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THE STATE ACTION DOCTRINE AND THE PRINCIPLE OF DEMOCRATIC CHOICE

Wilson R. Huhn*

INTRODUCTION

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INTRODUCTION

The state action doctrine is somewhat of a mystery to law students, legal scholars, lawyers and judges. It is a key component of the Fourteenth Amendment – a threshold requirement that must be satisfied before triggering protection of our fundamental rights – but the doctrine itself seems to be curiously without purpose, a collection of arbitrary rules that impede constitutional protection of liberty, equality, and fairness for no good reason. Nearly forty years ago Professor Charles Black called the state action doctrine “a conceptual disaster area”¹ and characterized scholarly commentary upon it as “a torchless search for a way out of a damp echoing cave.”² More recently other legal scholars have described the state action doctrine as “analytically incoherent”³ and “a miasma.”⁴ The reason that the state action doctrine is considered to be so inscrutable is that the purpose of the doctrine has been misunderstood. The purpose of this article is to explain what the purpose of the state action doctrine is.

The Supreme Court has badly misread the purpose of the state action doctrine. In 1982, in the case of *Lugar v. Edmondson Oil Co.*,⁵ the Court stated: “Careful adherence to the ‘state action’ requirement preserves an area of individual freedom by limiting the reach of federal law

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¹ Charles L. Black, Jr., *Forward: “State Action,” Equal Protection, and California’s Proposition 14*, 81 HARV. L. REV. 69, 95 (1967).

² *Id.*

³ Gary Peller and Mark Tushnet, *State Action and a New Birth of Freedom*, 92 GEORGETOWN L.J. 779, 789 (2004) (“The state action doctrine is analytically incoherent because, as Hohfeld and Hale demonstrated, state regulation of so-called private conduct is always present, as a matter of analytic necessity, within a legal order.”).

⁴ Alan R. Madry, *State Action and the Due Process of Self-Help; Flagg Bros. Redux*, 62 U. PITT. L. REV. 1, 2 (2000).

⁵ 457 U.S. 922 (1982).

and federal judicial power.”⁶ Different justices of the Supreme Court repeated this understanding of the purpose of the state action doctrine in 1988 in *National Collegiate Athletic Association v. Tarkanian*,⁷ in 2000 in *United States v. Morrison*,⁸ and in 2001 in *Brentwood Academy v. Tennessee Secondary School Athletic Association*.⁹ The Court has got it exactly wrong. The purpose of the state action doctrine is *not* to “preserve an area of individual freedom.” That is the purpose of the Fourteenth Amendment. Instead, the state action doctrine functions as a *limitation* upon the operation of the Fourteenth Amendment.

The Supreme Court’s justification of the state action doctrine is demonstrably wrong because individuals and private organizations do not have a constitutional right to operate free of constitutional norms mandating equality, fairness, and tolerance. Privately-owned restaurants do not have a constitutional right to discriminate on the basis of race,¹⁰ privately-owned utilities do not have a constitutional right to shut off a customer’s electrical service without notice and an opportunity to be heard,¹¹ and private athletic associations do not have a constitutional right to infringe their members’ right to freedom of speech.¹² Equal treatment, fundamental fairness, and tolerance among individuals may be mandated if the people, acting through the democratic process, choose to enact these principles into law. The state action doctrine does not protect the rights of individuals to be free of governmental control, but rather the right of the people to democratically determine for themselves what kind of society they wish to live in. It is not respect for the rights of the *individual*, but respect for *democracy*, that is at stake in the state action cases.

Just as the Supreme Court has misconstrued the state action doctrine by interpreting it too narrowly, a number of progressive legal scholars have also misunderstood it and have construed the doctrine too broadly. A common argument from this viewpoint is that “state action is always present” because background principles of contract, tort, and property law unfairly give

⁶ *Id.* at 936 (White, J.). See also G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility*, 34 Hous. L. Rev. 333, 339-340 (1997):

Why does the state action doctrine matter, and why does it merit the extensive attention it has received from courts and scholars? It matters because it is a core doctrine in our nation’s constitutional framework. It is the tool with which the courts attempt to balance at least three competing interests: (1) individual autonomy – the individual’s interest in preserving broad areas of life in which he or she can develop and act without being subjected to the restraints placed by the Constitution on governmental action, (2) federalism – the nation’s interest in preserving the proper balance between state and national power, especially the power of states to determine, within generous limits, the extent to which regulatory power should be applied to private action, and (3) constitutional rights the interest in protecting constitutional rights against invasion by government or by action fairly attributable to government.

Id. at 339-340 (footnotes omitted).

⁷ 488 U.S. 179, 191 (1988) (Stevens, J.).

⁸ 529 U.S. 598, 622 (2000) (Rehnquist, C.J.);

⁹ 531 U.S. 288, 295 (2001) (Souter, J.); *id.* at 306 (Thomas, J. dissenting).

¹⁰ *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (finding state action because privately-owned restaurant was operated on property leased from the government).

¹¹ *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (finding that privately-owned electrical utility was not a state actor).

¹² *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001) (finding that private non-profit athletic association was a state actor because it was effectively controlled by officials and employees of the state).

advantage to powerful individuals and organizations.¹³ Another common claim of progressive scholars is that the Constitution imposes upon the government the affirmative duty to protect its citizens from hunger, cold, and disease.¹⁴ In my opinion, both sides are in error, and this article will expose the errors of both sides in their understanding and interpretation and application of the state action doctrine.

Contributing to the difficulty is that the state action doctrine is actually not one doctrine, but four related strands of doctrine. One aspect of the doctrine distinguishes “state action” from “private action.”¹⁵ Another strand marks the difference between “state action” and “state inaction.”¹⁶ A third application of the doctrine depends upon the distinction between “mere repeal of a law” and “distortion of the governmental process.”¹⁷ The fourth aspect of the state action doctrine is its effect upon the power of Congress to enforce the Due Process Clause and the Equal Protection Clause under Section 5 of the Fourteenth Amendment.¹⁸

Part I of this article proposes that the true purpose of the state action doctrine is to serve the principle of democratic choice, in that the doctrine carves out certain fields within which the people have the right to democratically govern themselves.¹⁹ Parts II, III, IV, and V, respectively, explain how an accurate understanding the purpose of the state action doctrine would affect the analysis of the “state action / private action” dichotomy,²⁰ the “state action / state inaction” dichotomy,²¹ the “mere repeal / alter governmental structure” dichotomy,²² and the state action component of Section 5 of the Fourteenth Amendment.²³ Part VI argues that the constitutional theories of Alexander Bickel and John Hart Ely support my proposed understanding of the purpose of the state action doctrine.²⁴ I conclude that the state action doctrine should be interpreted in light of the principle of democratic choice.

I. THE TRUE PURPOSE OF THE STATE ACTION DOCTRINE

In my opinion, both liberals and conservatives are mistaken in their interpretation of the state action doctrine because both sides misperceive the purpose of the doctrine. Conservatives are in error because the state action doctrine was not intended to be used to protect individual

¹³ See Cass R. Sunstein, *State Action Is Always Present*, 3 Chi. J. Int'l L. 465 (2002); LOUIS MICHAEL SEIDMAN AND MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES 68 (1996) (**get quotation**); Liliya Abramchayev, *A Social Contract Argument for the State's Duty to Protect from Private Violence*, 18 St. John's J. Legal Comment. 849, 863 (2004) (“State action is pervasive and its traces can be found in the background of any situation.”); Peller and Tushnet, note __ *supra*, at 789 (“There is no region of social life that even conceptually can be marked off as ‘private’ and free from governmental regulation.”).

¹⁴ See notes __-__ *infra* and accompanying text.

¹⁵ See notes __-__ *infra* and accompanying text.

¹⁶ See notes __-__ *infra* and accompanying text.

¹⁷ See notes __-__ *infra* and accompanying text.

¹⁸ See notes __-__ *infra* and accompanying text.

¹⁹ See notes __-__ *infra* and accompanying text.

²⁰ See notes __-__ *infra* and accompanying text.

²¹ See notes __-__ *infra* and accompanying text.

²² See notes __-__ *infra* and accompanying text.

²³ See notes __-__ *infra* and accompanying text.

²⁴ See notes __-__ *infra* and accompanying text.

rights or states' rights.²⁵ Liberals are in error because the Constitution was not intended to be used to regulate the behavior of individuals²⁶ nor does it guarantee governmental benefits.²⁷ Instead, the state action doctrine stands for the proposition that the people have the right to determine for themselves, through their state and federal elected representatives, how individuals are to treat each other and how generous society will be in the distribution of wealth when it acts collectively. The state action doctrine is neither a barrier to governmental control of private parties, as conservatives imagine it to be, nor is it a replacement for the democratic process, as liberals would have it.

The Constitution is based upon the once revolutionary but now commonplace idea that the people of this Nation are sovereign. "We the people" ordained and established the government of the United States,²⁸ following the principles that were announced in the Declaration of Independence that governments are instituted for the purpose of securing people's inalienable rights, and that all just powers of government are derived from the consent of the governed.²⁹ The people of the United States do not serve the government; rather, the government serves the people.³⁰ It is for this reason that the government may not invade the fundamental rights of the people. In a hierarchy of constitutional values, the rights of the people trump the powers of government, and therefore governmental action is subject to people's fundamental rights.³¹ The state action doctrine emerges from and reinforces these fundamental principles of American government, in that the doctrine requires governmental action to be subject to judicial review.

Constitutional law is central to our society and our system of law. It establishes a democracy governed by majority rule, but it also protects against what Alexis de Toqueville and John Stuart Mill called a "tyranny of the majority."³² Our inalienable rights of equality, liberty, and fairness are protected from interference even when – especially when – the majority of the

²⁵ See notes ___-__ *infra* and accompanying text.

²⁶ See notes ___-__ *infra* and accompanying text.

²⁷ See notes ___-__ *infra* and accompanying text.

²⁸ U.S. CONST., pmbl.

²⁹ DECLARATION OF INDEPENDENCE, second sentence.

³⁰ See ALEXANDER HAMILTON, THE FEDERALIST PAPERS, No. 78 (explaining the relationship between the legislature and the people in the course of arguing that legislative acts which are inconsistent with the Constitution are invalid). Hamilton stated:

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

Id.

³¹ See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY xi ((1977) ("Individual rights are political trumps when held by individuals.").

³² ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA (Chapter XV, "Tyranny of the Majority"); JOHN STUART MILL, ON LIBERTY (introduction)

people wish to violate those rights. And because the Constitution is regarded as law, the duty to enforce its prohibitions against state action is the responsibility of the courts.³³

But there are circumstances where the Constitution does not apply, or where it applies in only weakened form. For example, two doctrines that inhibit the courts from subjecting certain laws or governmental actions to rigorous constitutional review are the political question doctrine and the doctrine of governmental intent. The political question doctrine identifies a number of *subjects* that must be resolved only through the political process. Under this doctrine, matters such as the impeachment of public officials and a number of matters relating to military and foreign policy are either not reviewable by the judiciary or are reviewable only under a very deferential standard of review.³⁴ The doctrine of governmental intent is concerned with the *motivation* of the person or entity whose actions are being reviewed.³⁵ It imposes a lower level of constitutional scrutiny upon and consequently vests more discretion in actors who do not intentionally target certain constitutionally protected groups or freedoms.³⁶ The state action doctrine, like the political question doctrine and the doctrine of governmental intent, shields certain categories of conduct from constitutional review.

The state action doctrine has four related applications. First, the state action doctrine focuses in part upon *whose* actions are subject to constitutional review, namely actions that are attributable to government. This aspect of the doctrine normally prohibits constitutional review of the actions of private individuals or organizations.³⁷ The second feature of the state action doctrine distinguishes between two *types* of governmental actions, affirmative acts and failures to act, and declares that only the former may qualify as violations of constitutional right.³⁸ Consequently, the state action doctrine does not require the government to adopt laws which forbid private acts of discrimination nor does it require the government to enact social welfare

³³ See *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (recognizing Constitution as “the fundamental and paramount law of the nation” and stating, “It is emphatically the province and the duty of the judicial department to say what the law is.”).

³⁴ See, e.g., *Nixon v. United States*, 506 U.S. 224 (1993) (ruling that question of procedure to be followed in trial of impeachment is committed to sole discretion of Senate, and is therefore a political question); *Goldwater v. Carter*, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring) (stating that question as to constitutionality of action by President unilaterally abrogating a treaty constituted a political question); David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. Colo. L. Rev. 1439 (describing spectrum of deference in different types of questions involving the interpretation of treaties).

³⁵ See Wilson Huhn, *Assessing the Constitutionality of Laws that Are Both Content-Based and Content Neutral: The Emerging Constitutional Calculus*, 79 Ind. L.J. 801, 818-827 (2004) (summarizing doctrine of governmental intent and analyzing its application in freedom of expression cases); see generally, STEPHEN E. GOTTLIEB, *MORALITY IMPOSED: THE REHNQUIST COURT AND LIBERTY IN AMERICA* (2000) (criticizing doctrine of governmental intent).

³⁶ See, e.g., *Personnel Adm’r v. Feeney* 442 U.S. 256 (1979) (upholding state statute against equal protection claim on ground that there was no governmental intent to discriminate on the basis of gender); *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) (Burger, C.J.) (upholding inclusion of nativity scene in public holiday display against Establishment Clause challenge in part because “there is insufficient evidence to establish that the inclusion of the crèche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message.”); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (upholding municipal regulation against First Amendment challenge on ground that laws which are intended to serve content-neutral purposes are subjected to a lower level of scrutiny than laws intended to regulate content).

³⁷ See notes ___-___ *infra* and accompanying text.

³⁸ See notes ___-___ *infra* and accompanying text.

programs.³⁹ Third, the state action doctrine creates the notion of a “constitutional baseline,” and it allows the government to return to the constitutional baseline by repealing antidiscrimination laws and social welfare programs, but it prohibits the adoption of any governmental process which makes it more difficult for some people to seek the aid of the government than it is for others.⁴⁰ And fourth, the state action doctrine is also employed to limit the power of Congress in the enforcement and protection of our fundamental rights.⁴¹

I propose that in all four of these areas the state action doctrine should serve a single, overriding purpose: *constitutional respect for democratic choice*. In other words, the state action doctrine contributes to the right of the people to govern themselves. Accordingly, it should be interpreted in light of its purpose and should be applied only in cases where it would make a significant contribution to democratic principles. I conclude that the Supreme Court has applied the state action doctrine in ways that did *not* serve the principle of democratic choice, leading to erroneous interpretations of the Constitution. I also conclude that, properly understood, the state action doctrine *is* analytically coherent, and that the criticism leveled at the doctrine by several progressive scholars is not justified.

The next four sections of this article each describe one aspect of the state action doctrine and analyze the application of the doctrine by the Supreme Court and by progressive critics of the Court. I suggest that in several cases the Court and its critics have misunderstood and misapplied the state action doctrine because they have failed to be guided by its overriding purpose – the preservation of democratic choice.

II. THE “STATE ACTION / PRIVATE ACTION” DICHOTOMY

The first aspect of the state action doctrine emphasizes the word “state,”⁴² and it is the idea that, with but one exception, the Constitution does not prescribe how *private individuals* or *private organizations* are to treat each other; rather, only *governmental* action is subject to the requirements of the Constitution.⁴³

Textual Basis for the State Action / Private Action Dichotomy

The text of the original Constitution unambiguously establishes that it is a law governing government, not individuals. Articles I, II, and III establish the legislative, executive and judicial branches of the federal government, while Article I, Sections 9 and 10, and Article IV identify a number of limitations that are imposed upon the federal and state governments.⁴⁴ Similarly, the

³⁹ See notes ___-___ *infra* and accompanying text.

⁴⁰ See notes ___-___ *infra* and accompanying text.

⁴¹ See notes ___-___ *infra* and accompanying text.

⁴² See Robin West, *Response to State Action and a New Birth of Freedom*, 92 Geo. L.J. 819, 824 (2004) (noting that the state action doctrine encompasses two different concepts, and stating, “In the first interpretation, the emphasis is on the state – the idea is that the Constitution restrains states rather than private parties.”).

⁴³ See *Shelley v. Kramer*, 334 U.S. 1, 13 (1948) (Vinson, C.J.) (stating that the Fourteenth Amendment “erects no shield against merely private conduct, however discriminatory or wrongful.”).

⁴⁴ See U.S. CONST., art. I, § 1 (creating Congress); art. II, § 1 (creating Presidency); art. III, § 1 (creating Supreme Court and authorizing creation of lower courts); art. I, § 9 (limiting powers of federal and state governments); art. I,

Bill of Rights and the Fourteenth Amendment are phrased as limitations upon the power of government. The First Amendment begins with the words, “Congress shall make no law”⁴⁵ and the Fourteenth Amendment commences with the words “No state shall make or enforce any law.”⁴⁶ Furthermore, it was the understanding of the framers of the Constitution that it was intended as a blueprint for the government.⁴⁷ Chief Justice John Marshall, who must be regarded as being among the framers,⁴⁸ observed in the foundation case of *Marbury v. Madison* that the Constitution “organizes the government, and assigns, to different departments, their respective powers.”⁴⁹

In contrast, the Constitution does not purport to determine how one *person* is to treat another. So far as the Constitution is concerned, one individual may steal the possessions of another, assault another person, even commit murder, and it is not a violation of the Constitution. The sole exception to this generalization is the commandment contained within the Thirteenth Amendment.⁵⁰ In light of the history of our Nation, there is one thing that no person may do to anyone else; under the Constitution, no person may enslave another individual.⁵¹ But aside from cases involving slavery, in cases arising under the Constitution the state action doctrine makes it necessary to determine whether the act complained of was committed by the government or by a private individual.

Critique of the Supreme Court’s Distinction Between State Action and Private Action

§ 10 (limiting powers of state governments); art. IV (imposing various limits and obligations upon state and federal governments).

⁴⁵ U.S. Const., amend. 1.

⁴⁶ U.S. Const., amend. 14, § 1.

⁴⁷ See, e.g., JAMES MADISON, THE FEDERALIST PAPERS, No. 51 (1788), available online at <http://www.yale.edu/lawweb/avalon/federal/fed51.htm>, website of The Avalon Project at Yale Law School (discussing the necessity for separating the powers of government). Madison stated:

Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

Id.

⁴⁸ See *John Marshall*, <http://www.lva.lib.va.us/howeare/exhibits/marshall/>, website of The Library of Virginia, accessed July 7, 2005 (stating that in June, 1788, Marshall served as a member of the Virginia convention ratifying the United States Constitution).

⁴⁹ *Marbury v. Madison*, 5 U.S. 137, 176 (1803) (Marshall, C.J.). Marshall stated:

This original and supreme will organizes the government, and assigns, to different departments, their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments. The government of the United States is of the latter description. The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.

Id.

⁵⁰ U.S. CONST., amend. 13 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

⁵¹ *Id.*

In most cases it is obvious whether or not the act complained of was “state action” or “private action.” The adoption and enforcement of laws and the promulgation and application of policies by public officials clearly constitute state action, while in the vast majority of civil and criminal cases it is equally clear that the actions of the defendants are wholly private acts, from common automobile accidents to the employment policies of giant corporations. But there are many cases where it is unclear whether the act complained of was committed by the government or by a private individual. These are cases where private parties are at least arguably imbued with governmental power, and have allegedly abused that power.

The factual circumstances of the state action cases are varied and diverse, and accordingly the standards that have evolved to resolve these cases are equally varied and diverse. The Supreme Court has generally stated that a private party will be considered to be a “state actor” in cases where the government was “significantly involved” in the actions of the defendant,⁵² or, considering the matter from another perspective, where the actions of the defendant are “fairly attributable” to the government.⁵³ As recurring patterns of relationships between private and governmental bodies have been evaluated under these two general standards the Supreme Court has identified a number of subcategories of state action. For every pattern of state action that the Court has defined, it has articulated a rule for determining whether or not the behavior in question constitutes state action. Furthermore, for every fact pattern and accompanying rule of inclusion within the concept of state action, the Court has also recognized an antithesis that does *not* constitute state action. The rule defining “state action” for each fact pattern is described below in terms of its antithesis and its thesis.

The Supreme Court has determined that when one person enters into a contract with another person, or performs such a contract, this alone does not constitute state action.⁵⁴ However, when a person invokes the power of the judicial system to enforce a contract, this does constitute state action, and the enforcement of the contract must conform to both procedural and substantive requirements of the Constitution.⁵⁵ Similarly, where the law merely acquiesces in or

⁵² See, e.g., *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (Clark, J.) (stating, “private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it.”); *Moose Lodge v. Iris*, 407 U.S. 163, 177 (1972) (Rehnquist, J.) (stating, “the operation of the regulatory scheme enforced by the Pennsylvania Liquor Control Board does not sufficiently implicate the State in the discriminatory guest policies of Moose Lodge to make the latter ‘state action’”).

⁵³ See, e.g., *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982) (White, J.) (ruling that private party’s resort to *ex parte* judicial attachment procedure constitutes state action, and stating, “Our cases have accordingly insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State.”).

⁵⁴ See, e.g., *Shelley*, 334 U.S. at 13 (Vinson, C.J.) (stating, “We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated.”).

⁵⁵ See, e.g., *Shelley*, 334 U.S. at 19-20 (Vinson, C.J.) (enforcement of restrictive covenant by state court constitutes state action); *Lugar v. Edmondson Oil*, 457 U.S. 922, 942 (1982) (finding state action to be present “when the State has created a system whereby state officials will attach property on the *ex parte* application of one party to a private dispute.”).

recognizes a preexisting right or power in an individual, this is not state action.⁵⁶ However, where the government coerces, encourages, or influences one individual to invade the rights of another, it is state action.⁵⁷ Merely entering into a contract with the government to provide goods or services is not state action,⁵⁸ but the performance of public functions that have heretofore been exclusively performed by government is state action.⁵⁹ Being the subject of government regulation or the recipient of government funding is not sufficient, in and of itself, to turn a private actor into a state actor,⁶⁰ but forging a partnership with government in a joint enterprise is state action.⁶¹ Finally, the participation of state institutions as members in a private organization does not, by itself, make the private organization a state actor,⁶² but governance of a private organization by public officials acting in their official capacity does make it a state

⁵⁶ See, e.g., *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 164 (1978) (Rehnquist, J.) (finding no state action where warehouseman threatened to sell stored goods pursuant to state statute authorizing self-help, stating, “This Court, however, has never held that a State’s mere acquiescence in a private action converts that action into that of the State.”).

⁵⁷ See, e.g., *Reitman v. Mulkey*, 387 U.S. 369, 381 (1967) (White, J.) (stating, “The California Supreme Court believes that the section will significantly encourage and involve the State in private discriminations. We have been presented with no persuasive considerations indicating that these judgments should be overturned.”).

⁵⁸ See, e.g., *Rendell-Baker v. Kohn*, 457 U.S. 830, 840-841 (1982) (Rehnquist, C.J.) (finding private school which contracted with public schools to teach children with behavior handicaps did not engage in state action when it terminated employment of teachers, and stating, “The school, like the nursing homes, is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government. Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.”).

⁵⁹ See, e.g., *Marsh v. Alabama*, 326 U.S. 501 (1946) (Black, J.) (finding company town subject to requirements of First Amendment, and stating, “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.”); *Terry v. Adams*, 345 U.S. 461 (1953), (political association’s pre-primary election constitutes state action); *Smith v. Allright*, 321 U.S. 649 (1944) (political party’s primary election constitutes state action).

⁶⁰ See, e.g., *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974) (stating, “The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so.”) (footnote and citations omitted); *Moose Lodge v. Irvis*, 407 U.S. 163, 176-177 (1972) (Rehnquist, J.) (finding no state action by private fraternal organization with liquor permit stating, “However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club’s enterprise.”); *Rendell-Baker*, 457 U.S., at 840 (Rehnquist, C.J.) (finding no state action when private school terminated employment of teachers despite fact that over 90 percent of school’s funding came from government sources, and stating, “we conclude that the school’s receipt of public funds does not make the discharge decisions acts of the State.”).

⁶¹ See, e.g., *Burton*, 365 U.S., at 725 (Clark, J.) (upholding injunction prohibiting racial discrimination by privately-owned restaurant leasing space in publicly-owned parking deck, and stating, “The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so ‘purely private’ as to fall without the scope of the Fourteenth Amendment.”).

