


1982

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Recommended Citation

Goodman, Frank, "Professor Brest on State Action and Liberal Theory, and a Postscript to Professor Stone" (1982). *Faculty Scholarship*. Paper 1408.

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PROFESSOR BREST ON STATE ACTION AND LIBERAL
THEORY, AND A POSTSCRIPT TO PROFESSOR STONE

FRANK I. GOODMAN †

Paul Brest, as always, has powerfully illuminated his subject. His analysis of the state action problem is searching, subtle, and generally sound. The part I find most intriguing, however, is the one with which I least agree. I refer to Brest's attempt to establish conceptual and historical connections between the state action doctrine and two substantive constitutional theories, positivism and natural law, representing polar tendencies in liberal thought. My comments will be addressed primarily to this aspect of Brest's paper.

I also comment briefly on Professor Stone's excellent discussion of governmental tort immunity.

I. STATE ACTION, POSITIVISM, AND NATURAL LAW

Professor Brest finds it incongruous, if not strictly inconsistent, that a "constitutional positivist" like Justice Rehnquist—one who holds that all rights of property and contract are created by the state—should nevertheless deny that the "private" exercise of those rights is "state action." His thesis, he tells us, is that "positivists—which means most of us most of the time—cannot so readily have it both ways."¹ "[S]ince any private action acquiesced in by the state can be seen to derive its power from the state, which is free to withdraw its authorization at will, positivism potentially implicates the state in every 'private' action not prohibited by law."²

Applying these generalizations to *Flagg Brothers v. Brooks*,³ Brest properly distinguishes between two separate questions: (a) whether the creditor's self-help enforcement of the warehouseman's lien was state action;⁴ and (b) whether the existence of a state statute permitting that self-help enforcement was state action.⁵ His claim is that Justice Rehnquist answered both questions negatively, that both answers were wrong, and that both were incon-

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¹ Brest, *State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks*, 130 U. PA. L. REV. 1296, 1302 (1982).

² *Id.* 1301.

³ 436 U.S. 149 (1978).

⁴ Brest, *supra* note 1, at 1310-14.

⁵ *Id.* 1315-16.

sistent with Justice Rehnquist's positivist view that all property rights (those of debtor and creditor alike) are state-created.

In contrast to the tension Brest perceives between state action and positivism is the mutual sympathy he finds between state action and positivism's rival, the doctrine of natural rights. "Under a regime of natural law, the state's enforcement of fundamental property and contractual interests is not the product of state policy or action, but the recognition of preexisting, natural rights of property and contractual liberty."⁶ Hence, for Justice Peckham, author of the famous natural rights opinion in *Lochner v. New York*,⁷ "a New York court's enforcement of the contract between Lochner and his employees would not have been state action," whereas its refusal to enforce the contract was "state action of the most egregious sort."⁸ "[N]atural rights doctrine," writes Brest, "posits a sphere of autonomous private conduct immune from state regulation; the state action doctrine protects that sphere from certain kinds of governmental interference. It is no coincidence that state action was born during the ascendancy of a constitutional jurisprudence of natural rights"⁹—and that the author of the Court's opinion in the *Civil Rights Cases*,¹⁰ Justice Bradley, was "a strong advocate of the constitutional enforcement of natural rights."¹¹

Professor Brest's contention that state action and natural rights are cut from the same philosophical cloth is only partly convincing. It is true that both doctrines are based on respect for the values of privacy, property, and personal autonomy, and that a judge's assessment of the degree to which these values are implicated in particular instances of nongovernmental conduct will weigh heavily in his decision whether to classify that conduct as state action. This alone, however, does not justify (or even make fully intelligible) Brest's assertion that "natural rights doctrine posits a sphere of private conduct immune from state regulation," while "state action doctrine protects that sphere from certain kinds of governmental interference." The only "governmental interference" from which the state action doctrine protects any private conduct are the judicially enforced prohibitions of the federal Constitution itself. Brest cannot mean that the immunity from

⁶ *Id.* 1299.

⁷ 198 U.S. 45 (1905).

⁸ Brest, *supra* note 1, at 1299.

⁹ *Id.* 1300 (footnote omitted).

