State Action,"* 80 NW. U.L. REV. 558 (1985) (abandonment of state action would expand judiciary's power).

the constitutional rights of the plaintiff and the defendant and decide which right prevails under the constitution. At first blush this is not a particularly novel role for the courts because it involves two traditional judicial functions: the common-law power to define torts and the power to interpret the constitution's meaning, which often involves balancing different constitutional values. I would suggest, however, that the coming together of these two powers—allowing the courts to create constitutional torts between private actors—raises the stakes by removing the judiciary from the check and balance framework that presently exists.

The problem is best understood by first noting how, standing alone, the judiciary's common-law and constitutional interpretation powers each are limited in their scope. A court's common-law power to define a new tort or expand an existing one is checked by the legislature, which can overrule or modify the common-law tort. Likewise, the judiciary's power of constitutional interpretation is a limited one, because under the state action doctrine the courts can act as a constitutional interpreter only when state conduct is involved. Thus, the California Supreme Court's power to engage in constitutional interpretation is derived from its role as a check on other state actors.[14]

If the state action requirement is removed, both limitations are lost. Unlike common-law torts which the legislature can overrule, the legislature cannot overrule or modify a constitutional right found by a court, which is why Professor Friesen appropriately calls these rights "super torts."[15] Consequently, no check by another branch of government exists over the judiciary's creation of new constitutional torts. Moreover, because the courts can now engage in constitutional interpretation even when a governmental entity has not acted or become involved, the court's role as constitutional interpreter no longer is limited by its function as a check on other state actors. The net effect of removing the state action requirement would be to extend the judiciary's traditional common-law powers into the arena of constitutional interpretation, cloaked with the power of *Marbury v. Madison*,[16] and limited only by the ability

14. The state actor in question may be another member of the judiciary.

15. Friesen, *supra* note 1, at 130. This power to create "super torts" is different from the power the United States Supreme Court has exercised to find a nonstatutory remedy for constitutional violations. *See, e.g.*, Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971); Davis v. Passman, 442 U.S. 228, 245 (1979); Carlson v. Green, 446 U.S. 14 (1980). In these cases, the Court did not impose new constitutional duties on private actors, but merely provided a remedy for already recognized constitutional rights.

16. 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). *See also* Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("[*Marbury*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution.").

of the parties to frame their issues under such broad values as freedom of speech, equal protection, or privacy.

Nor do I find the alternative limits on the courts' powers particularly persuasive. For example, the suggestion that the constitution can be amended to overrule undesirable holdings poses twin dangers. First, the danger arises of turning the constitution into a document resembling a legislative code if the idea is that amendments are to be proposed and passed to overrule specific rulings for specific settings. Additionally, the danger looms that those seeking an amendment to overturn an unfavorable ruling would seek an amendment with a broader scope to preclude future unfavorable rulings in the area. Consequently, an objection to a particular ruling might spawn an amendment leading to an even broader repeal of constitutional rights.

Nor do judicial elections and recalls cure the problem. First, removing a judge does not by itself overturn his or her rulings. The overturning of existing rulings falls to the new appointees, who must contend with the issue of stare decisis. Such a roundabout approach to constructing constitutional doctrine would be extremely cumbersome and would threaten the stability that is one of the hallmarks of our legal system. More fundamentally, I would hesitate to advocate using judicial recall and elections as methods of interpreting the constitution because they create the distinct danger of turning the judiciary into a political body more concerned with opinion polls than justice. Such a situation eventually would erode the public's confidence in the judiciary as an independent and neutral decisionmaker.

As with the other propositions, the problems that would be associated with expansion of the judiciary's role do not necessarily mean that retaining the state action doctrine is the best choice. If the alternative is to let constitutional values go unvindicated, the proper decision may be to allow the judicial power to expand beyond its traditional contexts. Such an expansion, however, should be undertaken with a clear notion of how the balance between the different branches of government is being changed.

Proposition Three: Applying the constitution to private actions changes the constitution's role from regulator of governmental behavior to moral arbitrator of private disputes.