⁶² See, e.g., *N.C.A.A. v. Tarkanian*, 488 U.S. 179, 193 (1988) (Stevens, J.) (finding National Collegiate Athletic Association not to be a state actor, and stating, “UNLV is among the NCAA’s members and participated in promulgating the Association’s rules; it must be assumed, therefore, that Nevada had some impact on the NCAA’s policy determinations. Yet the NCAA’s several hundred other public and private member institutions each similarly affected those policies.”).

actor.⁶³ These specific rule-oriented tests for state action are in the disjunctive. If conduct qualifies as state action under any one of the foregoing tests, then the conduct is subject to review under the Constitution.⁶⁴

There are two general approaches to applying these various tests. The conservative wing of the Supreme Court led by Chief Justice Rehnquist favors a “rule-oriented” approach to state action analysis, separately invoking and applying the various specific tests described in the previous paragraph for determining whether or not the challenged party is a state actor. In contrast, the liberal wing of the Court employs a “totality of the circumstances” test for making this determination. The seminal case utilizing the “totality of the circumstances” test is *Burton v. Wilmington Parking Authority*,⁶⁵ where the Court observed that “[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.”⁶⁶ The Supreme Court has vacillated between the rule-oriented approach and the totality of the circumstances approach in numerous cases.

For example, in *Blum v. Yaretsky*⁶⁷ and *Rendell-Baker v. Kohn*,⁶⁸ companion cases decided in 1988, the majority of the Court applied the various tests for state action separately, finding that there was no state action under any particular formula. The majority found that the private school and the private nursing home in those cases were not engaged in state action because neither the school nor the nursing home was performing a public function,⁶⁹ neither was engaged in a joint enterprise with the government,⁷⁰ and neither had been coerced, encouraged, or influenced by the government to take the specific action that was being challenged.⁷¹ In contrast, the dissent in both cases took into account *all* of the facts and circumstances, concluding that even if no particular test for state action had been wholly satisfied, the totality of government involvement in each case warranted a finding of state action.⁷² In *Brentwood*

⁶³ See, e.g., *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 299-300 (Souter, J.) (2001). The Court found the nominally private statewide secondary school athletic association to be a state actor, in part because of the following facts:

In sum, to the extent of 84% of its membership, the Association is an organization of public schools represented by their officials acting in their official capacity to provide an integral element of secondary public schooling. There would be no recognizable Association, legal or tangible, without the public school officials, who do not merely control but overwhelmingly perform all but the purely ministerial acts by which the Association exists and functions in practical terms. Only the 16% minority of private school memberships prevents this entwinement of the Association and the public school system from being total and their identities totally indistinguishable.

Id. at 299-300 (Souter, J.).

⁶⁴ See *id.* at 302 (Souter, J.) (a finding of state action under the “entwinement” theory was “in no sense unsettled merely because other criteria of state action may not be satisfied by the same facts.”).

⁶⁵ 365 U.S. 715 (1961) (finding state action and holding municipal parking authority responsible for racially discriminatory practices of private restaurant leasing space on its property).

⁶⁶ *Id.* at 722 (Clark, J.).

⁶⁷ 457 U.S. 991 (1982) (finding no state action in conduct of nursing home which had allegedly transferred resident to lower level of medical care without adequate notice).

⁶⁸ 457 U.S. 830 (1982) (finding no state action in conduct of private school which had allegedly discharged teachers in violation of their constitutional rights).

⁶⁹ See *Blum*, 457 U.S., at 1010-1011 (Rehnquist, J.); *Rendell-Baker*, 457 U.S., at 842 (Burger, C.J.).

⁷⁰ See *Blum*, 457 U.S., at 1011-1012 (Rehnquist, J.); *Rendell-Baker*, 457 U.S., at 842-843 (Burger, C.J.).

⁷¹ See *Blum*, 457 U.S., at 1005-1010 (Rehnquist, J.); *Rendell-Baker*, 457 U.S., at 840-842 (Burger, C.J.).

⁷² See *Blum*, 457 U.S., at 1013-1014 (Brennan, J., dissenting) (stating, “The Court today departs from the *Burton* precept, ignoring the nature of the regulatory framework presented by this case in favor of the recitation of abstract

Academy v. Tennessee Secondary School Athletic Association,⁷³ the position of the majority and dissent were reversed, with the majority taking all of the circumstances into account in concluding that there was state action,⁷⁴ and the dissenters contending that no single test warranted a finding of state action.⁷⁵

In my opinion, Chief Justice Rehnquist's misunderstanding of the purpose of the state action doctrine has led him to adopt an inappropriately narrow method of interpretation, namely the "rule-oriented" approach. Chief Justice Rehnquist believes that in narrowly construing the state action doctrine he is protecting individual liberty.⁷⁶ However, where an individual or a private organization is not engaged in constitutionally protected activity such as expression or the practice of religion, then there is no reason under the Constitution to presume that the individual or organization has a right to be free of governmental control. The Court's reasoning in *Blum* and *Rendell-Baker* was skewed towards protecting "individual freedom," and yet a private nursing home does not have a constitutional right to change the level of medical care rendered to a patient without consulting the patient or the family, nor does a private school have a constitutional right to terminate the employment of teachers because of their criticism of the school's administration. The task of the courts in state action cases is not to protect the individuals and private organizations who commit these acts from government regulation, and there is therefore no reason to narrowly construe the state action requirement. Rather, the Court simply has the duty to ascertain the extent of governmental involvement in the challenged acts in order to determine whether or not the acts are subject to constitutional scrutiny. Because the nature of governmental involvement in any particular case may arise in myriad forms resulting

tests and a pigeonhole approach to the question of state action."); *Rendell-Baker*, 457 U.S., at (Marshall, J., dissenting) (stating, "Even though there are myriad indicia of state action in this case, the majority refuses to find that the school acted under color of state law when it discharged petitioners. The decision in this case marks a return to empty formalism in state action doctrine. Because I believe that the state action requirement must be given a more sensitive and flexible interpretation than the majority offers, I dissent.").

⁷³ 531 U.S. 288 (2001) (finding that action of statewide secondary school athletic association constituted state action).

⁷⁴ See *id.* at 296 (Souter, J.) (stating, "What is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity. From the range of circumstances that could point toward the State behind an individual face, no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government," and concluding that "amidst such variety [of fact patterns] examples may be the best teachers"). As Justice Thomas observes in dissent, however, in applying the "fairly attributable" standard to the facts of the case, the majority of the Court in *Brentwood Academy* creates a new categorical rule of "entwinement." See note ___ *infra*; see also Wilson Huhn, *The Stages of Legal Reasoning: Formalism, Analogy, and Realism*, 48 VILLANOVA LAW REVIEW 305, 378 (2003) (describing how standards become rules through judicial application of a standard to specific facts).

⁷⁵ See *Brentwood Academy*, 531 U.S., at 305 (Thomas, J., dissenting) (stating, "We have never found state action based upon mere 'entwinement.' Until today, we have found a private organization's acts to constitute state action only when the organization performed a public function; was created, coerced, or encouraged by the government; or acted in a symbiotic relationship with the government. The majority's holding – that the Tennessee Secondary School Athletic Association's (TSSAA) enforcement of its recruiting rule is state action – not only extends state-action doctrine beyond its permissible limits but also encroaches upon the realm of individual freedom that the doctrine was meant to protect.").

⁷⁶ See note ___ *supra* and accompanying text.

from different combinations of factors,⁷⁷ the “totality of the circumstances” test is more appropriate than the “rule-oriented approach” for measuring whether private parties are engaged in state action.⁷⁸

Critique of Progressive Scholarship Regarding the State Action / Private Action Dichotomy

A number of progressive legal scholars contend that even the “totality of the circumstances” test is inadequate to capture the meaning of the state action doctrine, because “state action is always present.”⁷⁹ Cass Sunstein has made the following argument for the proposition that state action is present when a private employer acts in a discriminatory manner:

Suppose, for example, that an employer refuses to hire women, or discharges people who disclose that they are homosexual. If the employer’s acts are challenged on constitutional grounds, we might ask whether constitutional norms apply to the employer’s action. But we might also ask whether the constitution permits the existing background law, undoubtedly a product of the state, to authorize the relevant decisions by the employer. If an employer is discharging people, or refusing to hire them, and is being allowed to do so, it is not because nature has decreed anything. It is because the law has allocated the relevant rights to the employer.⁸⁰

The primary argument from this point of view is that background principles of law permeate our society, and therefore private action is taken with the implicit sanction of law and constitutes state action.⁸¹

This argument proves too much. The framers believed that there was a distinction between government action and private action, as is evident from the text of the Constitution and the earliest interpretations of it.⁸² The Constitution requires us to draw a line between state action and private action, and this line, though subject to fair dispute in difficult cases, must be drawn. That there is a spectrum between state action and private action is not to be disputed, and

⁷⁷ See Black, note __ *supra*, at 90 (stating that in light of “the variety of all possible action by that complex entity that is called the state,” “The commitment of the Court to a single and exclusive theory of state action, or to just five such theories, with nicely marked limits for each, would be altogether unprincipled . . .”)

⁷⁸ See *id.*; see also Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 *Duke L.J.* 557, 621-622 (1992) (concluding that rules are preferable to standards in situations where the same behavior is frequently repeated, but in situations where “behavior varies greatly,” standards are more efficient than rules).

⁷⁹ See note 13 *supra* and accompanying text.

⁸⁰ Sunstein, note 13 *supra*, at 467.

⁸¹ See Mark Tushnet, *State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations*, 3 *Chi. J. Int’l L.* 435 (2002) (after describing situations involving discriminatory termination of a homosexual by a private employer, refusal of a hospital to treat a deaf patient unless the patient supplied an interpreter, and private employer’s refusal to hire union members, concluding, “In each [case] the defendant has acted in a manner authorized by background rules of property and contract.”); Lilya Abramchayev, *A Social Contract Argument for the State’s Duty to Protect from Private Violence*, 18 *St. John’s J. Legal Comment.* 849, 863 (2004) (criticizing decision of Supreme Court in *DeShaney*, and stating, “These are specific examples of the notion that state action is everywhere, contributing to the conditions individuals find themselves. State action is pervasive and its traces can be found in the background of any situation.”).

⁸² See note __ *supra* and accompanying text.

the multivariant factors that may influence that judgment make it a particularly complex calculation. In the end, the decision should depend upon the *extent* or *degree* of governmental involvement in any particular event. At present, however, it is the clear understanding of the Supreme Court that background principles of law allowing individuals to enter into contracts⁸³ and statutes subjecting business to extensive governmental regulation⁸⁴ do not turn the acts of these private entities into state action.

A more persuasive argument for the expansion of the state action doctrine is based upon the familiar principle that changes in our society may necessitate changes in the application of constitutional norms.⁸⁵ If one assumes that the power of private individuals and entities is growing in our society, these accumulations of private power should arguably be subject to greater constitutional scrutiny. For example, one might reasonably contend that the state action doctrine should be expanded in order to protect First Amendment rights because shopping malls have replaced downtown business areas,⁸⁶ gated communities are replacing neighborhoods,⁸⁷ and a mass media has arisen which is under the control of a handful of corporations.⁸⁸ Under this view, if the state action doctrine is not extended to include these private-owned places and enterprises, the average person will lose access to opportunities for free expression.⁸⁹

However, advancing technology not only concentrates power, it also disperses it. The power of the mass media is balanced by the fact that video production is now in the hands of the

⁸³ See *Shelley*, note __ *supra* and accompanying text.

⁸⁴ See note 60 *supra* and accompanying text.

⁸⁵ See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 855 (1994) (Kennedy, J., O'Connor, J., and Souter, J.) (stating that one of the reasons that would justify overruling constitutional precedent is "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."); *Brown v. Board of Education*, 347 U.S. 483, 492-493 (1954) (Warren, C.J.). The Court in *Brown* stated:

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Id. at 492-493 (Warren, C.J.).

⁸⁶ See Josh Mulligan, *Finding a Forum in the Simulated City: Mega Malls, Gated Towns, and the Promise of Pruneyard*, 13 CORNELL J.L. & PUB. POL'Y 533, 545 (stating, "In 2001, shopping centers accounted for over half of the nation's retail business. However, shopping malls were a relatively new and novel phenomenon when the Supreme Court refused to recognize free speech rights in shopping centers.") (footnote omitted).

⁸⁷ See Steven Siegel, *The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years After Marsh v. Alabama*, 6 WM. & MARY BILL RTS. J. 461 (1998) (contending that the actions of private residential communities should be considered state action).

⁸⁸ See John H.F. Shattuck and Fritz Byers, *An Egalitarian Interpretation of the First Amendment*, 16 HARV. C.R.-C.L. L. REV. 377, 378 n. 7 (1981) (stating, "The growing concentration of mass media in the hands of a small number of large corporations limits opportunities for self-expression for all but a few."); *but see* Stuart Minor Benjamin, *Evaluating the Federal Communications Commission's National Television Ownership Cap: What's Bad for Broadcasting Is Good for the Country*, 46 WM. & MARY L. REV. 439, 443 (2004) (supporting laws allowing the concentration of media ownership, and stating, "In my view, the demise of broadcast television would be a salutary event. It would free up valuable spectrum, lead to more innovative and more variegated programming, and limit the incentive for and scope of government control over communications. In other words, what is bad for the viability of broadcasting is good for the country.").

⁸⁹ See Mulligan, note __ *supra*, at 546 (stating, "in the world of shopping malls, common interest communities, and corporate industrial parks, citizens are left with nowhere to engage others freely in social and political discourse.").

average citizen,⁹⁰ and is also balanced by “the vast democratic forums of the Internet.”⁹¹ Furthermore, in general is it accurate to say that private individuals and organizations wield more power over us than they did over our ancestors, or that we face greater challenges than they did in controlling the exercise of private power? In Revolutionary times, America was home to a “virtual aristocracy” that was only slowly dissolved in the cauldron of Jacksonian democracy.⁹² In the first part of the Nineteenth Century, the planters who constituted the “Slave Power” dominated southern society and subjugated half the population.⁹³ In the latter half of the Nineteenth Century the Robber Barons sought to gain a stranglehold on the economic life of the Nation.⁹⁴ Sometimes the Supreme Court in its interpretation of the Constitution stood in the way of the people in their attempt to bring powerful private interests to heel,⁹⁵ but eventually the people, acting through the democratic process, found the means to rein in these oppressive accumulations of private power by expanding the franchise,⁹⁶ outlawing racial and gender discrimination,⁹⁷ and regulating business and industry.⁹⁸ So long as the democratic process remains strong, the people will have the capability to regulate powerful private interests, and it is not necessary to ask the Supreme Court in its interpretation of the Constitution to do all the work. It is up to the people acting through the democratic process to control the abuses of private power. This is where the framers put the power and the responsibility,⁹⁹ and it is appropriate for the Court to preserve this area of democratic choice through its interpretation of the state action doctrine.

III. THE “STATE ACTION / STATE INACTION” DICHOTOMY

⁹⁰ See Steven Siegel, *Lights, Video Camera ... Wait!*, 18 HUM. RTS. 16, 17 (1991) (stating, “While there is a growing concentration of corporate mass media in fewer and fewer hands – Time-Warner, General Electric, Sony – we are also witnessing a true democratization of the media.”).

⁹¹ *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868 (1997) (Stevens, J.) (invalidating federal law prohibiting transmission of “indecent” expression over the internet); but see Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115, 1116 (2005) (stating, “In contrast to real space (which enjoys a mixture of privately- and publicly-owned places in which speech occurs) and in contrast to media channels such as broadcast and cable television (which enjoy publicly-subsidized and public forums), speech in cyberspace occurs almost exclusively within privately-owned places. The public/private balance that characterizes real space and renders the First Amendment meaningful within it is all but absent in cyberspace.”).

⁹² See book stating that it was common to “doff one’s cap” to a man such as Alexander Hamilton.

⁹³ See generally, KENNETH M. STAMPP, *THE PECULIAR INSTITUTION*.

⁹⁴ See Allen D. Boyer, *Activist Shareholders, Corporate Directors, and Institutional Investment: Some Lessons from the Robber Barons*, 50 WASH. & LEE L. REV. 977 (1993) (comparing “waste and chicanery” by the robber barons of the Gilded Age to the abuses by the corporate raiders of the 1980s).

⁹⁵ See, e.g., *Dred Scott v. Sandford*, 60 U.S. 393 (1857) (invalidating Missouri Compromise on ground that it violated the constitutional rights of slaveholders); *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating state maximum hours law on ground that it violated Due Process Clause).

⁹⁶ See, e.g., U.S. CONST. amend. 15, 19, and 26 (removing barriers to voting based upon race, gender, and age); amend. 17 (direct election of senators); and amend. 24 (eliminating poll tax); Voting Rights Act.

⁹⁷ See, e.g., U.S. CONST. amend 13, 14, 15, and 19; Public Accommodations Act; Equal Employment Opportunity Act; Fair Housing Act

⁹⁸ See, e.g., FOX, *UNDERSTANDING ADMINISTRATIVE LAW* PAGES (describing three periods of growth in regulation of business and industry).

⁹⁹ See U.S. CONST., amend 10 (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

The second distinction that is drawn by the state action doctrine emphasizes the word “action.”¹⁰⁰ The Supreme Court has held that state *inaction* does not constitute state *action*.¹⁰¹ This aspect of the state action doctrine is understood to mean that while the Constitution *forbids* the government from exceeding its assigned powers or infringing individual rights, in most cases the Constitution does not *require* the government to take any particular action. In accord with this view is Judge Richard Posner, who has described the Constitution as “a charter of negative rather than positive liberties”¹⁰²

The principle of democratic choice is fundamental to understanding the distinction between state action and state inaction. The principle of democratic choice means that the people, acting through their elected and appointed representatives, have discretion to legislate with respect to civil rights and social welfare benefits, and to determine how far they wish to go above the constitutional baseline in each area.

The notion that the state does not have affirmative duties with respect to civil rights or social welfare rights is consistent with the notion of the “neutral state,”¹⁰³ and while the idea of the neutral state is no longer considered to be constitutionally *required*,¹⁰⁴ a consequence of the Court’s current interpretation of the state action doctrine is that the neutral state does represent the default position of American government in the absence of affirmative legislation.

¹⁰⁰ See West, note 42 *supra*, at 824 (noting that the state action doctrine encompasses two different concepts, and stating, “In the second interpretation, the emphasis is on the action – the Constitution forbids particular actions, not inaction. This second interpretation is typically understood as buttressed by the common perception, or observation, that the Constitution is one of “negative rights” only – it protects us against the bad things states do, not against the state’s failure to act.”).

¹⁰¹ See *American Mfrs. Mutual Ins. Co. v. Sullivan*, 526 U.S. 40, 53 (1999) (Rehnquist, C.J.) (finding law allowing private insurers to withhold payments pending review of claims to be “state inaction” and therefore immune from constitutional review); *Flagg Brothers*, 436 U.S., at 164-165 (Rehnquist, J.) (stating that the Court had “clearly rejected the notion that our prior cases permitted the imposition of Fourteenth Amendment restraints on private action by the simple device of characterizing the State’s inaction as ‘authorization’ or ‘encouragement.’”).

¹⁰² *Jackson v. City of Joliet*, 715 F. 2d 1200, 1203 (7th Cir.) (Posner, J.), cert denied, 465 U.S. 1049 (1983) (finding no violation under the Constitution where police negligently failed to assist victims of automobile accident).

¹⁰³ See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1920* 19 (1992). Horwitz describes the concept of the “neutral state” in the following passage:

The “night watchman” state that was first outlined for Americans in Madison’s Tenth *Federalist* embodied what would become a pervasive nineteenth-century liberal vision of a neutral state, a state that could avoid taking sides in conflicts between religions, social classes, or interest groups. *Id.* at 19. One problem with the concept of the “neutral state” is that the involvement of the state may not become apparent unless the facts of the case are sufficiently investigated. See Wendy R. Brown, *The Convergence of Neutrality and Choice: The Limits of the State’s Affirmative Duty to Provide Equal Educational Opportunity*, 60 *Tenn. L. Rev.* 63, 69 (1992) (arguing that the state’s history of official segregation accounted for the lack of racial integration under current standards allowing students freedom to choose which state university to attend, and stating, “This narrow decontextualized perspective that equality can be achieved when the state is neutral enables the court to ignore the continuous acts of discrimination either committed or condoned by the state.”).

¹⁰⁴ For example, the doctrine of economic substantive due process, exemplified by cases such as *Lochner v. New York*, 198 U.S. 45 (1905) (striking down maximum hour legislation) and *Adkins v. Childrens Hospital*, 261 U.S. 525 (1923) (striking down child labor legislation), prevented the legislative branch of the state and federal governments from ameliorating working conditions. These cases were eventually overruled by the Supreme Court during the mid-1930s. See, e.g., *West Coast Hotel v. Parrish*, 300 U.S. 379, 391 (1937) (Hughes, C.J.) (upholding state minimum wage law and stating, “The Constitution does not speak of freedom of contract.”).

The Principle of Democratic Choice with Regard to Civil Rights and Social Welfare Rights

With regard to civil rights, the principle of democratic choice under the state action doctrine means that the people have discretion to legislate precisely how fair, how tolerant, and how equal private citizens must be in their interactions with others. Under this theory, the Constitution establishes a baseline below which the government may not go in the protection of individual rights, but above which the government in its discretion is free to go. The constitutional baseline in cases of private action is contained in the Thirteenth Amendment (no person may enslave another), while the baseline in cases of state action is contained in the Bill of Rights and the Fourteenth Amendment.¹⁰⁵ Most civil rights laws are in addition to the constitutional baseline, and are not mandated by the Constitution itself.¹⁰⁶ The effect of the state action doctrine upon the power of government to repeal civil rights laws, or to make it more difficult to adopt to adopt civil rights laws and policies, is the subject of Part IV of this article. The effect of the state action doctrine upon the power of the federal government to adopt civil rights laws affecting private action is the subject of Part V of this article.

With regard to social welfare rights, the consequence of the distinction between “state action” and “state inaction” is that there is no constitutional right to governmental benefits. The meaning of this is that the people, acting through the democratic process, have unfettered discretion to determine how generous they choose to be in the distribution of public funds.¹⁰⁷ The Supreme Court has referred to this as the idea that the government has “no affirmative duty” to provide benefits.¹⁰⁸ This feature of the state action doctrine is the central focus of the next portion of this article. The following section describes how although legal scholars disagree about whether governmental benefits are constitutionally required, the Supreme Court has unequivocally held that they are *not*. The “no affirmative duty” doctrine is supported by the text of the Constitution, but there are textual and historical arguments that could support the conclusion that the government has at least some affirmative duties. I conclude that there are strong arguments for finding that the government has an affirmative duty to provide two governmental services: education and protection.

Textual and Historical Arguments Regarding Affirmative Duties

¹⁰⁵ See notes ___-___ and accompanying text *supra*.

¹⁰⁶ See, e.g., Civil Rights Act of 1964, Pub.L. 88-352, Title II, § 201, July 2, 1964, 78 Stat. 243, codified at 42 U.S.C. 2000a *et seq.* (outlawing discrimination and segregation in places of public accommodation); Voting Rights Act of 1965, Pub.L. 89-110, Aug. 6, 1965, 79 Stat. 437, codified at 42 U.S.C. 1973 *et seq.* (eliminating various devices employed in a discriminatory manner as barriers to voting, including literacy tests); Fair Housing Act, Pub.L. 90-284, Title VIII, Apr. 11, 1968, 82 Stat. 81, codified at 42 U.S.C. 3601 *et seq.* (outlawing discrimination in sale or lease of real estate), Equal Employment Opportunity Act of 1972, Pub. L. 92--261, Mar. 24, 1972, 86 Stat. 103, codified at 42 U.S.C. 2000e *et seq.* (amending Title VII of Civil Rights Act of 1964 to give Equal Employment Opportunity Commission authority to initiate civil lawsuits against employers or unions).

¹⁰⁷ If the government does create a benefits program, however, the program must be administered in a manner consistent with the requirements of Due Process, and eligibility criteria must conform to Equal Protection. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970) (striking down procedures for notice and hearing regarding termination of statutory welfare entitlements as violation of Due Process); *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973) (striking down provision of Food Stamp Act intended to exclude “hippies” and “hippy communes” from eligibility as violation of Equal Protection).

¹⁰⁸ See *Rust v. Sullivan*, 500 U.S. 173, 201 (1991) (Rehnquist, C.J.) (“The Government has no affirmative duty to ‘commit any resources to facilitating abortions’”) (citation omitted).