¹⁰ 109 U.S. 3 (1883).

¹¹ Brest, *supra* note 1, at 1300 (footnote omitted).

state regulation "posited" by natural rights as a philosophical matter is made constitutionally enforceable by the state action doctrine, since it is clear that the latter affords no constitutional protection whatever against state regulation of any kind. Moreover, the "sphere of private conduct" insulated from state regulation by the natural rights doctrine is not even remotely coextensive with the sphere of private conduct exempted from constitutional limitations by the state action doctrine. Even the most zealous defender of natural rights would concede that only a small fraction of human activity falls into that category, whereas the state action doctrine, as the Supreme Court has applied it for a century, removes virtually all private conduct from the purview of the fourteenth amendment. The most that can be said, therefore, is that the natural rights doctrine protects a limited class of private conduct from governmental interference generally, while the state action doctrine insulates private conduct generally from a single type of governmental regulation, that imposed by the federal Constitution itself.

Even this formulation, however, exaggerates the companionship of the two doctrines. If one compares them not in terms of their substantive implications, but in terms of the respective roles they allocate to the political and judicial processes, the relationship between the state action and natural rights doctrines becomes one of mutual tension rather than mutual sympathy. The former reserves to the politically accountable branches of government, while the latter entrusts to the courts, decisions as to whether the restrictions imposed by the fourteenth amendment on state government should be brought to bear on private conduct as well—whether a private restaurant should be forbidden to refuse service on racial grounds; a shopping center to exclude political leafletters; a private employer to terminate an employee without a hearing. From this perspective, the state action doctrine has far more in common with positivism than with natural rights theory. The constitutional enforcement of natural rights demands an assertive judiciary; positivism, on the other hand, is compatible with a judiciary that bows to the value preferences of the political branches. Justice Holmes's dissenting opinion in *Lochner*, characterized by Brest as a paradigm of positivism,¹² is perhaps more often regarded as a classic expression of judicial self-restraint, and the doctrinal sea change by which Holmes's dissent in *Lochner* became the law of the land was a transition not only from natural

¹² *Id.* 1297.

rights to positivism, but also from an era of judicial boldness to one of judicial deference. In sum, whereas Brest, comparing them in substantive terms, sees natural rights and state action as complementary doctrines, both of which insulate private conduct from one or another kind of government interference, a comparison in terms of "process" would find instead a complementarity between *positivism* and state action, both insulating the political processes from constitutional limitations of one kind or another and leaving them free to adjust the competing interests of private actors without close judicial oversight.

Brest is also wide of the mark in his historical speculation that it was "no coincidence" state action doctrine originated in the era of ascendant natural rights jurisprudence and in an opinion written by a Justice committed to that jurisprudence. Brest seems to be implying that Justice Bradley's holding in the *Civil Rights Cases*—that racial discrimination by private inns, theaters, and railroads was not "state action" under section 1 of the fourteenth amendment and therefore not subject to regulation by Congress under section 5—reflected the tenderness of a natural law judge for the property rights of these discriminators. This is clearly not the case. Far from believing that the defendant discriminators were exercising natural rights constitutionally immune from state regulation, Bradley explicitly based his no-state-action ruling on the assumption that state law could, and generally did, forbid such discrimination.¹³ The only natural rights mentioned in his opinion were the "essential rights" of the *victims* of discrimination to "equal accommodations and privileges" in inns and public conveyances.¹⁴ The Court assumed without deciding that the *failure* of the states to vindicate those rights *would* have amounted to unconstitutional state action. In sum, it was not because of, but in spite of, his natural law orientation that Justice Bradley accepted the no-state-action defense. Rather than having given birth to the state action doctrine, the prevailing natural rights philosophy very nearly strangled the infant in its cradle.

The *Civil Rights Cases* set the pattern for future litigation involving the state action doctrine. Seldom has there been a substantial basis for claiming that the putative state actor was exercising a constitutionally protected natural right, and never has the rejection of the state action defense been predicated on this ground. Typically, it is the *victim*, not the perpetrator, of "state action"

¹³ 109 U.S. at 18-19.