This characterization is derived directly from one of the major advocates of abandoning state action, Professor Chemerinsky, who states, "The effect of discarding the concept of state action is that the Constitu-

tion would be viewed as a code of social morals, not just of governmental conduct, bestowing individual rights that no entity, public or private, could infringe without a compelling justification."[17] If one agrees with Professor Chemerinsky's prediction of the effect of abandoning state action, as I do, the question then becomes the one with which we started: Is this asking too much of the constitution? As Professor Friesen recognizes, extending constitutional protection to private acts opens up a new panorama of constitutional challenges.[18] Taken to its logical extreme, an individual could sue her neighbor for not inviting her to a dinner party, alleging a violation of her first amendment or equal protection rights.[19] Professor Friesen argues, and undoubtedly is correct, that a court would disallow such a claim once it weighed the plaintiff's constitutional rights against the defendant's freedom of association rights.[20]

Even if we can be confident of that outcome, however, several problems remain. First, similar frivolous claims will arise where the defendant has no countervailing constitutional right; the plaintiff may establish a constitutional violation when the problem is a nosy neighbor snooping inside her garage. Calling such an act a constitutional violation trivializes the constitution, transforming it from a blueprint of fundamental freedoms into a document for litigating everyday disputes.[21]

Fairness requires acknowledgment that the problem of frivolous constitutional claims is not confined to private actions. State infringements, such as the plaintiff's claim in *Parratt v. Taylor*[22] that his due process rights were violated because the mail clerk in the prison in which he was incarcerated lost a $23.50 mail order package, can also be frivolous. With private actors, however, the problem is exacerbated by the

17. Chemerinsky, *supra* note 3, at 550.

18. *See* Friesen, *supra* note 1, at 115.

19. The dinner party hypothetical is a popular example, along with the suggestion that without state action demonstrators could not be excluded from people's living rooms. *See generally* Chemerinsky, *supra* note 3, at 538 (raising the examples and demonstrating how such claims would not succeed).

20. *See* Friesen, *supra* note 1, at 115-16.

21. Although the likelihood of some of these claims being filed may be marginal given litigation costs, the increase in the courts' caseload over the last decade does not leave one sanguine. *See generally* Marvell, *Caseload Growth—Past and Future Trends*, 71 JUDICATURE 151 (1987); R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM (1985). *But see infra* note 35 (citing authorities who argue that abandoning state action will not greatly increase caseload).

22. 451 U.S. 527 (1981). The Court did not unanimously agree that such a claim should be cognizable under the Constitution. Justices Stewart and Powell both expressed concern that recognizing such a claim trivialized the Constitution and suggested that a due process "deprivation" should be limited to intentional state actions. *Id.* at 544-45 (Stewart, J., concurring); *see id.* at 548-49 (Powell, J., concurring) (claims based on unintentional conduct should not be viewed as due process "deprivation").

increase in the number and the variety of settings in which private actors operate. With a state action requirement, a constitutional claim always will have at least the significance of involving government action and its implications for how our system of government should work.

At the risk of overromanticizing the citizenry's perception of the constitution, the constitution's current moral force would be diminished if day-to-day affronteries raised potential constitutional claims. This loss of respect also might extend to the judiciary if the courts become perceived as having assumed the role of regulating the conduct of everyday affairs. As Judge Learned Hand once wrote, "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not."[23]

Additionally, even if many frivolous questions are handled through judicial balancing, resulting in broad and clear rules such as The Dinner Party Rule (no constitutional right exists to attend a neighbor's dinner party), the overall effect may be to dilute protections. I make this argument with some trepidation, because a certain wariness is always justified when the argument is that fewer constitutional rights will result if one extends the constitution's scope of protections.[24] The United States Supreme Court has forwarded this apparently liberal rationale of protecting constitutional rights by restricting their application to justify not extending the exclusionary rule to the states,[25] to deny an automatic right to counsel in felony cases,[26] and to find that "separate but equal ac-

23. L. HAND, THE BILL OF RIGHTS 73 (1958). Justice Frankfurter urged similar caution against the judiciary risking its independence:

> Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.

Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring).

Professor Robert Nagel has argued that "an unchecked urge to enforce [constitutional] norms through adjudication may in fact undermine the capacity for durable constitutional government." NAGEL, CONSTITUTIONAL CULTURES 25 (1989). He warns against overreliance on judicial interpretation for establishment of constitutional norms in part because the Constitution "does not apply to many public issues or, at least, . . . in any determinative way." *Id.* at 25. The problems and dangers of trying to resolve all difficult policy questions through constitutional adjudication would be multiplied if the Constitution were extended to cover private conflicts as well.

24. This wariness is wittily reflected in the title of Professor Chemerinsky's reply defending his call for the abandonment of the state action doctrine. Chemerinsky, *More is Not Less: A Rejoinder to Professor Marshall*, 80 NW. U.L. REV. 571 (1986).