The distinction between state action and state inaction is supported by the plain language of the Constitution. The Constitution says what the government *may* do and what it *may not* do, but for the most part it does not say what the government *must* do. Articles I, II, and III grant powers to the branches of the federal government, while Article I, Section 9 and 10, impose certain limitations on the state and federal governments. The only affirmative duty that the original Constitution places upon the government is set forth in the Guarantee Clause, which provides that the government of the United States “shall guarantee to every state a Republican form of government, and shall protect each of them against invasion, and ... against domestic violence.”¹⁰⁹ However, the Supreme Court has ruled that cases arising under the Guarantee Clause are nonjusticiable political questions.¹¹⁰ Most of the Amendments to the Constitution are also phrased as limitations on the power of government. The First Amendment states that “Congress shall make or enforce no law” abridging freedom of speech, press, religion, or the right to petition for redress of grievances,¹¹¹ the Second Amendment states that the right of the people to keep and bear arms “shall not be infringed,”¹¹² and the remainder of the first eight amendments within the Bill of Rights are similarly prohibitory in nature.¹¹³ The Ninth Amendment might be construed as allowing for the possibility of affirmative rights, stating that “the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”¹¹⁴ However, the unenumerated rights that have been recognized to date, including freedom of association¹¹⁵ the right to travel,¹¹⁶ and the right to privacy,¹¹⁷ are, like the enumerated rights, doctrines that prohibit the government from restraining individual action.

¹⁰⁹ U.S. CONST., art. IV, § 4.

¹¹⁰ *See, e.g.,* *Luther v. Borden*, 48 U.S. 1 (1849) (Taney, C.J.) (stating, “The question which of the two opposing governments was the legitimate one, viz. the charter government, or the government established by the voluntary convention, has not heretofore been regarded as a judicial one in any of the State courts. The political department has always determined whether a proposed constitution or amendment was ratified or not by the people of the State, and the judicial power has followed its decision.”).

¹¹¹ U.S. CONST. amend. 1.

¹¹² U.S. CONST. amend 2.

¹¹³ *See* U.S. CONST. amend 3 (“No soldier shall ... be quartered in any house....”); amend 4 (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”); amend 5 (“No person shall be held ...; nor shall any person be subject for the same offense ...; nor shall be compelled ...; nor be deprived of life, liberty, or property ...; nor shall private property be taken”); amend 6 (“In all criminal prosecutions, the accused shall enjoy”); amend 7 (“In suits at common law ... the right of trial by jury shall be preserved”); amend. 8 (“Excessive bail shall not be required, nor excessive fines imposed”).

¹¹⁴ U.S. CONST. amend. 9.

¹¹⁵ *See, e.g.,* *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (ruling that the state may not apply anti-discrimination law against organization with a significant message against homosexuality); *NAACP v. State of Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (Harlan, J.) (stating, “It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.”); *NAACP v. Button*, 371 U.S. 415 (1963) (striking down state law infringing freedom of association).

¹¹⁶ *See, e.g.,* *Saenz v. Roe*, 526 U.S. 489, 500-504 (1999) (Stevens, J.) (discussing the textual basis for different aspects of the right to travel).

¹¹⁷ *See, e.g.,* *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (Kennedy, J.) (striking down state law making homosexual conduct a crime, and stating, “Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”); *Moore v. City of East Cleveland*, *Roe v. Wade*, 410 U.S. 113

Similarly, the Fourteenth Amendment appears to be phrased in negative terms, but there are persuasive arguments that at least one provision of the Fourteenth Amendment imposes an affirmative duty upon the states. The first three words of the second sentence of the Fourteenth Amendment are “No state shall.”¹¹⁸ This sentence declares that the states may not “abridge” the privileges and immunities of citizens of the United States, “deprive” persons of life, liberty or property without due process of law, nor “deny” to any person the equal protection of the laws.¹¹⁹ The first two clauses of this sentence clearly impose prohibitions, not obligations, upon the state governments, in that no state is permitted to “abridge” or “deprive” the fundamental rights of individuals. The third clause of this sentence – the Equal Protection Clause – is more difficult to classify as imposing solely a negative prohibition upon the state governments.

There are three textual arguments which support a finding that the Equal Protection Clause imposes an affirmative duty upon the government. First of all, there is a “plain meaning” argument. The double negative “to not deny” may be literally construed to mean “to provide.”¹²⁰ Second, there is an intratextual argument based upon a comparison of the phraseology of the Privileges and Immunities Clause (“No state shall make or enforce any law which shall abridge and immunities of citizens of the United States,”) and the Equal Protection Clause (“nor shall any state ... deny to any person within its jurisdiction the equal protection of the laws.”). This argument was made by Senator John Pool on the floor of Congress shortly after the Fourteenth Amendment was adopted:

There the word “deny” is used again; it is used in contradistinction to the first clause, which says, “no state shall make or enforce any law” which shall do so and so. That would be a positive act which would contravene the right of a citizen; but to say that it shall not deny to any person the equal protection of the law it seems to me opens up a different branch of the subject. It shall not deny by acts of omission, by a failure to prevent its own citizens from depriving by force any of their fellow-citizens of these rights.”¹²¹

(1973) (striking down state law forbidding abortion); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (striking down state law forbidding use of contraceptive devices).

¹¹⁸ U.S. CONST. amend. 14, §1. The principal drafter of the 14th Amendment, Representative John Bingham, stated that he was inspired to use the words “No state shall ...” by Chief Justice John Marshall’s opinion in *Barron v. Baltimore*, 32 U.S. 243, 248-249 (1833), wherein the Court had declined to apply the Bill of Rights against the states in part because the Bill of Rights lacked the language used in Article I, Section 9 and Section 10: “No state shall” Bingham stated: “Acting upon this suggestion I did imitate the framers of the original Constitution. As they had said, ‘no state shall emit bills of credit, pass any bill of attainder, *ex post facto* law, or law impairing the obligations of contracts;’ imitating their example and imitating it to the letter, I prepared the provision of the first section of the fourteenth amendment as it stands in the Constitution.” CONG. GLOBE, 42nd Cong., 1st Sess., p. 84, March 31, 1871; *THE RECONSTRUCTION AMENDMENTS DEBATES: THE LEGISLATIVE HISTORY AND CONTEMPORARY DEBATES IN CONGRESS ON THE 13TH, 14TH, AND 15TH AMENDMENTS* 510 (Alfred Avins, ed.) (hereinafter AVINS).

¹¹⁹ U.S. CONST. amend. 14, §1.

¹²⁰ See West, note 42 *supra*, at 825 (stating, “The Fourteenth Amendment, read literally, comes much closer to prohibiting inaction than action. ‘No State Shall ... Deny ... Equal Protection’ means, if we take out the double negative, that all states must provide something, namely equal protection of law.”) (footnote omitted).

¹²¹ CONG. GLOBE, S.p. 3611, 41st Cong., 2d Sess, May 19, 1870; AVINS, at 447.

A third textual argument supporting an affirmative understanding of the Equal Protection Clause is to consider how the Clause reads if the adjective “equal” is omitted: “No state shall ... deny to any person ... the ... protection of the laws.” This clearly imposes an affirmative duty of protection upon the government. If the Clause is read in this way, the word “equal” does not *limit* but rather *enhances* the obligation of the government towards the citizenry; not only must the government protect its citizens, but it must do so equally. This reading of the Equal Protection Clause, although unfamiliar to contemporary Americans, was the standard understanding of the framers of the Fourteenth Amendment, who were concerned with the lack of protection that was being accorded to Unionists and newly-freed slaves in the Reconstruction South.¹²² As many constitutional scholars have noted, the members of the Reconstruction Congress who adopted the Fourteenth Amendment were committed to a particular theory of the social contract.¹²³ The framers of the amendment believed that a citizen owes a duty of allegiance to government in return for the protection offered by the government.¹²⁴ Here is what Senator Lyman Trumbull, the author of the Civil Rights Act of 1866¹²⁵ and a floor manager of the Fourteenth Amendment,¹²⁶ said about allegiance and protection:

How is it that every person born in these United States owes allegiance to the Government? ... [C]an it be that our ancestors struggled through a long war and set up this Government, and that the people of our day have struggled through another war, with all its sacrifices and all its desolation, to maintain it, and at last that we have got a Government which is all-powerful to command the obedience of the citizen, but has no power to afford him protection? ... Sir, it cannot be. Such is not the meaning of our Constitution. Such is not the meaning of American citizenship. This government, ... has certainly some power to protect its own citizens in their own country. Allegiance and protection are reciprocal rights.¹²⁷

¹²² See, e.g., CONG. GLOBE, 42nd Cong., 1st Sess., April 14, 1871, S.p. 697; AVINS, at 563 (remarks of Senator Edmunds, citing the *Magna Carta* for the proposition that “it has been the recognized and bounden duty of all courts, and of all executive officers intrusted with the administration of justice and the law, to give that which the citizen was entitled to, to execute justice and afford protection against all forms of wrong and oppression.” and referring to this as an “affirmative right of a citizen,” not “a mere negative declaration, a kind of admonitory prohibition to a State ...”).

¹²³ See DANIEL A. FARBER AND SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION, 302-305 (stating, “Natural law and law-of-nations thinkers had stressed the idea that citizens owe allegiance to their government in exchange for the government’s grant of protection to them,” and citing and quoting remarks of members of Congress who agreed with this principle); Rebecca E. Zietlow, Congressional Enforcement of Civil Rights and John Bingham’s Theory of Citizenship, 36 AKRON L. REV. 717, 740 (2003) (stating, “This theory of citizenship reflected the “social compact” theory of John Locke, that people submit to the authority of the government in return for its protection.”); Alan R. Madry, State Action and the Due Process of Self-Help: Flagg Bros. Redux, 62 U. PITT. L. REV. 1, 40 (2000) (referring to the “familiar Republican linkage between allegiance and protection.”).

¹²⁴ See FARBER & SHERRY, note 123 *supra*, at 302, stating that this view “played an important role in the [congressional] debates.”)

¹²⁵ Scaturro, note __ *supra*, at 27.

¹²⁶ See Hadely Arkes, *Book Review: Scalia Contra Mundum*, 21 HARV. J.L. & PUB. POL’Y 231, 241 (1997).

¹²⁷ CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866). This is an early statement of Trumbull, before he shifted to opposition to Reconstruction; see SCATURRO, at 29 (noting that Trumbull was nominated for Governor by the Democrats in 1880); see notes __ and __ *infra*, (citing instances where Trumbull voted against Reconstruction important civil rights legislation in 1871 and 1875).

Many other members of Congress expressed this view,¹²⁸ and it is reasonable to conclude that the framers had this theory in mind when they adopted the Equal Protection Clause.

Judicial Interpretation and Scholarly Commentary Upon Social Welfare Rights

Despite the force of these textual and historical arguments, the Supreme Court, for the most part, has found that individuals do not have a constitutional right to governmental benefits, and it has invoked this aspect of the state action doctrine in a number of cases, finding no affirmative duty on the part of the government to provide welfare benefits,¹²⁹ housing,¹³⁰ or medical care.¹³¹ In an abortion-funding case the Court expressly distinguished between negative liberties and affirmative duties:

Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom. To hold otherwise would mark a drastic change in our understanding of the Constitution. It cannot be that because government may not prohibit the use of contraceptives, or prevent parents from sending their child to a private school, government, therefore, has an affirmative constitutional obligation to ensure that

¹²⁸ See, e.g., the remarks of Representative John H. Broomal:

But throwing aside the letter of the Constitution, there are characteristics of Governments that belong to them as such, without which they would cease to be Governments. The rights and duties of allegiance and protection are corresponding rights and duties. Upon whatever square foot of the earth's surface I owe allegiance to my country, there it owes me protection, and wherever my Government owes me no protection I owe it no allegiance and can commit no treason.

CONG. GLOBE, 39th Cong., 1st Sess., 1263, March 8, 1866; AVINS, at 175; see also CONG. GLOBE, 42nd Cong., 1st Sess., H.p. 85 (March 31, 1871); AVINS, at 511 (John Bingham quoting Daniel Webster as having said, "The maintenance of the Constitution does not depend on the plighted faith of the States as States to support it ... It relies on individual duty and obligation. ... On the other hand, the Government owes high and solemn duties to every citizen of the country. It is bound to protect him in his most important rights and interests.").

¹²⁹ See *Dandridge v. Williams*, 397 U.S. 471, 484 (1970) (Stewart, J.) (upholding state regulation imposing a cap of \$275 per month upon AFDC payments regardless of family size and actual need, and stating, "here we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights").

¹³⁰ See *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (White, J.) (upholding Oregon Forcible Entry and Detainer Act and stating, "We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement. Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions.").

¹³¹ See *Maier v. Roe*, 432 U.S. 464, 473-474 (1977) (Powell, J.) (upholding state Medicaid regulation that denied payment for abortions that were not "medically necessary," and stating, "*Roe* did not declare an unqualified 'constitutional right to an abortion' Rather, the right protects the woman only from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy."); *Harris v. McRae*, 448 U.S. 297, 316 (1980) (Stewart, J.) (upholding "Hyde Amendment," federal legislation which prohibited the use of Medicaid funds to pay for abortions except to save the life of the mother or in cases of rape or incest, and stating, "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation."); see also Kenneth R. Wing, *The Right to Health Care in the United States*, 2 Annals Health L. 161 (1993) ("There is nothing that can be characterized – at least in any general sense – as a constitutional right to health care in the United States.").

all persons have the financial resources to obtain contraceptives or send their children to private schools. To translate the limitation on governmental power implicit in the Due Process Clause into an affirmative funding obligation would require Congress to subsidize the medically necessary abortion of an indigent woman even if Congress had not enacted a Medicaid program to subsidize other medically necessary services.¹³²

These decisions of the Supreme Court establish that there is no fundamental constitutional right to subsistence payments, shelter, or medical care.¹³³

A number of legal scholars agree with the Court that social welfare rights are not embodied in the Constitution. David Currie, for example, characterizes arguments in favor of social welfare rights as “taking liberties” with the Constitution.”¹³⁴ On the other hand, there are legal scholars who have written in favor of the constitutionalization of social welfare rights. Charles L. Black, for example, in his book *A New Birth of Freedom* argued that the inalienable right to “the pursuit of happiness” set forth in the Declaration of Independence means that the government has the affirmative duty to attempt to eliminate poverty.¹³⁵ Other leading scholars who have called for recognition of social welfare rights include Frank Michelman¹³⁶ and Peter Edelman.¹³⁷ However, even scholars who are sympathetic to finding social welfare rights to be

¹³² *Harris*, 448 U.S., at 317-318 (Stewart, J.) (citations omitted).

¹³³ The Justices of the Supreme Court have not been unanimous in their acceptance of the “no affirmative duty” doctrine. See *Dandridge*, 397 U.S., 520-521 (Marshall, J., dissenting) (declining to find a fundamental right to subsistence payments, but nevertheless concluding that the cap on subsistence payments was discriminatory towards large families, and stating, “In my view, equal protection analysis of this case is not appreciably advanced by the a priori definition of a ‘right,’ fundamental or otherwise. Rather, concentration must be placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification.”) (footnote omitted); *Lindsey*, 405 U.S., at 89-90 (Douglas, J., concurring in part and dissenting in part) (stating, “But where the right is so fundamental as the tenant’s claim to his home, the requirements of due process should be more embracing. In the setting of modern urban life, the home, even though it be in the slums, is where man’s roots are. To put him into the street when the slum landlord, not the slum tenant, is the real culprit deprives the tenant of a fundamental right without any real opportunity to defend.”). See also *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 588 (1972) (Marshall, J., dissenting) (where the majority of the Supreme Court had denied the procedural due process claim of an untenured faculty member who had not been rehired by a state university on the ground that the professor had no “property right” in continued employment, Marshall, dissenting, stated, “In my view, every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying the employment.”)

¹³⁴ See David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. Chi. L. Rev. 864 (1986) (stating, “think twice about considering a set of positive constitutional rights as either a necessary or a sufficient condition for the achievement of the social state, and more than twice about the advisability of taking liberties with the Constitution to find them.”).

¹³⁵ See CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED* 131-139 (1997).

¹³⁶ See Frank I. Michelman, *The Supreme Court 1968 Term – Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

¹³⁷ See Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1 (1987). See also Robin West, note __ *supra*, at 822 (discussing whether a panhandler has a constitutional right to governmental assistance, stating, “The Constitution may be read, particularly if we read it in conjunction with the preamble and the Declaration of Independence, as suggesting that the panhandler ... has [a] constitutional right to some minimal level of welfare. If the legislature does not allocate some appropriate level of funding so as to ensure him decent food, housing, and above all medical care, he has cause for a constitutional complaint. Where and

mandated by the Constitution have concluded that this view is not likely to prevail¹³⁸ or that for practical reasons such rights would be unenforceable by the courts.¹³⁹

The Principle of Democratic Choice and Social Welfare Rights

In my opinion, the principle of democratic choice is a powerful argument against finding social welfare rights to be constitutionally mandated. Social welfare programs cost money, and the courts are not constitutionally empowered to impose taxes. A particularly memorable cry in our history was “no taxation without representation.”¹⁴⁰ Furthermore, the Constitution clearly vests the spending power in the legislative branch. The first power that is enumerated among the powers of Congress is the power “to lay and collect taxes, . . . to pay the debts and provide for the general welfare of the United States.”¹⁴¹ To make it crystal clear who has the power of the purse, the Constitution also specifically provides that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”¹⁴² The Supreme Court has recognized that the executive branch lacks constitutional authority over spending as demonstrated by the “impoundment” controversy¹⁴³ and the unconstitutionality of the “line item

against whom he will press that complaint is a dicey subject, but he has been constitutionally aggrieved.”).

¹³⁸ See William E. Forbath, *Symposium: The Constitution and the Obligations of Government to Secure the Material Preconditions for a Good Society*, 69 *FORDHAM L. REV.* 1821, 1824 (2001) (“Today, welfare rights are no longer part of anyone’s ‘ideal Constitution.’ Today, the idea simply seems ‘off the table’ and ‘off-the-wall.’”) (footnotes omitted); Robin West, *Symposium: Rights, Capabilities and the Good Society*, 69 *FORDHAM L. REV.* 1901, 1917 (explaining that many progressive legal scholars have come to see the traditional structure of constitutional rights as an obstacle to the creation of welfare programs, and therefore it is not surprising that these scholars have not developed a jurisprudence of social welfare rights, stating, “We might lack this jurisprudence, in part, because those who might otherwise have been inclined to contribute to that jurisprudence have been convinced not only of the futility of the project, but also of its counterproductivity.”).

¹³⁹ See Lawrence G. Sager, *Symposium: Thin Constitutions and the Pursuit of a Good Society*, 69 *FORDHAM L. REV.* 1989 (2001) (“We should understand the Constitution as containing some normative premises, albeit judicially unenforceable, that are categorical, non-negotiable, and demanding of priority. I think, for example, that the proposition that we ought to arrange our economic affairs so that a person willing to work hard will be able to provide herself and her family with minimum food, shelter, education, and medical care, is such a premise.”); Robin West, *Symposium: Charles L. Black, Jr.: Response to State Action and a New Birth of Freedom*, 92 *Geo. L.J.* 819 (2004) (stating, “With respect to welfare rights in particular, the constitutional case for welfare rights is strong, but it is one that must and should be directed to legislatures.”).

¹⁴⁰ See Wikipedia website *No Taxation without Representation*, online at http://en.wikipedia.org/wiki/Taxation_without_representation, (stating, “‘No taxation without representation’ was a rallying cry for advocates of American independence from Great Britain in the eighteenth century. . . . A slightly different version, ‘Taxation without representation is tyranny,’ is attributed to James Otis.”) (accessed July 21, 2005); see also *Virtual War Museum – Revolutionary War Hall* website, online at <http://www.virtualology.com/virtualwarmuseum.com/revolutionarywarhall/notaxationwithoutrepresentation.net/>, quoting excerpt from circular letter dated September 14, 1768, signed by John Hancock, stating “Taxes equally detrimental to the Commercial interests of the Parent Country and her Colonies, are imposed upon the People, without their Consent”) (accessed July 21, 2005).

¹⁴¹ U.S. CONST., art. I, § 8, cl. 1. Furthermore, the Supreme Court has generally abdicated any responsibility for determining whether federal spending is for the “general welfare.”

¹⁴² U.S. CONST., art I, § 9, cl. 7; See also *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (Rehnquist, C.J.) (stating, “In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress.”).

¹⁴³ See *Train v. City of New York*, 420 U.S. 35 (1975) (ordering the Administrator of the Environmental Protection Agency to release funds appropriated by Congress).

veto.”¹⁴⁴ If the power of appropriation is denied to the Executive Branch, how much less may it be said to reside in the Judicial Branch? A judicial order requiring the government to affirmatively provide welfare or other governmental benefits would strike most Americans as a stark violation of the Separation of Powers.

Education and Protection as Affirmative Duties

Although the Supreme Court has, in general, rejected the notion of affirmative rights to governmental benefits, there are two specific governmental services that people arguably have a constitutional right to receive: education and protection. The primary legal argument in favor of finding a fundamental right to education is that education is necessary for the exercise of other rights, while the principal legal argument in favor of finding “protection” to be a fundamental right is that this was clearly intended by the framers of the Fourteenth Amendment. In addition, recognizing education and protection as affirmative governmental duties would promote the principle of democratic choice, and would therefore be consistent with the state action doctrine.

In *Brown v. Board of Education*, the Supreme Court made a finding that “education is perhaps the most important function of state and local governments.”¹⁴⁵ However, the Court in *Brown* did not rule that the state *must* provide every child with a public school education; rather, the Court said, “Such an opportunity, *where the state has undertaken to provide it*, is a right which must be made available to all on equal terms.”¹⁴⁶ In *San Antonio Independent School District v. Rodriguez*,¹⁴⁷ the Supreme Court considered whether education should be considered to be a fundamental right because it is necessary for the exercise of other fundamental rights, including freedom of speech and the right to vote.¹⁴⁸ The Court rejected this view, expressly ruling that education is not a fundamental right.¹⁴⁹ Strictly speaking, however, this finding was

¹⁴⁴ See *Clinton v. City of New York*, 547 U.S. 417 (1988) (striking down federal Line Item Veto Act that authorized President to cancel spending items).

¹⁴⁵ *Brown*, 347 U.S., at 493 (Warren, C.J.). The Court stated:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Id.

¹⁴⁶ *Id.* (emphasis added).

¹⁴⁷ 411 U.S. 1 (1973) (upholding variations in funding among different school districts within state against equal protection challenge).

¹⁴⁸ *Id.* at 35 (Powell, J.) (stating, “It is appellees’ contention, however, that education is distinguishable from other services and benefits provided by the State because it bears a peculiarly close relationship to other rights and liberties accorded protection under the Constitution. Specifically, they insist that education is itself a fundamental personal right because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote.”)

¹⁴⁹ *Id.* at 35 (Powell, J.) (stating, “Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.”)

obiter dictum, because the question before the Court was not whether schoolchildren could be utterly denied a free public education, but rather whether differences in funding among public districts violated the Constitution; elsewhere in the opinion the Court appeared to reserve ruling on the question of whether a state is obligated to allocate funding to provide its children with a minimum adequate education.¹⁵⁰ Similarly, in two decisions since *Rodriguez*, although the Court has not declared education to be a fundamental right, nevertheless it has also not ruled out the possibility that the state has the obligation to provide children with a minimum adequate education. In *Plyler v. Doe*,¹⁵¹ the Court held that it was unconstitutional for a state to charge tuition for the children of illegal aliens to attend the public schools, in part upon the ground that education is vital to preparing children for a meaningful role in society.¹⁵² Dissenting in *Plyler*, Chief Justice Warren Burger contended that the majority of the Court had, in effect, elevated education to the level of a “quasi-fundamental right.”¹⁵³ And in *Kadrmas v. Dickinson Public Schools*,¹⁵⁴ the Court upheld a state law charging children’s families for transportation to the public schools, even though such a law imposed a proportionately greater burden upon the poor,¹⁵⁵ and once again stating that education is not a fundamental right.¹⁵⁶ However, the Court noted that the state law in question in that case expressly provided that a school board could take

¹⁵⁰ *Id.* at 36-37 (Powell, J.) (stating, “Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditures in Texas provide an education that falls short. Whatever merit appellees’ argument might have if a State’s financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where – as is true in the present case – no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.”).