¹⁴ *Id.* 19.

who puts forward some form of natural rights claim, while the perpetrator resists that claim, at the threshold by invoking the state action doctrine, and "on the merits" by a positivist argument denying the existence of the right.

That the natural rights and state action doctrines are typically invoked by opposing parties in litigation does not in itself imply any philosophical tension between the two. An element of tension does exist, however. Natural law theory holds that individuals have rights of life, liberty, and property not only against the state but, antecedently, against one another, and that the protection of those prepolitical rights is the very purpose for which "[g]overnments are instituted among men."¹⁵ A fourteenth amendment that enacted Locke's *Second Treatise on Government* or Jefferson's *Declaration of Independence* may not impose on the states an affirmative duty to provide that protection. This need not, in the very strictest sense, bring natural rights theory into collision with the state action doctrine, since the latter does not *have* to be construed as ruling out affirmative governmental duties to protect citizen against citizen. While insisting that the fourteenth amendment does not apply to private conduct *per se*, and that such conduct does not become state action merely because the state has chosen not to prohibit it, the doctrine can be understood as leaving open the substantive constitutional question whether the state's own failure to control certain types of private conduct (whether that failure be called "action" or "inaction") violates the amendment. The constitutional enforcement of a citizen's natural right to affirmative governmental protection against victimization by fellow citizens can thus be squared with the state action doctrine through a holding that nonprovision of such protection is unconstitutional state action. An example of such reasoning is Justice Bradley's intimation in the *Civil Rights Cases* that individuals may have an "essential right" of nondiscriminatory access to places of public accommodation, that the states are obligated by the fourteenth amendment to implement that right, and that their failure to do so would amount to unconstitutional state action.¹⁶ Professor Brest offers another illustration in his suggestion that Justice Peckham in *Lochner* would have found a state court's refusal to uphold the employment contract to be "state action of the most egregious sort."¹⁷ But although the doctrines technically can be reconciled

¹⁵ The Declaration of Independence para. 2 (U.S. 1776).

¹⁶ 109 U.S. at 19; see *supra* text accompanying notes 13-14.

¹⁷ Brest, *supra* note 1, at 1299.

in this fashion, there is no denying the uneasiness of the relationship. The recognition of affirmative governmental duties to regulate private conduct, though consistent perhaps with the letter of the state action requirement, is in derogation of its basic philosophy: that the conflicting interests of nongovernmental actors should, in general at least, be resolved through the democratic political process (or through legislatively reversible common-law adjudication) rather than through judicial application of the fourteenth amendment. More fundamentally, the essential function of the state action doctrine is to restrict the coverage of the fourteenth amendment, whereas that of the natural rights doctrine is to expand that coverage. Given this basic difference, and given also the conflicting implications of the two doctrines with respect to the role of the courts vis-a-vis the political process, it is not surprising that the state action doctrine has long survived "the ascendancy of a constitutional jurisprudence of natural rights" or that the Court's most eloquent opponent of that natural rights jurisprudence, Justice Hugo Black, could at the same time be among the strongest supporters of the state action doctrine.¹⁸

II. BREST'S VIEWS ON STATE ACTION

Implicit in Professor Brest's analysis of doctrinal relationships, and also in his discussion of *Flagg Brothers v. Brooks*,¹⁹ are certain views of his own about state action. Specifically, Brest states or implies the following: (a) that private conduct in the exercise of a state-created right is state action; (b) that the statutory or decisional rule that creates the right and authorizes the conduct likewise is state action; (c) that private conduct in the exercise of a constitu-

¹⁸ Compare, for example, Justice Black's dissenting opinion in *Griswold v. Connecticut*, 381 U.S. 479, 507, 515-16, 522-24 (1965) (rejecting "natural law due process philosophy") with his dissenting opinion, joined by two other Justices, in *Bell v. Maryland*, 378 U.S. 226, 318, 335-43 (1964) (rejecting, among other things, the conclusion that the fourteenth amendment "was written or designed to interfere with a storekeeper's right to choose his customers or with a property owner's right to choose his social or business associates, so long as he does not run counter to valid state or federal regulation"). Compare the latter, in turn, with Justice Black's concurring opinion six months later in *Katzenbach v. McClung*, 379 U.S. 294, 268 (1964), in which he joined a unanimous Court in upholding a federal statute prohibiting racial discrimination by restaurants, hotels, and other places of public accommodation, noting that "this Court has consistently held that regulation of the use of property by the Federal Government or by the States does not violate either the Fifth or the Fourteenth Amendments." *Id.* 277. It would be hard to imagine a more striking illustration of the fact that willingness to invoke the state action doctrine as a basis for negating constitutional constraints upon private conduct need not be, and in recent history has not been, an expression of natural rights philosophy, but on the contrary is consistent with strong hostility to that philosophy.