25. Wolf v. Colorado, 338 U.S. 25 (1949).

26. Betts v. Brady, 316 U.S. 455, 471 (1942) (right to counsel applies only when special circumstances exist).

comodations" do not violate the Constitution.[27] Yet, the cases that eventually reversed those holdings, *Mapp v. Ohio*,[28] *Gideon v. Wainwright*,[29] and *Brown v. Board of Education*,[30] stand as some of the Court's proudest moments in constitutional history. And, obviously, the legal sky did not fall upon the extension of such rights.

Despite these examples in which expanding a constitutional right did not result in fewer protections, instances also exist in which the Court has extended constitutional coverage that ultimately did result in the dilution of rights.[31] The specific cases that illustrate my concern are *Camara v. Municipal Court*[32] and *Terry v. Ohio*,[33] in which the Court extended fourth amendment coverage to include housing inspections and police stops and frisks. In one sense, the cases are expansive holdings because they extended the Fourth Amendment to areas not traditionally covered. In the long run, however, they have lowered protections, because to extend the Fourth Amendment to these areas, the Court has had to move from the strict requirement of a warrant based on probable cause to a broader reasonableness test. In the process, the Court has lost its focus on individualized suspicion and opened the door to a wide-range of governmental intrusions.[34]

I do not want to play the role of a constitutional Cassandra and suggest that such dilution is always inevitable. On the other hand, it does not seem far-fetched to suggest that if constitutional protections are extended to private actions as well as government-citizen matters, a court will tend to err on the side of restricting the scope of the right rather than give an expansive reading. This tendency would seem particularly likely given the existing perception that the courts are already overburdened by a litigation explosion.[35] Consequently, although abandoning state action

27. Plessy v. Ferguson, 163 U.S. 537, 552 (1896) ("If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.").

28. 367 U.S. 643 (1961) (exclusionary rule applies to the states).

29. 372 U.S. 335 (1963) (right to counsel requires appointment of an attorney in felony cases).

30. 347 U.S. 483 (1954) (segregated school system violates Equal Protection Clause).

31. *Cf.* Crosby, *New Frontiers: Individual Rights Under the California Constitution*, 17 HASTINGS CONST. L.Q. 81 (1989) (large number of claims of right to privacy under California Constitution has led some judges to call for lowering of "compelling interest" standard); *see also* Marshall, *supra* note 13, at 567-68 (noting danger of dilution of rights if extended to private actors).

32. 387 U.S. 523 (1967) (Fourth Amendment applies to housing inspections).

33. 392 U.S. 1 (1968) (police stop and frisks subject to fourth amendment protections).

34. *See generally* Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383 (1988).

35. One of the major ideas behind abandoning the state action requirement is, of course, that claims currently without remedy would be redressable through the courts. Yet, many

might expand the range of remedies against private actors, ultimately such a move might lead to a watered down version of constitutional rights.[36]

Conclusion

The state action doctrine can be cast rather easily in an unfavorable light. In its least attractive form, the doctrine can be seen as saying that a private citizen should have the right to act like a bigot or silence others unreasonably without constitutional restraints. What I have attempted to do is provide a more rational and attractive explanation for why state action may exist as a doctrine in constitutional law. I would prefer to look at the desirability of state action in the more traditional way that constitutional questions are framed when the issue is one of a private liberty interest conflicting with a broader societal interest: Does a sufficient societal interest exist to justify extending constitutional restraints to private activity?[37] I believe that one's reaction to the three propositions that I have identified will help answer that question. Society may be at a point at which it wants to extend the constitution to all actions that impinge on constitutional values, but such a decision should not be made under the illusion that all that is involved is a slight change in course.

have suggested that the tort system is already overburdened with a litigation explosion. *See generally* Marvell, *supra* note 21; R. POSNER, *supra* note 21. Some commentators have predicted, however, that abandoning state action " 'need not occasion any long run surfeit of cases.' " Chemerinsky, *supra* note 3, at 549 (quoting Professor Van Alstyne); *see also id.* ("[T]he overall increase in suits might be more of a drizzle than the expected flood.").

36. Professor Marshall concludes that the question is really one of a trade-off, asking "whether the cure offered for private infringements of constitutional rights is worth a remedy that undercuts existing constitutional protections against state officials"? Marshall, *supra* note 13, at 569.

37. *See* Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 698 (1974).