¹⁵¹ 457 U.S. 202 (1982) (striking down Texas law requiring the children of undocumented aliens to pay tuition to attend the public schools).

¹⁵² *Id.* at 223-224 (Brennan, J.) (stating, “But more is involved in these cases than the abstract question whether [the state statute] discriminates against a suspect class, or whether education is a fundamental right. [The state statute] imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of [the state law], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in [the law] can hardly be considered rational unless it furthers some substantial goal of the State.”).

¹⁵³ *Id.* at 244 (Burger, C.J., dissenting) (stating, “Yet by patching together bits and pieces of what might be termed quasi-suspect-class and quasi-fundamental-rights analysis, the Court spins out a theory custom-tailored to the facts of these cases. In the end, we are told little more than that the level of scrutiny employed to strike down the Texas law applies only when illegal alien children are deprived of a public education. If ever a court was guilty of an unabashedly result-oriented approach, this case is a prime example.” (internal citation and footnote omitted)).

¹⁵⁴ 487 U.S. 450 (1988) (upholding North Dakota law allowing local school districts to charge families for bus transportation to public schools).

¹⁵⁵ *See id.* at 455 (O’Connor, J.) (stating, “Appellants contend that Dickinson’s user fee for bus service unconstitutionally deprives those who cannot afford to pay it of “minimum access to education.” See Brief for Appellants i. Sarita Kadrmas, however, continued to attend school during the time that she was denied access to the school bus. Appellants must therefore mean to argue that the busing fee unconstitutionally places a greater obstacle to education in the path of the poor than it does in the path of wealthier families.”).

¹⁵⁶

no action against a pupil whose family was too poor to pay the transportation fees.¹⁵⁷

Accordingly, like *Rodriguez* but unlike *Plyler*, the Court in *Kadrmas* was faced with evaluating the constitutionality of a law which did not utterly deny a class of children the opportunity of a free public education. At a minimum, whether a free public education is a fundamental right is at least a close and difficult constitutional question.¹⁵⁸

Another difficult question which arises under the “no affirmative duty” aspect of the state action doctrine is whether the government is obligated under the Constitution to protect its citizens from acts of private violence. The leading case on this question is *Deshaney v. Winnebago County Department of Social Services*.¹⁵⁹ The *Deshaney* case arose from one of the most repulsive and tragic incidents ever reviewed by the Supreme Court. Four-year-old Joshua Deshaney was beaten repeatedly by his father, and even though a family member, neighbors, and emergency room personnel made multiple reports of child abuse to the state, and the state made nearly twenty home visits where serious signs of abuse were observed, the state failed to remove the child from the home before the final beating which rendered Joshua brain-damaged and profoundly retarded.¹⁶⁰ Joshua and his mother claimed that the State had violated Joshua’s fundamental rights by leaving him in his father’s home despite knowledge of the abuse.¹⁶¹ The Supreme Court ruled against Joshua, and expressly held that under circumstances such as these the government has no duty to protect individuals from acts of violence committed by other individuals.¹⁶²

The Supreme Court invoked two aspects of the state action doctrine in the *DeShaney* case. First, the Court drew the distinction between state action and private action. Writing for

¹⁵⁷ See *id.* at 459-460 (O’Connor, J.) (stating, “A [school] board may waive any fee if any pupil or his parent or guardian shall be unable to pay such fees. No pupil’s rights or privileges, including the receipt of grades or diplomas, may be denied or abridged for nonpayment of fees,” quoting N.D. CENT. CODE § 15-43-11.2 (1981)).

¹⁵⁸ See generally John Dayton and Anne Dupre, *Symposium: School Funding Litigation: Who’s Winning the War?*, 57 VAND L. REV. 2351 (2004) (summarizing school funding cases at state and federal level); see also Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. CHI. L.J. 111, 134-135 (2004) (criticizing the Supreme Court for failing to apply the Constitution to the schools in a number of settings, stating, “As described above, constitutional guarantees of equal protection, freedom of speech, protection from unreasonable search and seizure, and procedural due process all have been deemed to have little application in schools.”).

¹⁵⁹ 489 U.S. 189 (1989).

¹⁶⁰ See *id.* at 191-193. See also *id.* at 208-209 (Brennan, J., dissenting). Justice Brennan gave this description of the facts:

Each time someone voiced a suspicion that Joshua was being abused, that information was relayed to the Department for investigation and possible action. When Randy DeShaney’s second wife told the police that he had “hit the boy causing marks and [was] a prime case for child abuse,” the police referred her complaint to DSS. When, on three separate occasions, emergency room personnel noticed suspicious injuries on Joshua’s body, they went to DSS with this information. When neighbors informed the police that they had seen or heard Joshua’s father or his father’s lover beating or otherwise abusing Joshua, the police brought these reports to the attention of DSS. And when respondent Kemmeter, through these reports and through her own observations in the course of nearly 20 visits to the DeShaney home, compiled growing evidence that Joshua was being abused, that information stayed within the Department--chronicled by the social worker in detail that seems almost eerie in light of her failure to act upon it.

Id. at 208-209 (Brennan, J., dissenting) (internal footnotes omitted).

¹⁶¹ See *id.* at 193.

¹⁶² See *id.* at 195 (Rehnquist, C.J.) (stating, “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.”).

the majority, Chief Justice Rehnquist pointed out that the violence had been perpetrated by Joshua's father, not by the government.¹⁶³ Second, the Court referred to the distinction between state action and state inaction, and observed that the events complained of were not that the state had committed some act against Joshua, but that it had *failed* to act,¹⁶⁴ and that absent a "special relationship" between Joshua and the government, the state had no duty to protect him.¹⁶⁵ The Court noted that if the state had deprived Joshua of his liberty by taking him into custody, then it would have had the affirmative duty to protect him from harm.¹⁶⁶ However, in a passage that recalls the Chief Justice Rehnquist's belief that the state action doctrine is intended to protect "individual freedom," he stated: "While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them."¹⁶⁷ The Court ruled that the neither the original custody ruling placing Joshua in his father's care nor the decision of caseworkers to leave Joshua in his father's home sufficiently implicated the government in the beating.¹⁶⁸

Aside from the harshness of this ruling,¹⁶⁹ the reasoning of the majority in *Deshaney* is troublesome for a number of reasons. First of all, the Court was able to reach this result only by finding that there was no "state action," a conclusion that seems remarkable in light of the extensive number of home visits and intervention by state authorities into Joshua's life. Second, the application of the state action doctrine in this case was inconsistent with the Court's own description of the purpose of the doctrine. Third, the conclusion that the state has no affirmative

¹⁶³ See *id.* at 203 (Rehnquist, C.J.) (stating, "the harm was inflicted not by the State of Wisconsin, but by Joshua's father.").

¹⁶⁴ See *id.* (Rehnquist, C.J.) (stating, "The most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them.").

¹⁶⁵ See *id.* at 197-202 (Rehnquist, C.J.).

¹⁶⁶ See *id.* at 198-199 (Rehnquist, C.J.) (referring to prisoners and persons who have been involuntarily committed mental patients, and stating, "It is true that in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals.").

¹⁶⁷ See *id.* at 201 (Rehnquist, C.J.).

¹⁶⁸ See *id.* at 201 (Rehnquist, C.J.) . The Chief Justice stated:

That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter. Under these circumstances, the State had no constitutional duty to protect Joshua.

Id. at 201.

¹⁶⁹ See *id.* at 213 (Blackmun, J., dissenting). Justice Blackmun stated:

Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except, as the Court revealingly observes, "dutifully recorded these incidents in [their] files." It is a sad commentary upon American life, and constitutional principles – so full of late of patriotic fervor and proud proclamations about "liberty and justice for all" – that this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded. Joshua and his mother, as petitioners here, deserve – but now are denied by this Court – the opportunity to have the facts of their case considered in the light of the constitutional protection that 42 U.S.C. § 1983 is meant to provide.

Id. at 213 (Blackmun, J.) (internal footnote omitted); see also Thomas J. Sullivan and Richard L. Bitter, Jr., *Abused Children, Schools, and the Affirmative Duty to Protect: How the Deshaney Decision Cast Children into a Constitutional Void*, 13 GEO. MASON U. CIV. RTS. L.J. 243 (2003) ("Categorically, it does not seem fair nor just that states are able to let this behavior reach such levels, however under DeShaney, it sure is constitutional.").

duty to protect individuals from acts of private violence is contrary to the expressed intent of the framers of the Fourteenth Amendment. And fourth, the principle of democratic choice requires the Court to recognize a duty of protection in this case, because the right of protection is fundamentally different from the claimed right to social welfare benefits.

First, even if one accepts the ruling of the Court that an affirmative duty of protection arises only where an individual has entered into a “special relationship” with the state, it seems reasonably clear that such a relationship existed in the *DeShaney* case. The state had placed Joshua in the custody of his father; the state was notified of the abuse pursuant to a process established by state law; the state undertook to monitor the home, and undertook the responsibility to remove Joshua if necessary; the state observed compelling evidence of physical abuse; finally, and most importantly, it was the state that decided to leave Joshua in the custody of his father, despite the child’s obvious need for protection.¹⁷⁰ As the dissenting justices in *DeShaney* observed, this would seem to constitute significant involvement by the state in the events that led up to the final beating.¹⁷¹

Second, it is difficult to see how the ruling of the Court in the *DeShaney* case advances the purposes of the state action doctrine even as those purposes are understood by the Court. As noted above, Chief Justice Rehnquist, who authored the *DeShaney* opinion, has grounded the state action doctrine upon a philosophy of individualism.¹⁷² But even if one accepts the individualistic premise of the state action doctrine subscribed to by Chief Justice Rehnquist, it seems inappropriate to apply that concept to children, let alone children who are being monitored by the governmental system of child protective services.¹⁷³

Third, the Supreme Court in *DeShaney* badly misread the intent of the framers of the Fourteenth Amendment. In the years immediately following the Civil War, terrorists threatened the newly freed blacks, while Southern courts, legislatures, and law enforcement officials denied blacks and their political allies the protection of the laws.¹⁷⁴ The Republicans in Congress were determined to end this reign of terror, and with that thought in mind they adopted a constitutional amendment that would guarantee to every person the protection of the laws.¹⁷⁵ However, the Supreme Court in *DeShaney* could find no affirmative duty of protection in the Fourteenth Amendment. Writing for the Court, the Chief Justice asserted that the Due Process Clause:

forbids the State itself to deprive individuals of life, liberty, or property without ‘due process of law,’ but its language cannot fairly be extended to impose an

¹⁷⁰ See notes ___-___ *supra* and accompanying text.

¹⁷¹ See note 159 *supra* and accompanying text (summarizing actions taken by the state and state employees regarding Joshua).

¹⁷² See notes ___-___ *supra* and accompanying text.

¹⁷³ See generally, Deborah Austern Colson, *Safe Enough to Learn: Placing an Affirmative Duty of Protection on Public Schools Under 42 U.S.C. Section 1983*, 30 Harv. C.R.-C.L. L.Rev. 169 (1995) (arguing placement of children in public schools sufficient to trigger affirmative duty of protection); Karen W. Yiu, *Foster Parents as State Actors in Section 1983 Actions: What Rayburn v. Hogue Missed*, 7 U.C. Davis J. Juv. L. & Pol’y 117 (2003) (arguing placement of children in foster care triggers affirmative duty of protection; Sullivan and Ritter, note 168 *supra*, at 243 (stating, “*DeShaney* is bad law because it says that states do not have an affirmative duty under the United States Constitution to protect the most powerless members of our society – abused children.”).

¹⁷⁴ See notes ___ *supra* and ___ *infra* and accompanying text.

¹⁷⁵ See notes ___ *supra* and ___ *infra* and accompanying text.

affirmative obligation on the State to ensure that those interests do not come to harm through other means.¹⁷⁶

Reviewing the historical evidence on this point, which is described both above¹⁷⁷ and in Part V of this article, Professor Steven Heyman concludes that “the congressional debates show that imposing a constitutional duty on the states to protect the fundamental rights of their citizens was a principal object of that Amendment.”¹⁷⁸ Heyman says:

A central purpose of the Fourteenth Amendment and Reconstruction legislation was to establish the right to protection as a part of the federal Constitution and laws, and thus to require the states to protect the fundamental rights of all persons, black as well as white. In establishing a federal right to protection, the Fourteenth Amendment was not creating a new right, but rather incorporating into the Constitution the concept of protection as understood in the classical tradition. The debates in the Thirty-Ninth Congress over the Fourteenth Amendment and the Civil Rights Act of 1866 confirm that the constitutional right to protection was understood to include protection against private violence.¹⁷⁹

I agree with the conclusion of Professor Heyman and other scholars that the historical evidence is compelling that the Equal Protection Clause was intended to impose upon the government a duty of protection against acts of private violence – a duty that the State of Wisconsin may have violated in the *DeShaney* case, if the actions of the state were undertaken with the requisite state of mind and level of culpability.¹⁸⁰

Finally, in my opinion, the Court’s application of the state action doctrine in *DeShaney* is wrong because it is inconsistent with the principle of democratic choice. The Chief Justice argued that it is up to the people of Wisconsin to decide whether or not the state should be held liable for its failure to enforce the laws.¹⁸¹ But “protection” is fundamentally different from other governmental benefits like subsistence payments, housing, or medical care, in that it does not necessarily entail the spending of additional funds. A judicial finding that the state has an affirmative duty to protect its citizens does not intrude upon the reserved power of the legislature to impose taxes and control spending. Furthermore, where the Court is merely enjoining the executive branch to enforce protective laws which have *already* been enacted, this would serve

¹⁷⁶ *DeShaney*, 489 U.S., at 195 (Rehnquist, C.J.).

¹⁷⁷ See notes ___-___ *supra* and accompanying text.

¹⁷⁸ Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 Duke L.J. 507, 571 (1991) (footnote omitted).

¹⁷⁹ *Id.* at 546 (footnote omitted).

¹⁸⁰ See, e.g., *Daniels v. Williams*, 474 U.S. 327, 333 (1986) (Rehnquist, J.) (referring to the Due Process Clause of the Fourteenth Amendment, and stating, “we do not believe its protections are triggered by lack of due care by prison officials.”).

¹⁸¹ See *id.* at 203 (Rehnquist, C.J.). The Chief Justice stated:

The people of Wisconsin may well prefer a system of liability which would place upon the State and its officials the responsibility for failure to act in situations such as the present one. They may create such a system, if they do not have it already, by changing the tort law of the State in accordance with the regular lawmaking process. But they should not have it thrust upon them by this Court’s expansion of the Due Process Clause of the Fourteenth Amendment.

Id. at 203 (Rehnquist, C.J.).

to *promote* the principle of democratic choice. In *DeShaney*, the people of Wisconsin had already spoken when the child protection laws were enacted, and the Court interfered with the will of the people when it failed to require the enforcement of these laws.¹⁸²

Conclusion

The principle of democratic choice generally supports the concept of the “no affirmative duty” doctrine, and the critics of the Supreme Court on the left of the political spectrum have erred in concluding that there is an affirmative constitutional right to welfare benefits. However, there is a persuasive argument in favor of the affirmative right to an education, necessary as it is to effective participation in our democracy. Although the Supreme Court has stated in *dictum* that there is no fundamental right to an education, the Court has yet to rule on the question of whether there is a fundamental right to a minimum adequate public education. Furthermore, the principle of democratic choice indicates that the Supreme Court erred in *Deshaney v. Winnebago County Department of Social Services* when it found that the executive branch of the state government has no affirmative duty under the Constitution to enforce existing laws protecting its citizens.

The following portion of this article discusses the distinction between “mere repeal” of a law and “distortion of the governmental process.”

IV. THE “MERE REPEAL / DISTORTION OF GOVERNMENTAL PROCESS” DICHOTOMY

A third type of state action problem arises when there is a legislative reaction *against* a civil rights movement. As a civil rights movement gathers momentum and begins to achieve legislative victories, it is common for there to be a backlash, a counter-reaction, as the traditional majority resists the emerging claim for equality. When this occurs, a central question that arises is whether the “backlash” amounts to unconstitutional “state action.”

Legal Restrictions Placed on Civil Rights Movements in American History

A significant example of a backlash against civil rights occurred in the 1830’s. As the antislavery movement gained ground in America, there was a terrible reaction against it.¹⁸³ And just as slavery is the denial of the fundamental equality of all men and women, many of the specific tactics that were used to protect slavery strike at the heart of the democratic process. Laws were adopted across the South to prohibit people from expressing antislavery views.¹⁸⁴

¹⁸² See also text accompanying notes ___-___ *infra*, arguing that the Supreme Court similarly contravened the principle of democratic choice when it invalidated the Violence Against Women Act in *United States v. Morrison*, 529 U.S. 598 (2000)).

¹⁸³ See MICHAEL KENT CURTIS, *FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE”*: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 117-299 (2000) (describing actions taken to suppress the antislavery movement, and people’s reactions demanding freedom of speech).

¹⁸⁴ See *id.* at 299 (stating, “The laws protecting slavery from criticism were sedition acts, broadly defined. They made it a crime to criticize one legal and social institution and to advocate its abolition.”).

The “gag rule” in the Congress made it impossible to discuss abolition.¹⁸⁵ Ultimately, both the Constitution of the United States and the state constitutions were interpreted or amended to make it impossible to pass antislavery legislation,¹⁸⁶ and this in turn made it impossible to address the great evil of slavery through the democratic process, leaving the matter to be resolved upon the fields of battle.

In response to the abolition of slavery and Reconstruction, the Southern states adopted “Black Codes” denying equal rights to African Americans,¹⁸⁷ and there was an uprising of mob violence and terrorism that attempted to return the black race to a state of virtual servitude.¹⁸⁸ Despite the relative success of the “redeemer” movement against Reconstruction, the black

¹⁸⁵ See *id.* at 176-181 (describing gag rule); *id.* at 180 (stating, “The gag rule had repressed abolitionist petitions, but it also attempted to silence congressional discussion. It gagged congressmen as well as abolitionists, underlining the abolitionists’ warning that the suppression of their rights implicated the rights of others as well.”).

¹⁸⁶ See ABRAHAM LINCOLN, II COLLECTED WORKS OF ABRAHAM LINCOLN 404 (excerpt from speech at Springfield, Illinois, June 26, 1857), available online at www.hti.umich.edu/l/lincoln. Here is what Abraham Lincoln had to say about how at the time of the Revolution the law in regard to slavery was different than it was by the time the spoke 1857:

In those days, as I understand, masters could, at their own pleasure, emancipate their slaves; but since then, such legal restraints have been made upon emancipation, as to amount almost to prohibition. In those days, Legislatures held the unquestioned power to abolish slavery in their respective States; but now it is becoming quite fashionable for State Constitutions to withhold that power from the Legislatures. In those days, by common consent, the spread of the black man's bondage to new countries was prohibited; but now, Congress decides that it *will* not continue the prohibition, and the Supreme Court decides that it *could* not if it would. In those days, our Declaration of Independence was held sacred by all, and thought to include all; but now, to aid in making the bondage of the negro universal and eternal, it is assailed, and sneered at, and construed, and hawked at, and torn, till, if its framers could rise from their graves, they could not at all recognize it. All the powers of earth seem rapidly combining against him. Mammon is after him; ambition follows, and philosophy follows, and the Theology of the day is fast joining the cry. They have him in his prison house; they have searched his person, and left no prying instrument with him. One after another they have closed the heavy iron doors upon him, and now they have him, as it were, bolted in with a lock of a hundred keys, which can never be unlocked without the concurrence of every key; the keys in the hands of a hundred different men, and they scattered to a hundred different and distant places; and they stand musing as to what invention, in all the dominions of mind and matter, can be produced to make the impossibility of his escape more complete than it is.

Id.

¹⁸⁷ See C. VANN WOODWARD, *THE STRANGE HISTORY OF JIM CROW* 23 (1966) (stating, “the provisional legislatures established by President Johnson in 1865 adopted the notorious Black Codes.”); KENNETH M. STAMMP, *THE ERA OF RECONSTRUCTION 1865-1877* 79 (1965) (stating, “the purpose of the Black Codes was to keep the Negro, as long as possible, ... a propertyless rural laborer, under strict controls, without political rights, and with inferior legal rights.”).

¹⁸⁸ See STAMMP, note 186 *supra*, at 75 (citing the 1866 report of Carl Schurz, who had been sent by President Johnson to review the situation in the South, to the effect that “the more brutal whites committed countless acts of violence against the freedmen.”); *id.* at 199 (stating, “At least as important a factor as racial demagoguery in the overthrow of the radical regimes [in the 1870s] was the resort to physical violence. ... Organized terrorism was popularly associated with the Ku Klux Klan, formed in Tennessee in 1866, but the Klan was only one of many such organizations, which included the Knights of the White Camelia, the White Brotherhood, the Palefaces, and the ’76 Association.”).

population of the South continued to vote in large numbers for two decades,¹⁸⁹ and were successful in obtaining representation and influence in state governments.¹⁹⁰ However, at the beginning of the 20th Century another wave of racist mob violence swept the South,¹⁹¹ and all of the southern states took steps to disenfranchise black voters.¹⁹² The principal mechanism that was used was the “Mississippi Plan,” which incorporated a series of devices intended to disqualify and discourage African Americans from voting.¹⁹³ As a result of these laws, as well as the very real threat of private intimidation, blacks were stripped of the right to vote.¹⁹⁴ For example, as late as the 1950s, less than two percent of African Americans over the age of 20 were registered to vote in the State of Mississippi.¹⁹⁵ The disenfranchisement of African Americans in the early years of the 20th Century was simply a continuation of the pattern established under slavery. As had been the case in the antebellum South, it was necessary to subvert the democratic process in order to maintain the system of white supremacy.

This pattern was repeated again during latter half of the 20th Century in reaction to the modern civil rights movement of African Americans seeking to dismantle the system of apartheid that had developed in the United States. In addition to committing yet another wave of racist violence in the 1950s and early 1960s,¹⁹⁶ the forces of segregation not only attempted to repeal hard-won civil rights legislation and policies, but they also sought to make it impossible for such legislation or policies to be adopted in the first place.¹⁹⁷ The Supreme Court responded by ruling in a series of cases that although it is constitutional for the government to *repeal* civil rights laws, it is unconstitutional to *alter the governmental decisionmaking process* to make it more difficult for civil rights laws to be adopted than it is for other types of legislation. In a series of cases – *Reitman v. Mulkey*,¹⁹⁸ *Hunter v. Ericson*,¹⁹⁹ and *Washington v. Seattle School*

¹⁸⁹ See WOODWARD, note 186 *supra*, at 53-54 (stating, “It is perfectly true that Negroes were often coerced, defrauded, or intimidated, but they continued to vote in large numbers in most parts of the South for more than two decades after Reconstruction.”).

¹⁹⁰ See *id.* at 54-65 (describing success of black officeholders and political alliances between blacks and both the conservative and populist political parties of the South).

¹⁹¹ See *id.* at 86-87 (describing several attacks by mobs engaged in “looting, murdering, and lynching.”).

¹⁹² See *id.* at 83-85 (describing the adoption of various devices disenfranchising black voters in thirteen states between 1890 and 1915).

¹⁹³ See *id.* at 83-84 (describing how property and literacy requirements (with loopholes for whites such as the “understanding clause,” the “grandfather clause,” and the “good character clause”), the poll tax, and the “white primary” were used to disenfranchise blacks).

¹⁹⁴ See *id.* at 85 (stating, “The effectiveness of disenfranchisement is suggested by a comparison of the number of registered negro voters in Louisiana in 1896, when there were 130,334, and in 1904, when there were 1,342.”).

¹⁹⁵ See *id.* at 174.

¹⁹⁶ See *id.* at 165-166 (describing wave of repression across the South and events at Little Rock in 1958); 173-174 (describing the State of Mississippi in the 1950s as a “police state” where “Negroes lived in constant fear and its whites under rigid conformity to dogmas of white supremacy as interpreted by a state-subsidized Citizens Council.”); 174-175 (describing the Battle of Oxford); 177-179 (describing the Birmingham atrocities, the murder of Medgar Evers, and other acts of interracial violence);

¹⁹⁷ See Woodward, note 186 *supra*, at 154-163, 162 (describing steps taken in many southern states against court-ordered integration, including the adoption of private school plans, nullification measures, laws penalizing school board officials and school districts who attempted desegregation, transfer of responsibility over assignment of pupils to local authorities, and stating, “by the end of the year [1956] eleven southern states had placed a total of 106 pro-segregation measures on their law books.”).