¹⁹ 436 U.S. 149 (1978).

tionally protected natural right is not state action; and (d) that a state statutory or decisional rule that confirms, or a state process that enforces, such a right likewise is not state action.

The second and third propositions are self-evident. A statute such as the New York lien law in *Flagg Brothers*, whether or not constitutional, is plainly state action; unlike Brest, I doubt that Justice Rehnquist meant to deny this truism.²⁰ Just as plainly, the exercise of a constitutional right could not be state action, if only because the state cannot be held responsible for conduct it is powerless to control. Brest's other two propositions, however—that the citizens' exercise of a state-created right is state action but the state's enforcement of a natural right is not—are counterintuitive and, as I hope to show, unsound.

A. State-Authorized Private Action as State Action

Consider first the notion that if the state had created the right to do X, then the actual doing of X, even by a private citizen, is state action. This proposition is all but explicit in Brest's assertion that Justice Rehnquist erred, and deviated from his positivist premises, in holding that the creditor's self-help enforcement in *Flagg Brothers* was not state action,²¹ and it is at least implicit in his more general contention that "positivism potentially implicates the state in every 'private' action not prohibited by law."²² This view is hard to accept.

²⁰ Except for a single footnote sentence, Justice Rehnquist's discussion of the state action issue focuses exclusively on the behavior of the self-helping creditor, not on the statute. In that sentence he states that "[i]t would intolerably broaden . . . the notion of state action . . . to hold that the mere existence of a body of property law . . . whether decisional or statutory, itself amounted to 'state action' even though no state process or state officials were ever involved in enforcing that body of law." *Id.* 160 n.10. This language, in context, can be read as denying not that the statute was state action, but merely that it was action sufficient to implicate the state in the private conduct it authorized, or that it was otherwise unconstitutional.

The very fact that Rehnquist qualified his assertion by conceding that the case might be different if the statute had authorized a breach of the peace, *see id.* 160 n.9, suggests that he may have been addressing the ultimate question of constitutionality rather than the preliminary question of state action. This is not to say that Justice Rehnquist's discussion of the constitutionality of the statute was adequate or his conclusion correct. If all laws authorizing one person summarily to seize another's property were constitutional, the protectiveness of the due process clause, as Justice Stevens pointed out in his *Flagg Brothers* dissent, 436 U.S. at 170, would be severely compromised.

²¹ Brest, *supra* note 1, at 1307, 1311-14.

²² *Id.* 1301. It is not clear how much of a hedge the term "potentially" represents, or what additional tests, if any, unprohibited private conduct must satisfy in order for a positivist to treat it as state action. If Brest means simply that private conduct is potentially state action in the way that every native-born American is

Permission by the state to engage in an activity, even when the state has power to withhold that permission, is not ordinarily thought of as implicating the state in the activity permitted. The fact that Pennsylvania licenses me to drive does not put Pennsylvania behind the wheel of my car or make it vicariously responsible for any accidents I may cause. By the same token, the fact that state law confers the right to exclude the world from one's property does not convert the property owner's exercise of that right, even in a racially discriminatory manner, into state action, though the statutory rule that creates the right, and the judicial or executive enforcement of it, clearly *is* state action.

"What the state authorizes, the state does" may reflect a confusion between two senses in which a state can be said to "authorize" private action: delegation and permission. When the state authorizes a private individual to perform some action on its behalf—when, that is, it delegates the performance of a governmental function—constitutional responsibility for that action rests essentially on agency principles. But when the state only permits or allows (and, in that far weaker sense, "authorizes") private individuals to perform actions on their own behalf, the basis for attributing such action to the state is, to say the least, obscure. This distinction does not automatically validate Justice Rehnquist's conclusion that the creditor's self-help enforcement in *Flagg Brothers* was not state action. There is much force in Justice Stevens' dissenting argument that the "power to order binding, nonconsensual resolution between debtor and creditor is exactly the sort of power with which the Due Process Clause is concerned"²³ and is a "governmental function" even when performed by private parties. But the more sweeping assertion that individuals engaged in ordinary activities on their own behalf, far removed from the business of government, are wielding the power of the state—as though those individuals wore uniforms and badges—merely because their conduct is not prohibited by state law or protected by the Constitution, is a notion disquietingly totalitarian, conspicuously artificial, and in no way deducible from positivism or any other legal or

potentially a President of the United States (technically eligible but unlikely to be called), if he means, that is, that unprohibited private conduct qualifies as state action only if it meets further tests such as "governmental function" or "substantial state involvement," his theory ceases to be interesting. Pending further enlightenment as to the meaning of "potentially," I proceed on the assumption that Brest is attributing to the positivist the view that virtually all constitutionally unprotected private conduct not prohibited by law is state action.

²³ 436 U.S. at 176.

political doctrine. It is far too broad a ground on which to reject a no-state-action defense in cases such as *Flagg Brothers*.

Professor Brest finds it anomalous that a positivist like Justice Rehnquist should reject the public/private dichotomy in denying that certain conduct is a natural right while simultaneously relying on it in holding that this same conduct is not state action. The two public/private distinctions, however, are quite different. The one proclaimed by natural lawyers and denied by positivists is between conduct subject to and conduct not subject to state regulation, whereas the one embedded in the state action doctrine is between conduct attributable to and conduct not attributable to the state. Although it is clear that whatever is "private" in the first sense must likewise be "private" in the second, there is no obvious reason why the converse must be true—no obvious reason why activities that the state can but does not prohibit must on that account be considered the action of the state; why the power to prohibit should carry with it the duty to prohibit; why that which the state is barred from doing, the state must also bar others from doing. These conclusions are not deductions from positivism, nor are they natural extensions of it; indeed, it is not clear why positivists should be politically or psychologically inclined, let alone logically obligated, to draw them.

To be sure, a positivist who rejects a jurisprudence of natural rights because he attaches less than overriding importance to the interests—property, economic liberty, privacy, among others—that claim its protection may be led by that same value judgment to reject a no-state-action defense predicated in part on respect for those very interests. But a value judgment that property and economic liberty are not important enough to be constitutionally immune from state interference is entirely consistent, both logically and psychologically, with a judgment that those interests *are* important enough to warrant judicial deference to the state's decision not to interfere. The greater his respect for and confidence in the democratic political process that generates the state's decision either way, the easier the positivist will find it to harmonize the two substantive value judgments. Indeed, those constitutional positivists, and there are many, who reject natural rights thinking primarily out of skepticism as to judges' capacity to identify those rights in an objective and principled fashion, and out of conviction that the choice among competing social and moral values and interests should be made through the political rather than the judicial process, are apt to be particularly sympathetic to

a state action doctrine grounded in part on that same deference to majoritarian decisionmaking.

It may fairly be asked whether there is any practical difference between the proposition (with which I agree) that a statutory or decisional rule permitting private conduct is state action and the proposition (with which I disagree) that the conduct so permitted is state action. Does it really matter whether the state action label is affixed, and the substantive constitutional issue posed, at the rule level or the conduct level? Indeed it does. Because the state action determination with respect to private conduct carries heavy substantive implications, whereas that same determination with respect to a rule carries none, constitutional violations will be found more readily in the former than in the latter case. Once state-authorized private acts are characterized as state action, the question of their constitutionality will tend to be decided as it would if the state itself were the actor. Private conduct will be held unconstitutional whenever the same conduct by public officials would be so held, and the class of state-authorized private acts violative of the fourteenth amendment will generally correspond to the class of governmental acts similarly violative. If it did not have these substantive consequences, the classification of private conduct as state action would serve no purpose. Under the alternative approach, which focuses on the authorizing rule rather than the conduct authorized, the fact that the permitted acts would be unconstitutional if done by public officials neither requires nor invites the conclusion that the permission itself is unconstitutional. Only on the extreme assumption that whatever the state cannot validly do it cannot validly permit or fail to prohibit, would this approach produce the same results as the other. Few judges are likely to adopt such a view; most are apt to recognize that affirmative duties of protection, if any there be, are the exception rather than the rule.