¹⁹⁸ 387 U.S. 369 (1967) (invalidating California state constitutional amendment making it unconstitutional for the state or any political subdivision to adopt fair housing law).

*District No. 1*²⁰⁰ – the Supreme Court struck down discriminatory laws that placed roadblocks in the way of the adoption of civil rights statutes and policies, and the state action doctrine figured prominently in the reasoning of the Court.

The Supreme Court's Response to Anti-Civil Rights Legislation

In *Reitman v. Mulkey*, the Supreme Court struck down a state constitutional amendment, Proposition 14, which provided that no state or local law could be adopted which would interfere with “the right of any person . . . to decline to sell, lease, or rent [his or her] property to such persons as he, in his absolute discretion, chooses.”²⁰¹ Proposition 14 was adopted in reaction to statewide fair housing laws, including the Unruh Act and the Rumford Acts, which had been recently promulgated by the state legislature.²⁰² Not only did Proposition 14 repeal the new fair housing laws, but it also prohibited the adoption of any fair housing law anywhere in the State of California.²⁰³ The Supreme Court ruled that although the people of the State of California were allowed to *repeal* fair housing laws, they were not permitted to withdraw the power to adopt this type of law from the state legislature.²⁰⁴

The state action doctrine was central to the Court's reasoning in *Reitman* in that it was used to explain the difference between repealing a civil rights law and making a civil rights law unconstitutional. The Court ruled that although mere repeal of fair housing laws might not constitute unconstitutional state action, making fair housing laws unconstitutional went too far

¹⁹⁹ 393 U.S. 385 (1969) (invalidating Akron city charter amendment requiring that any fair housing ordinance be approved by a referendum of the voters).

²⁰⁰ 458 U.S. 457 (1982) (invalidating Washington initiative prohibiting transportation of students for reasons other than special education, overcrowding, or lack of necessary physical facilities).

²⁰¹ See *Reitman*, 387 U.S., at 371 (White, J.) (quoting state constitutional amendment which provided: “Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.”).

²⁰² See *id.* at 374 (White, J.) (stating, “The Unruh Act, on which respondents based their cases, was passed in 1959. The Hawkins Act followed and prohibited discriminations in publicly assisted housing. In 1961, the legislature enacted proscriptions against restrictive covenants. Finally, in 1963, came the Rumford Fair Housing Act, superseding the Hawkins Act and prohibiting racial discriminations in the sale or rental of any private dwelling containing more than four units.”) (footnote and citations omitted).

²⁰³ See *id.* (White, J.) (stating, “It was against this background that Proposition 14 was enacted. Its immediate design and intent, the California court said, were ‘to overturn state laws that bore on the right of private sellers and lessors to discriminate,’ the Unruh and Rumford Acts, and ‘to forestall future state action that might circumscribe this right.’ This aim was successfully achieved: the adoption of Proposition 14 ‘generally nullifies both the Rumford and Unruh Acts as they apply to the housing market,’ and establishes ‘a purported constitutional right to privately discriminate on grounds which admittedly would be unavailable under the Fourteenth Amendment should state action be involved.’”).

²⁰⁴ See *id.* at 376 (White, J.) (stating, “as we understand the California court, it did not posit a constitutional violation on the mere repeal of the Unruh and Rumford Acts,”; and stating, “The California court could very reasonably conclude that [Proposition 14] would and did have wider impact than a mere repeal of existing statutes.”); see *id.* at 380-381 (White, J.) (stating, “Here we are dealing with a provision which does not just repeal an existing law forbidding private racial discriminations. [Proposition 14] was intended to authorize, and does authorize, racial discrimination in the housing market. The right to discriminate is now one of the basic policies of the State. The California Supreme Court believes that the section will significantly encourage and involve the State in private discriminations. We have been presented with no persuasive considerations indicating that these judgments should be overturned.”).

towards encouraging private acts of racial discrimination.²⁰⁵ The Supreme Court reached this conclusion by applying the state action standard from *Burton v. Wilmington Parking Authority*, which required the Court to determine the extent of governmental involvement in acts of private discrimination.²⁰⁶ The Court explicitly found that by making fair housing laws unconstitutional, Proposition 14 would “significantly encourage and involve the State in private discriminations.”²⁰⁷ Recast in the terminology that is currently used by the Court, the mere repeal of civil rights legislation amounts to no more than “acquiescence” in private acts of discrimination, which is *not* in itself “state action,” whereas impeding the enactment of fair housing legislation through the adoption of a constitutional amendment constitutes “encouragement” of private acts of discrimination, which *is* state action.²⁰⁸

There are two reasons why the Court’s use of the state action doctrine to explain the difference between “mere repeal” and “changing the structure of the democratic process” seems unsatisfactory. First of all, the repeal of a law, like the adoption of a law, is quintessential state action. When a law is repealed the state has undeniably acted to change people’s legal rights and responsibilities. A second difficulty with the explanation offered by the Court in *Reitman* is that it is difficult to imagine any action which would “encourage” racial discrimination more than the repeal of a nondiscrimination law. What the people of California did in repealing the Unruh Act was to legalize racial discrimination in the real estate market. It is undeniable that race was “a motivating factor” in the repeal of this legislation, making the repeal an act of “purposeful discrimination.”²⁰⁹ Accordingly, the implication that the action of the people in repealing the fair housing law merely “acquiesced” in private acts of discrimination is unconvincing.

²⁰⁵ See *id.* at 377 (White, J.) (stating, “Unruh and Rumford were thereby pro tanto repealed. But the section struck more deeply and more widely. Private discriminations in housing were now not only free from Rumford and Unruh but they also enjoyed a far different status than was true before the passage of those statutes. The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State’s basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. Those practicing racial discriminations need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources.”)

²⁰⁶ See *id.* at 378-379 (White, J.) (stating, “This Court has never attempted the ‘impossible task’ of formulating an infallible test for determining whether the State ‘in any of its manifestations’ has become significantly involved in private discriminations. ‘Only by sifting facts and weighing circumstances’ on a case-by-case basis can a ‘nonobvious involvement of the State in private conduct be attributed its true significance.’ Here the California court, armed as it was with the knowledge of the facts and circumstances concerning the passage and potential impact of [Proposition 14], and familiar with the milieu in which that provision would operate, has determined that the provision would involve the State in private racial discriminations to an unconstitutional degree. We accept this holding of the California court.”) (quoting *Burton*, 365 U.S., at 722).

²⁰⁷ See *id.* at 387 U.S., at 381 (White, J.) (stating, “The California Supreme Court believes that the section will significantly encourage and involve the State in private discriminations. We have been presented with no persuasive considerations indicating that these judgments should be overturned.”).

²⁰⁸ See notes ___-___ *supra* and accompanying text (“mere acquiescence” of government in violation of constitutional rights by private parties is not state action, while “encouragement” of such violation is state action).

²⁰⁹ See, e.g., *Washington v. Davis*, 426 U.S. 229, 239 (1976) (upholding writing skill test for applicants to police department against Equal Protection challenge on the ground that the test was not utilized for a discriminatory purpose, stating, “But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.”); *Village of Arlington Heights v. Metropolitan Housing Authority Corp.*, 429 U.S. 252, 265-266 (1977) (upholding municipality’s refusal to allow multifamily dwellings on ground that its refusal was not proven to be motivated by racial discrimination, stating, “When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified”).

A more straightforward explanation of the decision in *Reitman* is simply that the people have the right to return to the constitutional baseline, but that they do not have the right to create different rules for different people for the enactment of legislation. Legislation that was vitally important to African-Americans and other minority groups was blocked by Proposition 14 as no other similar legislation was. The state action doctrine stands for the proposition that, so far as the Constitution is concerned, the people are free to remain at, go beyond, or return to the constitutional baseline. Coupled with the Equal Protection Clause, the state action doctrine also stands for the proposition that laws may not *prevent* the people, acting through the democratic process, from deciding to protect minority rights over and above the constitutional baseline.

In subsequent cases the Supreme Court clarified its rationale, expressly holding that the law may not restructure or distort the governmental decisionmaking process to the detriment of minority groups. In *Hunter v. Ericson*, the citizens of the City of Akron, Ohio, adopted an amendment to the city charter which repealed a recently enacted fair housing ordinance, and which required that any future ordinance which “regulates the ... sale ... of real property ... on the basis of race ... must first be approved by a majority of the electors voting on the question”²¹⁰ Justice White, speaking for the Court, explained that while it was constitutional for the people of Akron to repeal the fair housing ordinance, it was not constitutional to adopt a different procedure for the adoption of fair housing laws.²¹¹ Justice White stated: “[T]he State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.”²¹²

Another case following the same line of reasoning involved the constitutionality of a ballot measure which was a backlash against busing for integration of the public schools. Voters in the State of Washington reacted against a voluntary school integration plan which had been designed by the Seattle School District²¹³ by adopting Initiative 350, which prohibited any school district from transporting students past neighboring schools or redrawing attendance zones for

²¹⁰ *See id.* at 387 (White, J.) (city charter amendment provided: “Any ordinance enacted by the Council of The City of Akron which regulates the use, sale, advertisement, transfer, listing assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective. Any such ordinance in effect at the time of the adoption of this section shall cease to be effective until approved by the electors as provided herein.”).

²¹¹ *See id.* at 389-390 and 390 and fn 5 (White, J.) (stating, “the City of Akron ... not only suspended the operation of the existing ordinance forbidding housing discrimination, but also required the approval of the electors before any future ordinance could take effect,” “Thus we do not hold that mere repeal of an existing ordinance violates the Fourteenth Amendment.”).

²¹² *See id.* at 392-393 (White, J.) (stating, “Even though Akron might have proceeded by majority vote at town meeting on all its municipal legislation, it has instead chosen a more complex system. Having done so, the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.”).

²¹³ *See Seattle School District*, 458 U.S., at 461 (Powell, J.) (stating, “in March 1978, the School Board enacted the so-called ‘Seattle Plan’ for desegregation. The plan, which makes extensive use of busing and mandatory reassignments, desegregates elementary schools by ‘pairing’ and ‘triading’ predominantly minority with predominantly white attendance areas, and by basing student assignments on attendance zones rather than on race.”).

integrative purposes unless required by the Constitution.²¹⁴ Once again, this follows the pattern that was established in *Reitman* and *Hunter* of a backlash against official policies protecting a minority group, and once again, the Supreme Court ruled that while the voters have the right to repeal civil rights policies, they do not have the right to restructure the governmental decisionmaking process to make it more difficult to adopt such policies. Justice Powell laid out the reasoning of the Court in the following words:

We are also satisfied that the practical effect of Initiative 350 is to work a reallocation of power of the kind condemned in *Hunter*. The initiative removes the authority to address a racial problem – and only a racial problem – from the existing decisionmaking body, in such a way as to burden minority interests. Those favoring the elimination of *de facto* school segregation now must seek relief from the state legislature, or from the statewide electorate. Yet authority over all other student assignment decisions, as well as over most other areas of educational policy, remains vested in the local school board. Indeed, by specifically exempting from Initiative 350’s proscriptions most nonracial reasons for assigning students away from their neighborhood schools, the initiative expressly requires those championing school integration to surmount a considerably higher hurdle than persons seeking comparable legislative action.²¹⁵

In the last decade a new civil rights movement has emerged demanding an end to discrimination on the basis of sexual orientation. As homosexuals have achieved political gains and legislative victories, our society has witnessed a furious backlash, attempting not only to undo the progress that homosexuals have achieved, but to make it difficult or impossible for equal rights legislation and policies to be adopted. The Supreme Court addressed this problem in *Romer v. Evans*,²¹⁶ in which the Court considered the constitutionality of a Colorado state constitutional amendment (Amendment 2) that was adopted in reaction to municipal ordinances and governmental directives forbidding discrimination on the basis of sexual orientation.²¹⁷

²¹⁴ See *id.* at 457 (Powell, J.) (stating that the opponents of busing for integration “drafted a statewide initiative designed to terminate the use of mandatory busing for purposes of racial integration. This proposal, known as Initiative 350, provided that ‘no school board ... shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student’s place of residence ... and which offers the course of study pursued by such student...’ The initiative then set out, however, a number of broad exceptions to this requirement: a student may be assigned beyond his neighborhood school if he ‘requires special education, care or guidance,’ or if ‘there are health or safety hazards, either natural or man made, or physical barriers or obstacles ... between the student’s place of residence and the nearest or next nearest school,’ or if ‘the school nearest or next nearest to his place of residence is unfit or inadequate because of overcrowding, unsafe conditions or lack of physical facilities.’ Initiative 350 also specifically proscribed use of seven enumerated methods of ‘indirec[t]’ student assignment--among them the redefinition of attendance zones, the pairing of schools, and the use of ‘feeder’ schools – that are a part of the Seattle Plan. The initiative envisioned busing for racial purposes in only one circumstance: it did not purport to ‘prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools.’”) (citations omitted).

²¹⁵ *Id.* at 474 (Powell, J.).

²¹⁶ 517 U.S. 620 (1996) (invalidating Colorado state constitutional amendment prohibiting state and local governments from enacting antidiscrimination measures protecting homosexuals).

²¹⁷ See *id.* at 623-624 (Kennedy, J.) (stating, “The impetus for the amendment and the contentious campaign that preceded its adoption came in large part from ordinances that had been passed in various Colorado municipalities. For example, the cities of Aspen and Boulder and the city and County of Denver each had enacted ordinances which

Amendment 2 prohibited the state and any of its subdivisions from adopting nondiscrimination laws protecting homosexuals.²¹⁸ In striking down Amendment 2, Justice Kennedy cogently phrased the legal principle in the following terms:

A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.²¹⁹

The Principle of Democratic Choice and the Mere Repeal / Distortion of Governmental Process Dichotomy

In summary, the decisions of the Supreme Court in this line of cases reflects the central importance of the principle of democratic choice within the state action doctrine. The Constitution requires that no law may allow society to drop below the constitutional baseline, a baseline that is set by the principles of Equal Protection with respect to the actions of government, and by the 13th Amendment with respect to the actions of individuals. The Constitution permits our society to remain at the constitutional baseline, and therefore society does not have the affirmative duty to enact civil rights legislation. Furthermore, it is constitutional to repeal civil rights laws and policies, and thereby return to the constitutional baseline. To this extent, society is allowed to “backslide.” However, the state action doctrine, coupled with the Equal Protection Clause, makes it unconstitutional to make it more difficult to adopt civil rights laws and policies than it is to adopt other similar laws and policies. This interpretation of the state action doctrine is consistent with the principle of democratic choice. It is up to the people acting through the democratic process to decide how fair, how tolerant, and how equal individuals must be in their treatment of each other. Any laws which interfere with the fair operation of the democratic process in the protection of fundamental rights are themselves unconstitutional state action.

The following portion of this article concerns another aspect of the state action doctrine, namely the power of Congress to adopt civil rights laws protecting people against acts of private discrimination.

V. THE STATE ACTION DOCTRINE AND THE ENFORCEMENT CLAUSE

The fourth aspect of the state action doctrine concerns the proper interpretation of Section 5 of the Fourteenth Amendment, called the “Enforcement Clause.” This constitutional provision grants Congress the power to enforce the Fourteenth Amendment. Since 1883 in the *Civil Rights*

banned discrimination in many transactions and activities, including housing, employment, education, public accommodations, and health and welfare services.”).

²¹⁸ See *id.* at 624 (Kennedy, J.) (quoting Amendment 2, which provided: “No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.”).

²¹⁹ *Romer* at 633 (Kennedy, J.).

*Cases*²²⁰ the Supreme Court has interpreted the Enforcement Clause as empowering the federal Congress to redress and remedy “state action” only, and the Court has held that the provision does *not* confer power upon the Congress to directly regulate the actions of private individuals and organizations.²²¹ Like the elder Justice John Harlan, who dissented in the *Civil Rights Cases*,²²² Justice Clark, who wrote a concurring opinion in *United States v. Guest*,²²³ and Justice Breyer, who dissented in *United States v. Morrison*,²²⁴ I conclude that this interpretation of Section 5 is mistaken, and that the Enforcement Clause was intended to give Congress the power to redress private as well as public invasions of constitutional rights. A number of constitutional scholars have reached the same conclusion.²²⁵

The Supreme Court’s misreading of Section 5 of the Fourteenth Amendment stems from its misunderstanding of the purpose of the state action doctrine. At the core of the Court’s mishandling of this matter is its lack of respect for the principle of democratic choice, which ought to be the animating principle for interpretation of the state action component of the Fourteenth Amendment. In this instance, democratic choice stands for the right of the people, through their federal representatives, to adopt nationwide protections for civil rights. In ruling that Congress lacks this power, and as a consequence invalidating civil rights legislation, the Court has, time and again, delayed or denied justice to our most vulnerable citizens, who believed that they had obtained federal protection from acts of discrimination or oppression at the hands of private parties.

What follows is the textual argument employed by the Supreme Court in finding that Congress lacks the authority to regulate private conduct under Section 5 of the Fourteenth Amendment.

²²⁰ 109 U.S. 3 (1883) (striking down federal Civil Rights Act of 1875).

²²¹ See *id.* at 11 (Bradley, J.); see text accompanying note ___ *infra*.

²²² 109 U.S. 3, 26 (Harlan, J., dissenting) (concluding that Congress does have power to reach private conduct under Section 5 of the Fourteenth Amendment); see note ___ *infra* and accompanying text.

²²³ 383 U.S. 745 (1966) (Clark, J., concurring) (stating, “it is, I believe, both appropriate and necessary under the circumstances here to say that there now can be no doubt that the specific language of Section 5 empowers the Congress to enact laws punishing all conspiracies – with or without state action – that interfere with Fourteenth Amendment rights.”).

²²⁴ See *United States v. Morrison*, 529 U.S. 598, 665 (1999) (Breyer, J., dissenting) (“I need not consider Congress’ authority under § 5 of the Fourteenth Amendment [to reach private conduct]. Nonetheless, I doubt the Court’s reasoning rejecting that source of authority.”).

²²⁵ See, e.g., Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. Rev. 863, 869 (1986) (stating, “the framers [of the 14th Amendment] intended to grant Congress authority to protect the fundamental rights of all American citizens, regardless of the source of the infringement.”); Barry Sullivan, *Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981*, 98 Yale L.J. 541, 549 (1989) (stating, “the historical materials provide ample support for the Court’s holding that the Civil Rights Act of 1866 was intended to reach private, as well as official, discrimination.”). See generally, Nathan Newman and J.J. Gass, *A New Birth of Freedom: The Forgotten History of the 13th, 14th, and 15th Amendments*, Nathan Newman and J.J. Gass, at www.brennancenter.org/resources/ji/ji5.pdf, accessed July 2, 2005 (concluding that the framers of the Fourteenth Amendment intended to grant Congress the power to redress both state action and private action which interferes with fundamental rights). See also Madry, note 4 *supra*, at 505:

Congress may create a private cause of action between private parties when, because a state is likely to be unwilling to protect the interest, the Supreme Court’s review would provide inadequate protection. Judgment in a private cause of action would be the premise for federal enforcement of those rights.

Id. at 505.

Textual Basis and Judicial Interpretation of the State Action Requirement of the Enforcement Clause

The language of Section 5 of the 14th Amendment confers vast power upon the Congress to adopt legislation protecting liberty and ensuring equality. It states, “Congress shall have the power, by appropriate legislation, to enforce the provisions of this Article,” the term “this Article” referring to the foregoing provisions of the Fourteenth Amendment, including the Privileges and Immunities Clause, the Due Process Clause, and the Equal Protection Clause. In the *Civil Rights Cases*,²²⁶ the Supreme Court interpreted Section 5 as granting Congress the power to regulate “state action,” but not the power to regulate the actions of private individuals and organizations.²²⁷ The *Civil Rights Cases* involved the constitutionality of the Civil Rights Act of 1875, which prohibited discrimination in all “inns, public conveyances . . . , theaters, and other places of public amusement.”²²⁸ The Supreme Court ruled that Congress lacked the authority to adopt this statute under Section 5 because it constituted an attempt to regulate the behavior of private parties.²²⁹ In describing the effect of the Enforcement Clause upon the power of Congress to enforce the 14th Amendment, the Supreme Court looked to Section 1 of the Amendment, which declares that “No state shall” abridge the privileges and immunities of citizens, deprive people of due process, nor deny them equal protection.²³⁰ In light of the fact that Section 1 operates as a prohibition on the *States*, the Court reasoned:

[T]he last section of the amendment invests congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited state law and state acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon congress, and this is the whole of it. It does not invest congress with power to legislate upon subjects which are within the domain of state legislation; but to provide modes of relief against state legislation, or state action, of the kind referred to. It does not authorize congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment.²³¹

²²⁶ 109 U.S. 3 (1883) (invalidating Civil Rights Act of 1875).

²²⁷ See text accompanying note __ *infra*.

²²⁸ See *Civil Rights Cases*, 109 U.S., at 8 (Bradley, J). Section 1 of the Civil Rights Act of 1875 provided: That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

Id.

²²⁹ See *Civil Rights Cases*, 109 U.S., at 11 (Bradley, J.).

²³⁰ See *id.* (Bradley, J.)

²³¹ *Id.* (Bradley, J.).

The Supreme Court was correct in finding that it is a permissible interpretation of the *text* of the Fourteenth Amendment to conclude that Congress has no power under Section 5 to regulate private conduct. As discussed in the following portion of this article, however, it was an egregious misinterpretation of the *intent* of the framers of the Fourteenth Amendment.

Intent of the Framers of the Fourteenth Amendment with Respect to Enforcement Power

It is clear that the Fourteenth Amendment was intended to give the Congress the power to enact civil rights legislation directed at individuals. After the Civil War, Congress found it necessary to directly regulate the actions of individuals and private organizations during the Reconstruction period because of the gross, persistent, and widespread violations of right which were then occurring throughout the South.²³² This was the conclusion of Justice Harlan, who wrote in his dissenting opinion in the *Civil Rights Cases*:

It was perfectly well known that the great danger to the equal enjoyment by citizens of their rights, as citizens, was to be apprehended, not altogether from unfriendly state legislation, but from the hostile action of corporations and individuals in the states. And it is to be presumed that it was intended, by that section [Section 5 of the 14th Amendment], to clothe congress with power and authority to meet that danger.²³³

Justice Harlan concluded that the majority of the Supreme Court has evaded the purpose of Section 5 of the Fourteenth Amendment by means of “a subtle and ingenious verbal mechanism;”²³⁴ in short, that in applying the state action doctrine to Section 5 of the Fourteenth

²³² See remarks of Senator George F. Edmunds, denying that the Fourteenth Amendment was “a mere negative declaration, a kind of admonitory prohibition to a State,” inapplicable “when criminals go unpunished by the score, by the hundred, and by the thousand, when justice sits silent in her temple in the States, or is driven from it altogether . . .” Cong. Globe, 42nd Cong, 1st Sess., S.p. 697, April 14, 18 1871, Avins at 563; Sullivan, note 221 *supra*, at 549 (“The Black Codes enacted by the Southern states under Presidential Reconstruction, as well as widespread acts of private discrimination and violence against the Freedmen, convinced Republican leaders that legislative action was needed.”); FRANK J. SCATURRO, THE SUPREME COURT’S RETREAT FROM RECONSTRUCTION: A DISTORTION OF CONSTITUTIONAL JURISPRUDENCE 84 (2000) (“the central problem facing Congress during Reconstruction was private action . . .”).

²³³ *Civil Rights Cases*, 109 U.S., at 54 (Harlan, J., dissenting).

²³⁴ See *id.* at 26 (Harlan, J. dissenting). Justice Harlan stated:

The opinion in these cases proceeds, as it seems to me, upon grounds entirely too narrow and artificial. The substance and spirit of the recent amendments of the constitution have been sacrificed by a subtle and ingenious verbal criticism. 'It is not the words of the law but the internal sense of it that makes the law. The letter of the law is the body; the sense and reason of the law is the soul.' Constitutional provisions, adopted in the interest of liberty, and for the purpose of securing, through national legislation, if need be, rights inhering in a state of freedom, and belonging to American citizenship, have been so construed as to defeat the ends the people desired to accomplish, which they attempted to accomplish, and which they supposed they had accomplished by changes in their fundamental law. By this I do not mean that the determination of these cases should have been materially controlled by considerations of mere expediency or policy. I mean only, in this form, to express an earnest conviction that the court has departed from the familiar rule requiring, in the interpretation of constitutional provisions, that full effect be given to the intent with which they were adopted.

Id.

Amendment, the Court improperly elevated textual arguments over the intent of the framers.²³⁵
 A number of constitutional historians agree with Justice Harlan's conclusion on this point.²³⁶

²³⁵ See generally WILSON R. HUHN, *THE FIVE TYPES OF LEGAL ARGUMENT* 159-164 (2002) (describing conflicts between legal arguments based upon text and intent).

²³⁶ See authorities cited in note __ *supra*; Akhil Reed Amar, *The Supreme Court's Most Extraordinary Year: Substance and Method in the Year 2000*, 28 Pepp. L. Rev. 601, 619-620 (2001) (criticizing the Supreme Court for failing to accord appropriate respect to the framers of the Fourteenth Amendment and to Justice Harlan). Amar states:

Many of these Congressmen had been leading architects of the Amendment itself. Why doesn't William Rehnquist accord these men any epistemic respect? Founders like James Madison and Thomas Jefferson, who lived and died as slaveholders, are treated with reverence by the Court (even though Jefferson was not even in America at the Founding). Why are Reconstructionists like John Bingham and Charles Sumner, crusaders for racial justice, treated with so much less respect? And what about the first Justice Harlan? After all, he dissented in the *Civil Rights Cases*, arguing that Congress had broad *Prigg*-ish power to address even certain private conduct, and that the Citizenship Clause of the Fourteenth Amendment had no state-action requirement. This is the same Harlan who later dissented in *Plessy*. If he was right in *Plessy*, perhaps he might have been right here. To pass over him in silence, as Rehnquist does, is to disrespect a great Justice. In other opinions, Harlan insisted that the Fourteenth Amendment incorporated the Bill of Rights against the states; that the federal government was bound by the principle of equal citizenship (a kind of reverse-incorporation); that free expression meant more than the ban on prior restraints; that the Bill of Rights protected brown-skinned folk in the territories; and that the Court could not simply ignore the Fifteenth Amendment in the face of massive southern disfranchisement. In all of these contexts, Harlan's opinions—often in dissent—have stood the test of time better than the majority opinions of his Gilded Age colleagues whom the Chief now privileges.

Id. (footnotes omitted). See Catherine A. McKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 Harv. L. Rev. 135, 153 (2000). McKinnon states:

The Congress that passed the Fourteenth Amendment clearly intended thereby to ensure the constitutionality of legislation designed to reach racist atrocities committed by one citizen against another that the states were not addressing. Although the text of the Fourteenth Amendment addresses states, Congress incontestably intended to create authority for federal legislation against private as well as state acts that deprived citizens of equal rights on a racial basis.

Id. (footnote omitted).

The constitutional historian Frank J. Scaturro quotes two significant historical figures regarding the failure of the Supreme Court to honor the intent of the framers of the Fourteenth Amendment. Justice Henry B. Brown, the author of the Court's 1896 opinion in *Plessy v. Ferguson*, is quoted as admitting in 1912 that "there is still a lingering doubt whether the spirit of the [Reconstruction] amendments was not sacrificed to the letter." See SCATURRO, note __ *supra*, at 130 (quoting CHARLES F. LOFGREN, *THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION* 251 n. 21 (1987)). Scaturro also quotes the following remarks of Frederick Douglass:

In the dark days of slavery, this Court, on all occasions, gave the greatest importance to *intention* as a guide to interpretation ... Everything in favor of slavery and against the negro was settled by this object and *intention* Where slavery was strong, liberty is now weak.

O for a Supreme Court of the United States which shall be as true to the claims of humanity, as the Supreme Court formerly was to the demands of slavery! When that day comes, as come it will, a Civil Rights Bill will not be declared unconstitutional and void, in utter and flagrant disregard of the objects and *intentions* of the National legislature by which it was enacted, and of the rights plainly secured by the Constitution.

SCATURRO, at 207 (quoting FREDERICK DOUGLASS, *THE FREDERICK DOUGLASS PAPERS*, Epigraph at 119-120 (1991)).

The Supreme Court reviewed the historical evidence regarding the intent of the framers of the Enforcement Clause in *City of Boerne v. Flores*.²³⁷ In *Boerne*, Chief Justice Rehnquist's primary argument for narrowly construing the power of Congress to enforce the Fourteenth Amendment was based upon the drafting history of the Amendment in Congress.²³⁸ The Chief Justice considered it to be of great significance that the initial draft of the Fourteenth Amendment, offered in February, 1866, which contained a very explicit grant of power to Congress to enforce civil rights, was rejected by Congress and replaced with the current language.²³⁹ The Chief Justice states: "Members of Congress from across the political spectrum criticized the Amendment, and the criticisms had a common theme: The proposed Amendment gave Congress too much legislative power at the expense of the existing constitutional structure."²⁴⁰ The problem with the historical analysis of Chief Justice Rehnquist in *Boerne* is that it is rebutted by the words and the actions of two significant figures: Representative John A. Bingham and Representative Giles W. Hotchkiss.

Representative Bingham had drafted the language contained in the February, 1866, version of the Fourteenth Amendment, and Representative Hotchkiss was the last member of the House to speak to the measure before a vote was taken to postpone consideration of it. Although a number of persons opposed to Reconstruction were concerned that the language of the February draft conferred too much power upon Congress, this was *not* the concern of Representative Hotchkiss, a supporter of Reconstruction,²⁴¹ who was instead concerned that Bingham's original language placed *sole* power in the Congress to protect civil rights.²⁴² In addition to granting Congress the power to protect fundamental rights, Hotchkiss wanted the Constitution to forbid any state interference with these rights. Hotchkiss was *not* arguing against Congressional power to protect civil rights. Hotchkiss stated:

²³⁷ 521 U.S. 507 (1997) (declaring federal Religious Freedom Restoration Act unconstitutional as beyond Congress' power under Section 5 of 14th Amendment).

²³⁸ See *id.* at 520-524 (Rehnquist, C.J.) (stating, "The Fourteenth Amendment's history confirms the remedial, rather than substantive, nature of the Enforcement Clause.").

²³⁹ The initial draft of the Fourteenth Amendment, offered in February, 1866, stated:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.

Cong. Globe, 39th Cong., 1st Sess., 1034 (1866).

This language was ultimately replaced with the language used in Section 1 and Section 5 of the Fourteenth Amendment:

Section 1: All persons born or naturalized within the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or 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.

Section 5: The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

²⁴⁰ See *Boerne*, 521 U.S., at 520 (Rehnquist, C.J.).

²⁴¹ See SCATURRO, note __ *supra*, at 80-81 (indicating that although there was opposition to Bingham's initial draft of the Fourteenth Amendment upon the ground of states' rights, among Republicans who supported Reconstruction, only Representative Columbus Delano expressed such a sentiment).

²⁴² See SCATURRO, note __ *supra*, at 96 (stating, "Hotchkiss' argument was based largely on the belief that Bingham's proposal was *insufficient* to secure rights, particularly because it was subject to changing congressional majorities.").

“Now, I desire that the very privileges for which the gentleman is contending shall be secured to the citizens; but I want them secured by a constitutional amendment that legislation cannot override. Then if the gentleman [Bingham] wishes to go further, and provide by laws of Congress for the enforcement of these rights, I will go with him.”²⁴³

After warning that if the opposing party gained control of Congress, this measure would allow the diminution of protection for fundamental rights, Hotchkiss stated, “Place these guarantees in the Constitution in such a way that they cannot be stripped from us by any accident, and I will go with the gentleman.”²⁴⁴ Driving home the point that Bingham’s initial draft did not go *far enough* in its protection of civil rights, Hotchkiss added,

Mr. Speaker, I make these remarks because I do not wish to be placed in the wrong upon this question. I think the gentleman from Ohio [Mr. Bingham] is not sufficiently radical in his views upon this subject. I think he is a conservative. [Laughter.] I do not make the remark in any offensive sense. But I want him to go the root of this matter.

His amendment is not as strong as the Constitution now is. The Constitution now gives equal rights to a certain extent to all citizens. This amendment provides that Congress may pass laws to enforce these rights. Why not provide by an amendment to the Constitution that no State shall discriminate against any class of its citizens; and let that amendment stand as a part of the organic law of the land, subject only to be defeated by another constitutional amendment. We may pass laws here to-day, and the next Congress may wipe them out. Where is your guarantee then?

Let us have a little time to compare our views upon this subject, and agree upon an amendment that shall secure beyond question what the gentleman desires to secure. It is with that view, and no other, that I shall vote to postpone this subject for the present.²⁴⁵

Following Hotchkiss’ remarks, the House of Representatives, Bingham included, voted overwhelmingly to postpone consideration of the measure,²⁴⁶ and the Fourteenth Amendment was eventually committed to a committee for revision.²⁴⁷ Justice Hugo Black takes up the history of the drafting from that point in his dissenting opinion from *Adamson v. California*.²⁴⁸ Justice Black, referring to John Bingham as “the Madison of the first section of the Fourteenth Amendment,”²⁴⁹ noted that Bingham proposed the language that became the second sentence of

²⁴³ CONG. GLOBE, 39th Cong., 1st Sess., H.p. 1095 (Feb. 28, 1866); (AVINS, at 160).

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ See Benjamin B. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction* (1914); *Adamson v. California*, 332 U.S. 46, 103 (Black, J., dissenting).

²⁴⁸ 332 U.S. 46 (1947) (adopting principle of selective incorporation of Bill of Rights into Fourteenth Amendment, as opposed to Hugo Black’s total incorporation approach).

²⁴⁹ *Id.* at 73-74 (Black, J., dissenting) (stating, “Yet Congressman Bingham may, without extravagance, be called the Madison of the first section of the Fourteenth Amendment.”).

Section 1 of the Fourteenth Amendment.²⁵⁰ Later, during the 42nd Congress, Bingham delivered what is perhaps his most memorable speech relating to the purpose behind the 14th Amendment. At that time the Congress was considering the Ku Klux Klan Act, which was intended to prevent individuals and groups of individuals from intimidating people in the exercise of their fundamental rights,²⁵¹ and the issue being debated was whether Congress had the constitutional authority to enact that law. In the course of that address, in response to remarks by Representative Farnsworth, Bingham observed that Congress had no less power under the final version of the 14th Amendment than it had under the proposed language of February, 1866:

Mr. Speaker, the Honorable Gentleman from Illinois [Mr. Farnsworth] did me unwittingly, great service, when he ventured to ask me why I changed the form of the first section of the fourteenth article of amendment from the form in which I reported it to the House in February, 1866, from the Committee on Reconstruction. I will answer the gentleman, sir, and answer him truthfully. I had the honor to frame the amendment as reported in February, 1866, and the first section, as it now stands, letter for letter, and syllable for syllable, in the fourteenth article of the amendments to the Constitution of the United States, save the introductory clause defining citizens. The clause defining citizens never came from the joint Committee on Reconstruction, but the residue of the first section of the fourteenth amendment did come from the committee precisely as I wrote it and offered it in the Committee on Reconstruction, and precisely as it now stands in the Constitution. . . .

The Fourteenth Amendment concludes as follows: “The Congress shall have power, by appropriate legislation, to enforce the provisions of this article.”

That is the grant of power. It is full and complete. The gentleman says that amendment differs from the amendment reported by me in February; differs from the provision introduced and written by me, now in the fourteenth article of amendments. It differs in this: that it is now, as it now stands in the Constitution, more comprehensive than as it was first proposed and reported in February, 1866. It embraces all and more than did the February proposition.²⁵²

Chief Justice Rehnquist misread the legislative history of the Fourteenth Amendment by failing to accord sufficient weight to the statements of Representative Hotchkiss and Representative Bingham.²⁵³ As a result, the Chief Justice adopted a restricted interpretation of Congress’ power under Section 5. In *Boerne*, speaking through the Chief Justice, the Court announced the rule that federal legislation enacted under Section 5 of the Amendment must be “congruent with” and “proportionate to” the Supreme Court’s understanding of what constitutes

²⁵⁰ *Id.* at 103 (Black, J., dissenting).

²⁵¹ See Linda E. Fisher, *Anatomy of an Affirmative Duty to Protect: 42 U.S.C. Section 1986*, 56 WASH. & LEE L. REV. 461, 463 (1999) (referring to 42 U.S.C. 1986, the Civil Rights Act of 1871, also known as the Ku Klux Klan Act: “Section 1986, the subject of this Article, imposes perhaps the strongest affirmative duty of any piece of legislation arising from the Civil War. It demonstrates the extent to which Congress reached, pursuant to the enforcement clause of the Fourteenth Amendment, to attempt to eradicate Ku Klux Klan violence during Reconstruction.”).

²⁵² CONG. GLOBE, 42nd Cong., 1st Sess., H.p. 83 (March 31, 1871); AVINS, at 509.

²⁵³ See Amar, note __ *supra*; see also SCATURRO, note __ *supra*, at 96 (remarking that the constitutional historian Alfred Avins “seriously misstates the congressman’s [Hotchkiss’] views.”).

a violation of Section 1.²⁵⁴ The consequence of this rule is that if the Court does not deem certain conduct to constitute a violation of Section 1 of the Fourteenth Amendment, then the Congress is very limited in its power to regulate or prohibit the conduct. In so ruling the Chief Justice essentially overturned the principle that the Court had announced in 1966 in the case of *Katzenbach v. Morgan*,²⁵⁵ in which the Court had stated that under Section 5 Congress had discretion to determine what legislation was necessary and proper for the protection of fundamental rights.²⁵⁶ Several legal scholars have correctly noted that the Court's opinion in *Boerne* represents a "juricentric" view of Constitutional enforcement that denigrates the role of Congress in protecting our fundamental freedoms.²⁵⁷

In particular, by preserving the "congruence" between Section 1 and Section 5 of the Fourteenth Amendment, the Supreme Court has prevented Congress from enacting laws governing the actions of private individuals and corporations under Section 5, because the Court has interpreted Section 1 to apply only to "state action."²⁵⁸ As noted previously, the problem with this reading of the Fourteenth Amendment is that it is totally at odds with the intent of the framers of that Amendment. Section 1 and Section 5 of the Fourteenth Amendment were not intended to be "congruent" in this respect.

It is beyond debate that the Reconstruction Congress, which adopted the Fourteenth Amendment, passionately believed that the Fourteenth Amendment gave it the power to adopt remedial legislation directed at individuals and private corporations, in order to protect the fundamental rights of American citizens. We know that this is true because the members of the Reconstruction Congress repeatedly said so and because they repeatedly exercised this power by enacting laws governing the actions of private parties.

After the Civil War, the Reconstruction Congress was faced with the task of protecting the newly freed slaves from violence and intimidation at the hands of their former masters. Representative Bingham directly addressed the question regarding the power of Congress under Section 5. Bingham first restated his opponent's position that by regulating private conduct the federal government would be invading the reserved powers of the states, and then responded to it:

You say it is centralized power to restrain by law unlawful combinations in States against the Constitution and citizens of the United States, to enforce the Constitution and the rights of United States citizen [sic.] by national law, and to

²⁵⁴ *Boerne*, 521 U.S., at 508 (Rehnquist, J.) (stating, "The Fourteenth Amendment's history confirms the remedial, rather than substantive, nature of the Enforcement Clause.").

²⁵⁵ 348 U.S. 641 (1966) (upholding provision of Voting Rights Act which outlawed English literacy requirement).

²⁵⁶ *See id.* at 651 (stating, "Correctly viewed, Section 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."); *see Boerne*, 521 U.S., 527-528 (discussing and distinguishing *Morgan*).

²⁵⁷ *See generally*, Rebecca E. Zietlow, *Symposium Vision and Revision: Exploring the History, Evolution, And Future of the Fourteenth Amendment: Juriscentrism and the Original Meaning of Section Five*, 13 TEMP. POL. & CIV. RTS. L. REV. 485 (2004); *see also* Amar, note __ *supra*, at 605 (stating, "The Reconstruction Republicans aimed to give Congress broad power to declare and define the fundamental rights – the privileges and immunities – of American citizens above and beyond the floor set by courts.").

²⁵⁸ *See* notes __-__ *supra* and accompanying text (discussing *Civil Rights Cases*, 109 U.S. 3 (1883)) and notes __-__ *infra* discussing *United States v. Morrison*, 529 U.S. 598 (1999)).

disperse by force, if need be, combinations too powerful to be overcome by judicial process, engaged in trampling underfoot the life and liberty, or destroying the property of the citizen.

...

The States never had the right, though they had the power, to inflict wrongs upon free citizens by denial of the full protection of the laws; because all State officials are by the Constitution required to be bound by oath or affirmation to support the Constitution. As I have already said, the States, did deny to citizens the equal protection of the laws, they did deny the rights of citizens under the Constitution, and except to the extent of the express limitations upon the States, as I have shown, the citizen had no remedy. They denied trial by jury, and he had no remedy. They took property without compensation, and he had no remedy. They restricted the freedom of the press, and he had no remedy. They restricted the freedom of speech, and he had no remedy. They restricted the rights of conscience, and he had no remedy. They bought and sold men who had no remedy. Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of right as these in States and by States, or combinations of persons?²⁵⁹

The House Committee on Reconstruction, chaired by Representative Benjamin F. Butler, concurred. In a report issued to Congress in February, 1871, after describing a series of murders and assaults committed against black citizens in a number of states, the Committee expressed its opinion regarding Congress' power to address the problem:

“The fourteenth amendment of the Constitution also has vested in the Congress of the United States the power, by proper legislation, to prevent any State from depriving any citizen of the United States of the enjoyment of life, liberty, and property. But it is said that this deprivation . . . is not done by the State but by the citizens of the State. But surely, if the fact is as your committee believe and assert it to be, that the State is powerless to prevent such murders and felonies . . . from being daily and hourly committed in every part of the designated States, and if, added to that, comes the inability of the State to punish the crimes after they are committed, then the State has, by its neglect or want of power, deprived the citizens of the United States of protection in the enjoyment of life, liberty, and property as fully and completely as if it had passed a legislative act to the same effect.”²⁶⁰

Many other members of the Reconstruction Congress expressed their belief that Congressional power extended to private conduct that interfered with fundamental rights.²⁶¹ Senator John Pool stated that “individuals may prevent the exercise of the right of suffrage; individuals may prevent the enjoyment of other rights which are conferred upon the citizen by the fourteenth amendment, as well as trespass upon the right conferred by the fifteenth. Not only citizens, but organizations of citizens, conspiracies, may be and are, as we are told, in some of

²⁵⁹ CONG. GLOBE, 42nd Cong., 1st Sess., H.p. 85 (March 31, 1871); AVINS, at 511.

²⁶⁰ See 41st Cong., 3rd Sess., H.R. Rep. No. 41-37, at 4 (1871) (statement of Rep. Butler); AVINS, at 472.

²⁶¹ See generally SCATURRO, note __ *supra*, at 85-109 (quoting numerous members of Congress to this effect).

the states formed for that purpose,²⁶² and he supported the adoption of legislation directed against this conduct.²⁶³ Representative and future President James A. Garfield declared that “it is undoubtedly within the power of Congress to provide by law for the punishment of all persons, official or private, who shall invade these rights, who shall by violence, threats, or intimidation shall deprive any citizen of their fullest enjoyment.”²⁶⁴ But Congress was not assuming the power to punish all crimes committed by private parties; rather, the legislation enacted by the Reconstruction Congress reached only those actions which interfere with fundamental, constitutional rights. In explaining the scope of the proposed Ku Klux Klan Act, Senator George Edmunds of Vermont stated that Bill would not punish “a private conspiracy growing out of a neighborhood feud” but that it could reach such conduct “if ... this conspiracy was formed against [a] man because he was a Democrat, ... or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter.”²⁶⁵

Even more persuasive than what the framers said is what they did. The Reconstruction Congress enacted a number of civil rights laws, some directed at state action, but more often directed at private action, in an attempt to redress and correct the vicious and widespread abuses which were being carried out by those who wished to oppress the black race and to return them to a state of virtual slavery. Among the laws adopted by the Congress during Reconstruction and directed against the actions of private individuals or organizations were the Civil Rights Act of 1866,²⁶⁶ the Ku Klux Klan Act,²⁶⁷ and the Civil Rights Act of 1875.²⁶⁸ Not surprisingly, in general the same legislators who had voted for the 14th Amendment also supported the enactment of these three civil rights laws.²⁶⁹

The Civil Rights Act of 1866 addressed discrimination in a number of matters involving state action as well as private action involving the sale or lease of real property and entering into contracts.²⁷⁰ This law, now codified at 42 U.S.C. 1981 and 1982, was originally directed against persons acting pursuant to state law *or custom*,²⁷¹ and it is presently considered to be fully

²⁶² CONG. GLOBE, S.p. 3611, 41st Congress, 2d Session, May 19, 1870; AVINS at 447.

²⁶³ *Id.*

²⁶⁴ CONG. GLOBE, 42nd Cong., 1st Sess., p. 153, April 4, 1871; AVINS, at 529.

²⁶⁵ CONG. GLOBE, 42nd Cong., 1st Sess, S.p. 567, (April 11, 1871); AVINS, at 547.

²⁶⁶ Civil Rights Act of 1866 (Apr. 9, 1866, ch. 31, 14 Stat. 27) presently codified at 42 U.S.C. §§ 1981 and 1982 (originally entitled *An Act to protect all Persons in the United States in their Civil Tights, and furnish the Means of their Vindication*).

²⁶⁷ Ku Klux Klan Act of 1871 (Apr. 20, 1871, c. 22, § 2, 17 Stat. 13), presently codified at 42 U.S.C. § 1985 and 18 U.S.C. § 241 (originally entitled *An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes*).

²⁶⁸ Civil Rights Act of 1875 (Mar. 1, 1875, ch. 114, §§ 3 to 5, 18 Stat. 336, 337) presently codified at 42 U.S.C. § 1984 (originally entitled *An act to protect all citizens in their civil and legal rights*).

²⁶⁹ See notes __, __, and __ *infra* and accompanying text.

²⁷⁰ See Civil Rights Act of 1866, note 266 *supra*, § 1 (conferring citizenship upon all persons born in the United States, and declaring that all citizens have the same right as white citizens “to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property” and that they “shall be subject to like punishment, pains, and penalties.”).

²⁷¹ See *id.*, § 2 (imposing penalty upon “any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act.”). See also Kaczorowski, note __ *supra* at 585 (stating, “When they inserted ‘custom,’ they meant custom.”).

applicable against private parties.²⁷² Although this statute was originally enacted *before* the Fourteenth Amendment was adopted, the legislative history is replete with references indicating that the Fourteenth Amendment was written and adopted for the principal purpose of removing any doubts about the constitutionality of this Act.²⁷³ This conclusion is supported by the fact that the Congress reenacted this law in 1870 after the ratification of the Fourteenth Amendment.²⁷⁴ Of the 33 Senators who voted to adopt the 14th Amendment, 32 of them had also voted for the Civil Rights Act of 1866.²⁷⁵

Another Reconstruction era civil rights law was the Third Enforcement Act, entitled “An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes,” and commonly referred to as the “Ku Klux Klan Act.”²⁷⁶ It was directed against the terrorism which was being perpetrated on a vast scale throughout the South

²⁷² See notes ___-___ *infra* and accompanying text (citing cases upholding Section 1 of Civil Rights Act of 1866 under Congress’ power to enforce the 13th Amendment).

²⁷³ See, e.g., Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, The Fourteenth Amendment, and the Slaughterhouse Cases*, 70 Chi-Kent L. Rev. 627 (1994) (hereinafter *Constricting*) (stating, “A minority Republican view, represented by Fourteenth Amendment author John A. Bingham, adhered to the traditional antislavery ‘non enforcement’ doctrine and saw the Fourteenth Amendment as the way to cure this “defect” in the Constitution.”); Richard L. Aynes, *The Continuing Importance of Congressman John A. Bingham and the Fourteenth Amendment*, 36 Akron L. Rev. 589, 610 (2003) (referring to John Bingham, the principal drafter of the 14th Amendment, “While he [Bingham] opposed the Civil Rights Act of 1866 on constitutional grounds, he saw the Fourteenth Amendment as a cure for those defects.”); Daniel A. Farber and Suzanna Sherry, *A History of the American Constitution* 311 (1990) (“several other speakers noted that they had supported the Civil Rights Act and believed it to be constitutional, but were supporting the [14th] amendment to remove any possible doubts.”). See Heyman, note ___ *supra*, at 553-554. Heyman states:

Most Republicans believed on these grounds that Congress had the constitutional authority to pass the Civil Rights Act. However, one leading Republican, Representative Bingham, strongly disagreed, denouncing the Act as an unconstitutional invasion of the province of the states. Although he believed that the national government should have the power to ensure protection of fundamental rights, Bingham argued that another constitutional amendment was necessary to give Congress such power. Some of the Act’s supporters also admitted having doubts about its constitutionality. For this reason, Republicans decided to draft a constitutional amendment “to make assurance doubly sure.” Equally important, Republicans desired to enshrine the protections of the Civil Rights Act in the Constitution, where they would be beyond the power of a subsequent Democratic majority in Congress to repeal.

Id. at 553-554 (footnotes omitted). See also SCATURRO, 78-79 (citing and quoting remarks by both supporters and opponents of Reconstruction to the effect that the 14th Amendment was adopted in part to dispel any doubts as to the constitutionality of the Civil Rights Act of 1866).

²⁷⁴ See Section 18 of the Enforcement Act of 1870, Act of May 31, 1870 c. 114, s 18, 16 Stat. 144 (stating, “And be it further enacted, That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted.”); Robert D. Goldstein, *Blyew: Variations on Jurisdictional Theme*, 41 Stan. L. Rev. 469, 478 (1989) (stating, “Congress readopted the [1866] Act as part of the Enforcement Act of 1870, thereby assuring that the full power of section 5 of the amendment supported the Act’s constitutionality.”) (footnote omitted).

²⁷⁵ See CONG. GLOBE, 39th Cong., 1st Sess., April 6, 1866, S.p. 1809; AVINS, at 205 (roll call vote of Senate to overrule President Johnson’s veto of Civil Rights Bill); *id.*, June 8, 1866, S.p. 3042; AVINS, at 237 (roll call vote of Senate to approve 14th Amendment). See also CONG. GLOBE, 39th Cong., 1st Sess., H.p. 2286; AVINS, at 211 (April 30, 1866) (roll call of House to approve 14th Amendment); *id.* at H.p. 3149 (June 13, 1866); AVINS, at 238 (roll call vote of House to overrule President’s veto of Civil Rights Act of 1866) (showing that most members of the House who voted for the 14th Amendment had also voted for the Civil Rights Act of 1866).

²⁷⁶ See SCATURRO, note ___ *supra*, at 11 (referring to the Ku Klux Klan Act as “the most sweeping legislation to counter Southern violence during Reconstruction”).

against freedmen and their unionist allies.²⁷⁷ Among many other provisions, it prescribed civil and criminal penalties against individuals who conspire to deprive other persons of equal protection of the laws or equal privileges and immunities, or to prevent other persons from voting.²⁷⁸ Nearly every member of the Congress who had voted for the Fourteenth Amendment also voted for the Ku Klux Klan Act.²⁷⁹

The Civil Rights Act of 1875 was an ambitious measure which was intended to remove an obvious and odious form of racial discrimination, namely exclusion from and segregation within places of public accommodation. Charles Sumner, the author of the bill, repeatedly introduced it into Congress between 1871 and 1875, and although he did not live to see its passage, his fight for this bill was “the last great struggle of his life.”²⁸⁰ This statute provided:

Whereas it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law: Therefore, *Be it enacted*, That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.²⁸¹

This statute imposed civil and criminal penalties upon “any person” who denied the “full enjoyment” of any of these public accommodations to any other person.²⁸² Once again, the vast

²⁷⁷ See notes __, __, and __ *supra* and accompanying text.

²⁷⁸ See McKinnon, *supra* note __, at 154 (stating, “The act under consideration, called the ‘Ku Klux Klan Act,’ and titled ‘An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes,’ provided civil remedies in law or equity for a range of acts undertaken by anyone, official or not, with the goal of denying a citizen the equal protection of the laws.”) (footnote omitted).

²⁷⁹ See SCATURRO, note __ *supra*, at 111 (stating, “all members of Congress who had voted for the [Fourteenth Amendment] and were still serving voted for the Ku Klux Klan Act . . . except for [Lyman] Trumbull” and three others who were recorded as absent or not voting for the bill.).

²⁸⁰ MOORFIELD STOREY, CHARLES SUMNER 402 (1900). On his deathbed in March of 1875, Sumner reportedly exhorted his friend Representative Hoar, “You must take care of the civil rights bill – my bill, the civil rights bill, don’t let it fail.” *Id.* at 430.

²⁸¹ 18 Stat. 335.

²⁸² Section 2 of the statute provided:

That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall, for every such offense, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, . . . and shall also, for every such offense, be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year . . .

majority of members of Congress who had voted for the 14th Amendment and who were still in Congress voted for the Civil Rights Act of 1875.²⁸³

The irresistible conclusion from the legislative history is that the members of Congress who voted for the Fourteenth Amendment believed that the Amendment conferred upon them the power to enact legislation directed against private action invading fundamental rights. Despite this evidence, the Supreme Court struck down these laws using the doctrine of “state action.”

Supreme Court’s Use of the State Action Doctrine to Strike Down Civil Rights Legislation During the Nineteenth Century

Despite the unambiguous intent of the people who framed and supported the Fourteenth Amendment, in the late nineteenth and early twentieth centuries the Supreme Court struck down many of the Reconstruction era civil rights laws in cases such as *Harris v. United States*,²⁸⁴ *The Civil Rights Cases*,²⁸⁵ *Baldwin v. Franks*,²⁸⁶ and *Hodges v. United States*,²⁸⁷ on the ground that Congress lacked power under the Fourteenth Amendment to regulate the behavior of private parties.²⁸⁸ A principal argument raised in Congress against the adoption of the Fourteenth Amendment and the Reconstruction civil rights laws had been that they would invade the reserved powers of the states.²⁸⁹ Upon this point the majority and the minority in Congress disagreed, the majority believing that Congress should and did have the authority to regulate private conduct, the minority asserting that Congress should not or could not reach private action.²⁹⁰ In *Harris*, the *Civil Rights Cases*, *Baldwin*, and *Hodges*, the same division over state

²⁸³ See James W. Fox, *Re-readings and Misreadings: Slaughterhouse, Privileges or Immunities, and Section 5 Enforcement Powers*, 91 Ky. L.J. 67, 146 (2002) (stating, “Of the twenty-two members of the Forty-second Congress who voted for the Fourteenth Amendment, twenty-one supported the Civil Rights Bill; only Senator Trumbull, who was backsliding to his Democratic roots, opposed it.”).

²⁸⁴ 106 U.S. 629, 640 (1883) (Wood, J.) (declaring provision of Ku Klux Klan Act unconstitutional, and stating, “As, therefore, the section of the law under consideration is directed exclusively against the action of private persons, without reference to the laws of the states, or their administration by the officers of the state, we are clear in the opinion that it is not warranted by any clause in the fourteenth amendment to the constitution.”).

²⁸⁵ 109 U.S. 3 (1883) (striking down federal Civil Rights Act of 1875); see notes ___-___ *supra* and accompanying text.

²⁸⁶ 120 U.S. 678 (1887) (following *Harris* in finding the Ku Klux Klan Act to be unconstitutional insofar as it applies to private action).

²⁸⁷ 203 U.S. 1, 14 (1906) (Brewer, J.) (overturning convictions of a group of individuals for interfering with the civil rights of other individuals in violation of Civil Rights Act of 1866, in part because the statute could not be grounded upon the Fourteenth Amendment, stating, “that the 14th and 15th Amendments do not justify the legislation is also beyond dispute, for they, as repeatedly held, are restrictions upon state action, and no action on the part of the state is complained of.”).

²⁸⁸ See notes 263-266 *supra*; see also *United States v. Cruikshank*, 92 U.S. 542 (1876) (recognizing the state action doctrine in *dictum*, stating, “The fourteenth amendment prohibits a state from depriving any person of life, liberty, or property without due process of law, or from denying to any person the equal protection of the laws; but this provision does not add anything to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society. The duty of protecting all its citizens in the enjoyment of an equality of rights was originally assumed by the states, and it remains there. The only obligation resting upon the United States is to see that the states do not deny the right. This the amendment guaranties, and no more. The power of the national government is limited to this guaranty.”).

²⁸⁹ See note ___ *supra* and accompanying text.

²⁹⁰ See note ___ *supra* and accompanying text.

action existed among the justices of the Supreme Court, however the majority and minority were reversed, with the majority of the Court importing the “state action doctrine” into Section 5 and agreeing with those legislators who had opposed the Fourteenth Amendment and who opposed civil rights for African Americans.²⁹¹

This travesty was compounded by other outrageous decisions from this period such as *Blyew v. United States*,²⁹² *United States v. Reese*,²⁹³ *The Slaughterhouse Cases*,²⁹⁴ *United States v. Cruikshank*,²⁹⁵ *Plessy v. Ferguson*,²⁹⁶ *Williams v. Mississippi*,²⁹⁷ and *Gong Lum v. Rice*,²⁹⁸ all

²⁹¹ See SCATURRO, note __ *supra*, at 110-111. Scaturro concludes:

In the end, the several theories of the Fourteenth Amendment expressed on the floor regarding congressional power of individual [action] ... do not support the Court’s version of the state action doctrine – unless one decides to embrace the theory endorsed almost exclusively by Democrats (joined in the 1870’s by liberal Republicans) who earlier had opposed the amendment out of fear of its expansion of congressional power in the first place.

Id. at 110-111. See also *id.* at 131:

[I]t is difficult to deny that the Court’s opinion in 1883 embraced the views of the opponents of the Fourteenth Amendment and Reconstruction, not those of its framers and other supporters.

Id. at 131. See also Richard L. Aynes, *Book Review: Pamela Brandwein, Reconstruction Reconstruction: The Supreme Court and the Production of Historical Truth*, 45 AM. J. LEG. HIST. 98-99 (2001) (noting that the author “claims that the majority in the case embraced the Democratic view of the problem of slavery, while the dissenters articulated opinions consistent with the Republican view of the problem of slavery. This may, at first, seem counterintuitive, since eight of the nine justices had been appointed by Republican presidents. However, in addition to her own strong claims, there are other facts that seem to support Brandwein’s conclusion. The solid Democrat, Buchanan appointee, and doughface Nathan Clifford voted with the majority. His vote should at least raise the question of whether the majority interpretation was what the adopters of the Amendment intended. Justice Samuel Miller, who wrote the majority opinion, had privately supported President Andrew Johnson’s effort to pass a conservative, alternative fourteenth amendment, apparently implying Miller’s own opposition to the Fourteenth Amendment actually adopted. In contrast, we know that dissenters Chief Justice Salmon P. Chase and Justice Stephen Field both supported the adoption of the Fourteenth Amendment. Further, Justice Noah H. Swayne’s dissenting opinion in very consistent with the Republican theories articulated in Congress, as is the dissent of Justice Joseph P. Bradley.).

²⁹² 80 U.S. 581 (1871) (Strong, J.) (giving Section 3 of Civil Rights Act of 1866 narrow construction, denying jurisdiction of federal court to hear murder case where Kentucky law prohibited blacks from testifying as witnesses to crime committed by whites, viz., the murder of an elderly black woman witnessed by members of her family.).

²⁹³ 92 U.S. 214 (1876) (Waite, C.J.) (construing Section 3 of the first Enforcement Act broadly, so as to render it unconstitutional as beyond Congress’ power to enact under the 15th Amendment); see Scaturro, note __ *supra*, at 41-49.

²⁹⁴ 83 U.S. 36, 73-80 (1873) (Miller, J.) (narrowly construing the privileges and immunities of national citizenship protected from state interference by the Fourteenth Amendment as *excluding* the fundamental rights); see *id.* at 74 (drawing a distinction between the privileges and immunities of state citizenship and the privileges and immunities of national citizenship, and stating, “It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.”).

²⁹⁵ 92 U.S. 542 (1876) (Waite, C.J.) (following *Slaughterhouse* in narrowly construing privileges and immunities of national citizenship, finding that right to assemble is not a right of national citizenship).

²⁹⁶ 163 U.S. 537 (1896) (upholding Louisiana statute requiring separate railroad cars for blacks and whites).

²⁹⁷ 170 U.S. 213 (1898) (upholding provisions of Mississippi constitution and laws such as poll tax, literacy test, disqualification for certain crimes, and residency requirements, which were designed to disqualify African Americans from voting); see WOODWARD, note 186 *supra*, at 71 (stating, “in *Williams v. Mississippi* the Court completed the opening of the legal road to proscription, segregation, and disenfranchisement by approving the Mississippi plan for depriving Negroes of the franchise.”)

²⁹⁸ 275 U.S. 78 (1927) (upholding Mississippi statute requiring separation of the races in the public schools).

of which narrowly interpreted the Reconstruction Amendments or Reconstruction civil rights statutes. The opinions of the Supreme Court in all of these cases are marked by intellectual dishonesty²⁹⁹ and, in my opinion, they collectively represent a moral failure amounting to complicity with racism.³⁰⁰ The Senate of the United States has now issued a formal apology for its failure to stem the tide of lynching that occurred during the era of Jim Crow.³⁰¹ However, the Supreme Court of the United States bears even more responsibility than the Congress for the abuses of that period, because it not only failed to enforce the Fourteenth Amendment in protection of black citizens, but it also struck down the federal laws which *were* adopted during Reconstruction which were intended to protect the civil rights of black citizens. The Reconstruction era civil rights laws, had they been upheld and enforced, would have deterred and perhaps prevented lynching as well as discrimination and segregation. Not only should the Supreme Court, like the Senate, apologize to the American people, but it has the moral obligation to recognize its responsibility by reversing its crabbed interpretation of Congress' power to enact protective legislation under the Fourteenth Amendment.

In 1954 the Supreme Court revived the Equal Protection Clause in its landmark decision in *Brown v. Board of Education*³⁰² overruling *Plessy*,³⁰³ and in the 1960s the Court made partial restitution for its grievous error in applying the state action doctrine to restrict the power of Congress under Section 5 of the Fourteenth Amendment by expanding its interpretation of Congress' power to enact civil rights legislation under *other* provisions of the Constitution. In

²⁹⁹ See Aynes, *Constricting*, note __ *supra*, at 644, 646-648 (describing Justice Miller's "deliberate misquotation" of both the Constitution and a judicial opinion in the majority opinion of the *Slaughterhouse* case); *id.* at 644, 648-649 (describing Miller's "woeful ignorance or duplicity" in his failure to mention the definition of citizenship contained in the Civil Rights Act of 1866); Goldstein, note __ *supra*, at 480-483 (describing how Court in *Blyew* found that federal courts did not have jurisdiction over criminal case where victims of racist murders and their family members were denied the right to testify as witnesses in state courts, because neither victims nor witnesses were "affected" by the discriminatory state laws); compare *Plessy*, 163 U.S., at 551 (Brown, J.) (stating, "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.") with *id.* at 557 (Harlan, J., dissenting) (stating, "Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. ... No one would be so wanting in candor as to assert the contrary."); see SCATURRO, note __ *supra*, at 49 (criticizing the reasoning of the majority in *Reese* for choosing to construe a the federal statute in such a manner as to render it *unconstitutional*, and describing the rule of decision as "a judicially created anomaly that conveniently conformed to the national attitude toward Reconstruction."); see SCATURRO, note __ *supra*, at 52-53 (criticizing the opinion of the Court in *Cruikshank* for failing to acknowledge that election of November 4, 1872 was a Presidential election, thereby supplying a jurisdictional element, and overlooking the national notoriety of the Colfax massacre).

³⁰⁰ See WOODWARD, note 186 *supra* at 70-71 (citing many of the same cases, and stating, "the cumulative weakening of resistance to racism was expressed also in a succession of decisions by the United States Supreme Court between 1873 and 1898").

³⁰¹ See Jacqueline Goldsby, *The Resolution Obscures How Widespread the U.S. Government's Complicity in Lynching Actually Was*, June 21, 2005 Chicago Sun-Times 41 (stating, "The U.S. Senate has apologized for its role in the nearly 5,000 lynching murders of African Americans by white lynch mobs between 1882 and 1968. As their resolution admits, their predecessors repeatedly turned back legislation that would have designated lynching a federal crime.").

³⁰² 347 U.S. 483 (1954) (striking down the doctrine of "separate but equal" as applied to the public schools).

³⁰³ See *id.*, at 494-495 (Warren, C.J.) (stating, "Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.") (omitting footnote).

*Jones v. Alfred Mayer Co.*³⁰⁴ and *Runyon v. McCrory*,³⁰⁵ the Court ruled that Section 1 of the Civil Rights Act of 1866 was constitutional under Section 2 of the Thirteenth Amendment.³⁰⁶ In *Heart of Atlanta Motel, Inc. v. United States*³⁰⁷ and *Katzenbach v. McClung*³⁰⁸ the Court held that the Public Accommodations Act of 1964 was properly enacted pursuant to Congress' power under the Commerce Clause.³⁰⁹ And in *United States v. Guest*³¹⁰ the Court held that Congress has the authority to prohibit private interference with the constitutional right to travel.³¹¹

However, there are serious drawbacks to this roundabout method of defining Congress' power to enact civil rights legislation, instead of simply grounding the power in Section 5 of the Fourteenth Amendment as the framers intended. The scope of each of the alternative foundations of Congressional power – the Thirteenth Amendment, the Commerce Clause, and

³⁰⁴ 392 U.S. 409 (1968) (upholding power of Congress, under § 2 of 13th Amendment, to adopt portion of Section 1 of Civil Rights Act of 1866 presently codified at 42 U.S.C. § 1982, as applied to private act of discrimination in the sale of real estate).

³⁰⁵ 427 U.S. 160 (1976) (upholding power of Congress, under § 2 of 13th Amendment, to adopt portion of Section 1 of Civil Rights Act of 1866 presently codified at 42 U.S.C. § 1981, as applied to refusal of private school to enter in contract on account of race); *see also* *Johnson v. Railway. Express Agency*, 421 U.S. 454 (1975) (upholding application of 42 U.S.C. 1981 to private act of employment discrimination).

³⁰⁶ *See Jones*, 392 U.S. at 441-443 (Stewart, J.) (finding private discrimination in the sale of real estate to be a badge or incident of slavery, and stating, “Just as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.”); *Runyon*, (stating, “Section 1981, as applied to the conduct at issue here, constitutes an exercise of federal legislative power under § 2 of the Thirteenth Amendment The prohibition of racial discrimination that interferes with the making and enforcement of contracts for private educational services furthers goals closely analogous to those served by § 1981’s elimination of racial discrimination in the making of private employment contracts and, more generally, by § 1982’s guarantee that “a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man.”) (footnote omitted and *quoting Jones*, 392 U.S., at 443).

³⁰⁷ 379 U.S. 241 (1964) (upholding public accommodations provisions of Civil Rights Act of 1964 as proper exercise of Congress’ power under the Commerce Clause).

³⁰⁸ 379 U.S. 294 (1964) (same).

³⁰⁹ *See Heart of Atlanta Motel*, 379 U.S., at 261 (Clark, J.) (stating, “We, therefore, conclude that the action of the Congress in the adoption of the Act as applied here to a motel which concededly serves interstate travelers is within the power granted it by the Commerce Clause of the Constitution, as interpreted by this Court for 140 years.”); *McClung*, 379 U.S., at 300 (Clark, J.) (stating, “We believe that this testimony afforded ample basis for the conclusion that established restaurants in such areas sold less interstate goods because of the discrimination, that interstate travel was obstructed directly by it, that business in general suffered and that many new businesses refrained from establishing there as a result of it.”).

³¹⁰ 383 U.S. 745 (1966) (1966) (upholding 42 U.S.C. § 241 as applied to conspiracy by individuals to interfere with other persons’ constitutional right to travel).

³¹¹ *See id.* at 760 (Stewart, J.) (stating, “if the predominant purpose of the conspiracy is to impede or prevent the exercise of the right of interstate travel, or to oppress a person because of his exercise of that right, then, whether or not motivated by racial discrimination, the conspiracy becomes a proper object of the federal law under which the indictment in this case was brought.”); *see also id.* at 759 (Stewart, J.) (declining to identify the precise textual basis for the constitutional right to travel, stating, “Although there have been recurring differences in emphasis within the Court as to the source of the constitutional right of interstate travel, there is no need here to canvass those differences further. All have agreed that the right exists.”) (footnote omitted); *Saenz v. Roe*, 526 U.S. 489, 501 (1999) (Stevens, J.) (striking down California statute that interfered with citizens’ constitutional right to travel and in *dictum* noting that the right to travel interstate, though not expressly mentioned in the Constitution, is constitutionally protected, stating, “For the purposes of this case, therefore, we need not identify the source of that particular right in the text of the Constitution.”).

the privileges and immunities of national citizenship – is very narrow, and each provision confers very limited powers upon the Congress.

The Thirteenth Amendment is applicable to private parties,³¹² and Section 2 of Thirteenth Amendment has been interpreted as authorizing Congress to eliminate the “badges and incidents of slavery.”³¹³ This term has been construed to include private acts of racial discrimination in entering into contracts³¹⁴ and the sale of real estate,³¹⁵ but it may not include segregation in places of public accommodation.³¹⁶ A more serious shortcoming is that while the Thirteenth Amendment may be used as a basis for combating acts of *racial* discrimination, it has no application to other forms of discrimination, such as discrimination based upon gender, disability, or sexual orientation.³¹⁷

Another basis of Congressional power to prevent private interference with constitutional rights is the implied power to protect the rights of citizens of the United States. For example, the Supreme Court has upheld federal legislation prohibiting individuals from violating with the national right to travel interstate.³¹⁸ The problem with this theory is that the Supreme Court has given a very narrow reading to the rights of national citizenship. In the *Slaughterhouse Cases*, the Supreme Court ruled that the rights of *state* citizenship include “civil rights” or rights which are “fundamental,”³¹⁹ while the rights of *national* citizenship include rights which are implied

³¹² See *Jones v. Alfred Mayer Co.*, 392 U.S. 409, 438 (1968) (Stewart, J.) (stating, “It has never been doubted . . . ‘that the power vested in Congress to enforce (the Thirteenth Amendment) by appropriate legislation’ . . . includes the power to enact laws ‘direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not.’”) (citation omitted).

³¹³ See, e.g., *Civil Rights Cases*, 109 U.S., at 20 (Bradley, J.) (stating, “it is assumed that the power vested in congress to enforce the article by appropriate legislation, clothes congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.”); *Patterson v. McLean Credit Union*, 491 U.S. 164, 192 (1989).

³¹⁴ *Runyon v. McCrory*, 427 U.S. 160, 179 (1976) (refusal of private school to enter into contract on account of race constitutes badge or incident of slavery, stating, “Section 1981, as applied to the conduct at issue here, constitutes an exercise of federal legislative power under Section 2 of the Thirteenth Amendment.”); cf. *Johnson v. Railway Express Agency*, 421 U.S. 454, 459-460 (1975) (stating, “Although this Court has not specifically so held, it is well settled among the federal Courts of Appeals – and we now join them – that Section 1981 affords a federal remedy against discrimination in private employment on the basis of race.”) (footnote omitted).

³¹⁵ *Jones v. Alfred Mayer Co.*, 392 U.S. 409, 439 (1968) (private act of discrimination in the sale of real estate constitutes badge or incident of slavery, and stating, “Does the authority of Congress to enforce the Thirteenth Amendment ‘by appropriate legislation’ include the power to eliminate all racial barriers to the acquisition of real and personal property? We think the answer to that question is plainly yes.”).

³¹⁶ See note 331 and accompanying text *supra*.

³¹⁷ See *Brzonkala v. Virginia Polytechnical and State University*, 935 F. Supp. 779, 796 n. 3 W.D. Vir. 1996) (*rev’d* 132 F.3d 949 (1997)) (*judgment aff’d* *United States v. Morrison*, 529 U.S. 598 (2000) (stating, “The Thirteenth Amendment applies to racial, not gender, discrimination.”); *but see* Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude, and the Thirteenth Amendment*, 4 Yale J.L. & Feminism 207 (1992).

³¹⁸ See notes 309-310 *supra*, and accompanying text (discussing *United States v. Guest*, 383 U.S. 745 (1966), and *Saenz v. Roe*, 526 U.S. 489 (1999)).

³¹⁹ See *id.* at 76 (Miller, J.) (referring to the rights of state citizenship, and stating, “They are, in the language of Judge Washington, those rights which the fundamental.”); *id.* at 82 (stating, “But, however pervading this sentiment, and however it may have contributed to the adoption of the amendments we have been considering, we do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the State with powers for domestic and local government, including the regulation of civil rights – the rights of person and of property –

from the fact that “we are one people, with one common country,”³²⁰ such as the right to petition the federal government; the right of access to seaports, federal buildings and agencies; the right to federal protection while on the high seas or in foreign nations; and the right to traverse the navigable waters of the United States.³²¹ Later decisions of the Supreme Court have recognized the right to travel interstate as a fundamental right of American citizenship.³²² Accordingly, even though Court has ruled that Congress lacks the authority to regulate the action of private parties as a violation of rights under Equal Protection,³²³ Congress does have the power to prohibit private parties from interfering with the right to travel.³²⁴

Finally, in *United States v. Lopez*,³²⁵ the Supreme Court interpreted the Commerce Clause as conferring upon Congress the power to regulate private individuals and companies who are engaged in interstate commerce or in an activity which, in the aggregate, affects interstate commerce.³²⁶ However, the Court implicitly distinguished economic from non-economic activity, in ruling that Congress has the power to regulate non-commercial activity only if the activity has a substantial *economic* effect on interstate commerce.³²⁷ Accordingly, under the Commerce Clause, although the Congress has power to address discrimination in access to places of public accommodation³²⁸ it does not have the power to redress noneconomic wrongs, and in accordance with this view the Supreme Court ruled in *United States v. Morrison* that since violence against women was not an economic activity, the Congress lacked authority under the Commerce Clause to enact a law addressing the problem of gender-based violence.³²⁹

was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States, and to confer additional power on that of the Nation.”).

³²⁰ *Id.* at 79 (Miller, J.).

³²¹ See *Slaughter-House Cases*, 83 U.S., at 79-80 (listing, by way of *obiter dictum*, the privileges and immunities of national citizenship).

³²² See notes 309-310 *supra* and accompanying text (discussing *United States v. Guest*, 383 U.S. 745 (1966), and *Saenz v. Roe*, 526 U.S. 489 (1999)).

³²³ See *Guest*, 383 U.S., at 755 (Stewart, J.) (stating, “It is a commonplace that rights under the Equal Protection Clause itself arise only where there has been involvement of the State or of one acting under the color of its authority.”).

³²⁴ See *id.* at 757-760 (Stewart, J.) (upholding federal statute as applied to private interference with right to travel).

³²⁵ 514 U.S. 549 (1995).

³²⁶ See *id.* at 558-559 (Rehnquist, C.J.) (stating, “[W]e have identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.”) (citations omitted).

³²⁷ See *United States v. Lopez*, 514 U.S. 549, 561 (1995) (Rehnquist, C.J.) (striking down federal Guns Free School Zone Act on ground that possession of firearms in a school zone does not have a substantial *economic* effect on interstate commerce, and stating that the Act “is a criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms. [The Act] is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.”).

³²⁸ See notes ___-___ and accompanying text *supra*.

³²⁹ See *Morrison*, 529 U.S., at 617 (Rehnquist, C.J.) (“We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.”).

Another objection to the penchant of the Court for basing the authority for civil rights legislation on constitutional provisions other than the Enforcement Clause of the Fourteenth Amendment is that the judicial reasoning justifying these alternative sources of authority seems strained. Every year that our society is further removed from the memories and the horrors of slavery, the argument that acts of discrimination are “badges and incidents of slavery” becomes psychologically weaker. In 1883, more than a century ago but less than two decades after the end of the Civil War, a majority of the Supreme Court impatiently declared that “it would be running the slavery argument into the ground” to contend that acts of racial segregation were remnants of slavery.³³⁰ As for Congress’ power to protect the rights of national citizenship, these rights are so narrow and so limited, and so dependent upon a case so discredited as *Slaughterhouse*, that reliance upon this power seems a slender reed indeed.³³¹ And as for the Congress’ power under the Commerce Clause, the true object of civil rights legislation is not to regulate commerce, but rather to protect rights that are guaranteed to all persons under the Fourteenth Amendment. Consequently, reliance upon the Commerce Clause as a foundation of civil rights legislation seems pretextual.³³² The Court’s failure to concede that Congress is constitutionally authorized to protect *all* of our fundamental rights from private interference is, in and of itself, a serious breach of the respect that is due to a coordinate branch. It is insulting to the Congress for the Court to say that Congress has the power to outlaw discrimination in places of public accommodation only because discrimination is bad for business. And it is embarrassing to all Americans for the Court to say that the Congress does not have plenary power to protect our basic human rights. In *Heart of Atlanta Motel* the Supreme Court left open the door that the civil rights legislation there under consideration might be sustained upon grounds other than the Commerce Clause.³³³ The Supreme Court ought to revisit the question of Congress’ power to enact protections for civil rights.

Critique of United States v. Morrison

In place of the half-measures used by the Supreme Court authorizing Congress to enact civil rights laws under the Thirteenth Amendment, the Citizenship Clause, and the Commerce Clause, the Court should have simply overruled the racist decisions of the post-Civil War era wherein the Court had stripped Congress of the power that the Nation granted to it under Section 5 of the Fourteenth Amendment. However, instead of overruling those shameful precedents, the current Supreme Court, led by Chief Justice William Rehnquist, has chosen to resurrect them. In

³³⁰ See *Civil Rights Cases*, 109 U.S., at 24-25 (“It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business.”).

³³¹ See notes ___-___ *supra* and accompanying text (discussing and criticizing the Court’s decision in the *Slaughterhouse Cases*).

³³² See *McCulloch v. Maryland*, 17 U.S. 316 (1819) (noting that Congress’ exercise of the commerce power could not be undertaken for other purposes because “comparing the means with the proposed end, will decide, whether the connection is real, or assumed as the pretext for the usurpation of powers not belonging to the government”).

³³³ See *Heart of Atlanta Motel*, 379 U.S., at 250 (Clark, J.) (stating, “Our study of the legislative record, made in the light of prior cases, has brought us to the conclusion that Congress possessed ample power [to enact this legislation under the Commerce Clause], and we have therefore not considered the other grounds relied upon. This is not to say that the remaining authority upon which it acted was not adequate, a question upon which we do not pass, but merely that since the commerce power is sufficient for our decision here we have considered it alone.”).

United States v. Morrison the Chief Justice cited and followed *Cruikshank*, *Harris*, and the *Civil Rights Cases* in support of his conclusion that Congress is without power under Section 5 of the Fourteenth Amendment to regulate the actions of private parties.³³⁴

Justice Breyer, in dissent in *Morrison*, made the modest argument that federal civil rights laws are “congruent with” and “proportionate to” state *failures* to enact or enforce their own laws protecting citizens in their basic rights.³³⁵ This is only one of a number of theories that could be utilized to justify the enactment of federal civil rights laws directed against individuals under the Fourteenth Amendment. Framers of the Fourteenth Amendment also argued, for example, that a state’s failure to act constituted a denial of equal protection,³³⁶ or a violation of the citizen’s constitutional right of protection.³³⁷ Whatever analytical model is utilized, at least *some* private action – private action that infringes fundamental constitutional rights – should be subject to Congressional protection. This interpretation of Section 5 of the Fourteenth Amendment would lack the simplicity and clarity of the present bright-line rule against federal laws affecting private action. But it is the right decision – right morally, right historically, and right jurisprudentially.

The people of this Nation fought a ferocious and devastating civil war because a number of state governments had failed to protect people’s basic civil rights from the actions of both public officials and private individuals.³³⁸ The decision of the Supreme Court in the *Civil Rights Cases* stripping away the power of Congress to protect the rights of citizens against private action was a cynical betrayal of the sacrifices of that war. It is long past time to undo this injustice and overrule the decision of the Supreme Court in the *Civil Rights Cases*, and to adopt instead the dissenting opinion of Justice Harlan as the proper interpretation of Section 5 of the 14th Amendment.³³⁹ The state action doctrine of the 14th Amendment stands for the right of the majority of the American people, acting through their federal representatives, to enact legislation to lift the standards of behavior among individuals above the constitutional baseline. Section 5 of the 14th Amendment should be interpreted as authorizing the federal Congress to protect our fundamental rights from both public and private interference.

The following portion of this article describes two theoretical frameworks which I believe provide an appropriate context for understanding the state action doctrine: the contradiction that Alexander Bickel dubbed the “countermajoritarian difficulty,” and John Hart Ely’s response to Bickel, the theory of “representation-reinforcement.”

³³⁴ See *Morrison*, 529 U.S., at 621-622 (citing and quoting *Harris*, the *Civil Rights Cases*, and *Cruikshank*); see also Newman and Gass, note __ *supra* at 26 (stating that the opinion of Chief Justice Rehnquist in *Morrison* “not only revived racist decisions [such as *Cruikshank* and *Harris*] as valid authority but declared that they deserved more respect than other precedents.”).

³³⁵ See *id.* at 665 (1999) (Breyer, J., dissenting) (concluding that the Violence Against Women Act was proportionate to and congruent with the failure of state governments to provide an adequate remedy for gender-based violence).

³³⁶ See text accompanying note __ *supra* (remarks of Senator John Pool), S.p. 3611, 41st Cong., 2d Sess., May 19, 1870; Avins 447); see also SCATURRO at 92 (quoting remarks of Representative Jeremiah M. Wilson to effect that when a state fails to enact or enforce protective laws, it is a denial of equal protection, which empowers the Congress to enact laws to secure equal protection)

³³⁷ See *supra* notes __-__ and accompanying text.

³³⁸ See CURTIS, note 182 *supra*.

³³⁹ See Amar, note __ *supra* (criticizing the Supreme Court for failing to adopt the reasoning of the dissenting opinion of Justice Harlan in the *Civil Rights Cases*).

VI. BICKEL'S DILEMMA AND ELY'S SOLUTION

Professor Gary L. McDowell has observed that “[t]o an extraordinary degree the work of Alexander Bickel remains the rubric under which most contemporary constitutional theorizing has taken place.”³⁴⁰ Professor Bickel identified a fundamental contradiction at the heart of constitutional law which he called the “countermajoritarian difficulty.”³⁴¹ Bickel described this dilemma in these terms: “[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it.”³⁴²

Bickel's thesis is based upon the principle that in America the people are sovereign. One of the fundamental truths that this nation was founded upon is that all just powers of government “are derived from the consent of the governed.”³⁴³ Pursuant to this principle, “We, the People of the United States”³⁴⁴ adopted the Constitution of the United States, which installed a representative democracy as the government of the people. The Congress and the President are the servants of the people who are elected to enact and enforce the laws on behalf of the people.³⁴⁵ They are answerable to the people and are removable at the times of regularly scheduled elections.³⁴⁶ In addition, the President may be impeached by the representatives of the people.³⁴⁷

Although the Constitution establishes and installs a democratic form of government, constitutional law may be thought of as the *antithesis* of democracy. The Constitution becomes significant precisely when the representatives of the people overstep their bounds and commit some act that is forbidden by the Constitution. Every time that a law or an official policy is declared unconstitutional, it means that the will of the people, as expressed through the democratic process, is being thwarted.³⁴⁸ Professor Bickel's conundrum, the countermajoritarian difficulty, was anticipated a century and a half earlier by Chief Justice John Marshall. In *Marbury v. Madison*, Justice Marshall observed that the crucial question in constitutional law is whether “written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.”³⁴⁹

Professor Bickel attempted to reconcile the conflict between democracy and constitutional law by an appeal to morality. He explained that constitutional law must respect

³⁴⁰ GARY L. MCDOWELL, *CURBING THE COURTS* 63-64 (1988).

³⁴¹ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (1962) (stating, “The root difficulty is that judicial review is a counter-majoritarian force in our system.”).

³⁴² *Id.* at 16-17.

³⁴³ DECLARATION OF INDEPENDENCE (1776).

³⁴⁴ U.S. CONST., preamble.

³⁴⁵ See note __ *supra* (quoting ALEXANDER HAMILTON, *THE FEDERALIST*).

³⁴⁶ See U.S. CONST., art. I, § 2, cl. 1 (members of House of Representative elected every two years); art. I, § 3, cl. 1 (members of Senate elected every six years); art. II, § 1, cl. 1 (President elected every four years).

³⁴⁷ U.S. CONST., art. II, § 4 (authorizing impeachment for “treason, bribery, or other high crimes or misdemeanors.”)

³⁴⁸ See ELY, note __ *supra*, at 4-5 (describing the “central problem” of judicial review under the Constitution as the fact that “a body that is not elected or otherwise politically responsible in any significant way is telling the people's elected representatives that they cannot govern as they'd like.”).

³⁴⁹ *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (Marshall, C.J.).

“the morality of government by consent” as well as ensuring “moral self-government.”³⁵⁰ In short, the Constitution must both preserve the moral right of the people to govern themselves democratically, and it must place curbs upon the immoral exercise of power by democratic government. However, Professor Bickel never persuasively identified where the line between “the morality of government by consent” and “moral self-government” must be drawn.³⁵¹

The constitutional theorist John Hart Ely, who described Bickel as “probably the most creative constitutional theorist of the past twenty years,”³⁵² proposed an elegant solution to Bickel’s paradox of judicial supremacy within a democratic society. Ely suggested that that the predominant purpose of judicial review under the Constitution is to safeguard the democratic process. In other words, in any case where laws or public policies interfere with the proper or efficient working of the political process, the courts are justified in stepping in to restore balance. Ely called this theory of constitutional interpretation “representation-reinforcement,”³⁵³ and he summarized it in these terms: “unblocking stoppages in the democratic process is what judicial review ought preeminently to be about.”³⁵⁴

Like Bickel’s concept of the “majoritarian difficulty,” Ely’s theory of “representation-reinforcement” found early expression in a foundational opinion by Chief Justice John Marshall. While Bickel’s dilemma was the focus of *Marbury v. Madison*,³⁵⁵ Ely’s theory was at the core of Marshall’s opinion in *McCulloch v. Maryland*.³⁵⁶

In *McCulloch*, the Supreme Court considered the constitutionality of a Maryland statute that placed a tax upon notes issued by the Bank of the United States.³⁵⁷ The Court declared that the law was unconstitutional because the people of the State of Maryland had no power to tax the functions of the government of the United States.³⁵⁸ Justice Marshall described the organs of the

³⁵⁰ BICKEL, THE LEAST DANGEROUS BRANCH 199 (observing that American society is “dedicated both to the morality of government by consent and to moral self-government.”). Other leading scholars also point to “morality” as the cornerstone of constitutional law. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY vii, 143, 147 (1977) (calling for a “fusion of constitutional law and moral theory” and stating that “a claim of right presupposes a moral argument and can be established in no other way.”); MICHAEL PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 99, 112 (1982) (contending that the Court should interpret the Constitution in a way that is “faithful with the notion of moral evolution” and urging the Court to foster “a new moral order”); Frank Michelman, *Politics and Values or What’s Really Wrong with Rationality Review*, 13 Creighton Law Review 487, 509, 402 (1979). See generally MCDOWELL, at 15-37 (describing the moral frameworks developed by these and other constitutional scholars).

³⁵¹ See ELY, *supra* note __, at 71 (noting that Bickel “ran the gamut of fundamental-value methodologies.”).

³⁵² JOHN HART ELY, DEMOCRACY AND DISTRUST 71 (1980).

³⁵³ *Id.* at 87 (“The remainder of this chapter will comprise three arguments in favor of a participation-oriented, representation-reinforcing approach to judicial review.”).

³⁵⁴ *Id.* at 117.

³⁵⁵ See note __ *supra* and accompanying text.

³⁵⁶ 17 U.S. 316 (1819).

³⁵⁷ See *id.* at 425 (after finding that the government of the United States had the power to establish a Bank of the United States, describing an issue to be decided as “Whether the state of Maryland may, without violating the constitution, tax that branch?”).

³⁵⁸ See *id.* at 429. The Court stated:

The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable, that it does not. Those powers are not given by the people of a single state. They are

federal government as having been created “by all for the benefit of all,”³⁵⁹ and accordingly the Court ruled that the notes of the Bank of the United States were immune from taxation by the states. Ely cited the court’s reasoning in *McCulloch* as an example of the principle of representation.³⁶⁰

Using the theory of representation-reinforcement, Ely attempted to construct an overarching theory of constitutional interpretation. In doing so Ely took a broad view of what comprises adequate representation. He did not suggest that the courts should limit judicial review to oversight of the electoral process, but rather he believed that the courts had the obligation to protect minorities from oppressive legislation, stating that “judicial intervention becomes appropriate when the existing processes of representation seem inadequately fitted to the representation of minority interests, even minority interests which are not voteless.”³⁶¹ However, Ely was skeptical about other formulas for identifying fundamental rights. For example, he rejected the doctrine of substantive due process.³⁶² Although he personally favored legislation guaranteeing women the right to terminate a pregnancy, he believed that *Roe v. Wade* was wrongly decided.³⁶³ In particular, he did not believe that the Supreme Court should have balanced women’s right to privacy against the interest of state in protecting fetal life.³⁶⁴

Although Ely mounted a compelling argument that representation-reinforcement is an *important* function of judicial review under the Constitution, it is not tenable to maintain that representation-reinforcement is the *only* proper function of judicial review.³⁶⁵ The Preamble of the Constitution lists a number of other purposes that the Constitution is intended to serve:

We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and

given by the people of the United States, to a government whose laws, made in pursuance of the constitution, are declared to be supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them.

³⁵⁹ Marshall repeatedly expressed this “of ... by...for” theme. See *McCulloch*, 17 U.S., at 404-405 (“The government of the Union, then ... is, emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.”); *id.* at 405 (“the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result, necessarily, from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all.”). Forty-four years later President Abraham Lincoln would echo Marshall’s words in the last line of the Gettysburg Address, declaring that the sacrifices of the Civil War had been made so that “government of the people, by the people, and for the people, shall not perish from the earth.” Cite to GA.

³⁶⁰ See ELY, *supra* note __, at 85-86 (discussing the significance of *McCulloch* to the theory of representation).

³⁶¹ ELY, *supra* note __, at 86.

³⁶² See ELY, *supra* note __, at 18 (“there is simply no avoiding the fact that the word that follows ‘due’ is ‘process.’”).

³⁶³ See JOHN HART ELY, ON CONSTITUTIONAL GROUND 305 (1996) (describing himself as “pro-choice” yet opposed to the Court’s decision in *Roe*).

³⁶⁴ See *id.* at 285 (“the Court has no business getting into that business” of “second-guessing legislative balances.”).

³⁶⁵ Ironically, this is the same charge that Ely brought against Hugo Black’s theory of “total incorporation.” See ELY, *supra* note __, at 28 (rejecting Black’s contention that the *only* fundamental rights that are applicable against the States are those contained in the Bill of Rights).

our posterity, do ordain and establish this Constitution for the United States of America.³⁶⁶

Consequently, representation-reinforcement is only one purpose that the constitution serves. The Constitution also creates a single unified nation with a government that is capable of defending the people and achieving common goals; it attempts to diffuse governmental power within that nation; and it protects basic freedoms. Furthermore, the consequences of restricting the scope of our fundamental rights to “representation-reinforcement” would be severe. The right to individual privacy, for example, is wholly outside the scope of representation-reinforcement. Moreover, it is difficult to perceive how representation-reinforcement could protect freedom of expression beyond political speech. However, Ely’s theory of representation-reinforcement serves as a compelling, if partial, answer to Bickel’s dilemma. In addition, it provides a reliable touchstone for interpreting the state action doctrine.

The framework for understanding the state action doctrine that I propose in this article incorporates the theories of both Alexander Bickel and John Hart Ely. I suggest that the state action doctrine should be interpreted as preserving a sphere within which the American people have the unfettered right to govern themselves. I refer to this principle as “democratic choice,” and it is the equivalent of what Bickel called “the morality of government by consent.” Furthermore, I suggest that the scope of the state action doctrine is limited by democratic principles, and that it should not be applied in cases where it would weaken the right of the people to govern themselves. This limitation is consistent with Ely’s theory of “representation-reinforcement.”

I do not contend that “democratic choice” is the only principle that the Constitution serves. A number of constitutional doctrines serve other purposes. For example, the doctrines of procedural and substantive due process, equal protection, freedom of expression and freedom of religion promote liberty, equality, tolerance, and fairness. Still other doctrines – federalism, separation of powers, the spending clause, the commerce clause, the dormant commerce clause, and full faith and credit – are concerned with seeking a balance between the competing goals of diffusing governmental power and erecting an effective government within a single, unified nation. However, I do suggest that preserving democratic choice is the predominant consideration behind the state action doctrine.

CONCLUSION

The fundamental value that is served by the state action doctrine is not “individual freedom” but rather “democratic choice.” The Supreme Court has failed to recognize this, and as a result it has misinterpreted and misapplied the state action doctrine in a number of different contexts.

In the context of drawing the distinction between state action and private action, the Supreme Court’s belief that the state action doctrine is designed to preserve individual freedom has influenced the Court to narrowly construe the concept of state action, thereby failing to properly control the exercise of state power. In determining whether particular actions being

³⁶⁶ U.S. CONST. pmbl.

challenged were state action or private action, Chief Justice Rehnquist's strict adherence to atomized rules of state action, and his consequent neglect of the cumulative import of various elements of governmental involvement, has influenced both him and the Court to underestimate the necessity of applying constitutional norms to the exercise of combined private and state power.

The Supreme Court has also misconstrued the distinction between state action and state inaction, because it has failed to focus on the concept that the state action doctrine is intended to preserve the right of the people to decide for themselves the extent to which society will evolve beyond the constitutional baseline. The "no affirmative duty" doctrine stands for the proposition that the people, acting collectively, are not required to adopt social welfare programs. However, once protective laws have been enacted through the democratic process, and members of the executive branch have been elected or appointed to enforce those laws, state action exists, and constitutional norms govern the execution of those laws. In this context as well, the theme of "individualism" promoted by Chief Justice Rehnquist has led the Court to an incorrect analysis of the state action doctrine as applied to the obligation of the government to enforce protective legislation, and therefore *DeShaney v. Winnebago County Department of Social Services* is wrongly reasoned on state action grounds.

The only line of state action cases whose results are fully consistent with the principle of democratic choice is the *Reitman / Romer* line of authority, which authorizes "mere repeal" of antidiscrimination legislation, but which prohibits restructuring of the governmental process to the detriment of minority groups. This line of cases is not only consistent with the principle of democratic choice, it reinforces and protects the right of the people to democratically choose how individuals shall treat each other and what governmental benefits shall be distributed. The reason that these cases do not seem to "fit" with other aspects of the state action doctrine is that until now it has not been clear that the concept of democratic choice should be the motivating principle in *all* state action cases.

Finally, the principle of democratic choice suggests that the state action doctrine guarantees that the American people, acting through their state *and federal* elected representatives, have the discretion to determine whether and to what extent individuals and private organizations have the duty to observe constitutional norms. The state action doctrine was never intended to inhibit the power of Congress to protect against private invasions of fundamental right. That this is true is apparent from the legislative history surrounding the adoption of the Fourteenth Amendment and the enactment of civil rights laws directed at private conduct by the Reconstruction Congress. The *Civil Rights Cases* and all of the cases which follow in that line, including *United States v. Morrison*, are wrongly decided.

Critics from the left have also failed to appreciate that the purpose of the state action doctrine is to strengthen democracy, and as a result, they, like the Supreme Court, have also not comprehended the reason for the distinction between state and private action. The exercise of private power may be oppressive, but it is up to the people themselves, acting through the legislature, to determine the conditions under which and the extent to which private power will be regulated. The state action doctrine places principal responsibility upon the people to decide

whether and to what extent the fundamental principles of fairness, tolerance, and equality should govern the actions of private individuals and organizations.

For this same reason progressive legal scholars also fail to appreciate the reason for the distinction between state action and state inaction. The state action doctrine stands for the proposition that the people alone have the final say in determining the nature and the degree of governmental services that they will support with their tax dollars. Social welfare policy is a matter of legislative grace, not constitutional right. The only governmental services that the government might be considered to have an affirmative duty to provide are education, so that citizens may have the opportunity to participate meaningfully in the democratic process, and the equal protection of the laws against acts of private violence.

Once it is understood that the state action doctrine serves and is controlled by the principle of democratic choice, the errors of both the Supreme Court and its critics become obvious, and the doctrine emerges as a rational and coherent building block of our democracy.