For that matter, when the question presented is the constitutionality of what the *state* has done or failed to do—such as permitting or not prohibiting certain private conduct—the threshold state action determination is an entirely superfluous step in the analysis. Clarity and economy would be better served if the court moved immediately to the question whether allowing private individuals to act as they did amounts to a deprivation by the state of the life, liberty, or property of the victim or a denial by the state of the equal protection of the laws. Labelling the permission “state action” serves no purpose other than to meet the possible defense

that the fourteenth amendment prohibits only acts, not omissions—action, not inaction; but if the amendment does make this distinction critical, the action requirement is unlikely to be satisfied by a decisional rule, especially a rule unstated by any court prior to the litigation at hand, or even by a statute that merely grants permission to do what would be lawful even without it.

B. *State Enforcement of a Constitutional Right as
Non-State Action*

If Brest is clearly correct in saying that a statutory or decisional rule is state action (though not necessarily unconstitutional) when it creates a state-law right to engage in certain activity, he seems just as clearly wrong in suggesting that a statutory or decisional rule is *not* state action when the private rights it declares or enforces are natural and, presumably, constitutional rights that would exist even in the absence of state law. This way of looking at state action seems to me both conceptually flawed and practically unhelpful. Consider the following case: A state statute barring racial discrimination in places of public accommodation is challenged by a restaurant owner (either defensively in a criminal prosecution or offensively in an anticipatory civil action) as a deprivation of property without due process of law. Clearly such a challenge would fail, but on what ground? One might have thought the statute would be routinely upheld, on the merits, without mention of any threshold “state action” problem, on the ground that it violated no constitutionally protected right of the property owner. Under Brest’s analysis, however, a judge who believed (like Justice Bradley in the *Civil Rights Cases*²⁴) that blacks have a natural right of nondiscriminatory access to places of public accommodation and that the statute merely confirmed this pre-existing right, could properly decide the case on the threshold ground of no state action. The choice between the two grounds, “no state action” and “valid state action,” is of little practical importance, since both invariably yield the same result. To suggest, however, that a statute enacted by a state’s legislature and enforced (or soon to be enforced) by its executive is not “state action” is to use language in a very odd way—language, one might add, that is not found in the Constitution itself and not obviously in need of stylized construction. Granted, Brest’s recommended usage, however odd, might be acceptable if it served a purpose—for example, the avoidance of difficult substantive questions as to the

²⁴ See *supra* text accompanying notes 13-14.

meaning of constitutional norms such as "liberty," "property," "due process," or "equal protection." But plainly it does not. On the contrary, in our hypothetical case, Brest's natural law judge could answer the "threshold" question of state action only after having first decided not one but two questions on the merits: whether the restaurant owner had a constitutional right to choose his customers and whether his customers had a constitutional right not to be discriminated against. The first, and easier, question would alone dispose of the case if the court went directly to the merits without pausing over the issue (or non-issue) of state action; the latter, more difficult, question of the *customers'* natural and constitutional rights would not arise at all. A state action issue that cannot be answered until the merits have been decided twice over is neither a threshold question nor one worth asking.

All this is equally true in the converse situation (no doubt nearer the one Brest had in mind) of a statute protective of the discriminator's property rights—for example, a trespass law challenged (either defensively or offensively) by blacks seeking nondiscriminatory service in a restaurant that excludes them because of race. This statute, too, even if it were merely declarative of the restaurant owner's natural law property rights, should be upheld on the merits, not, as Brest would have it, at the no-state-action threshold.

The matter may be less clear when the putative state action is a decisional rule rather than a statute, but that would be true even of a decisional rule that did *not* track natural law. Once it is granted that a common-law property rule imposing damage liability on a trespassing sit-in demonstrator is state action no less than its statutory counterpart, that conclusion ought not be changed by the added assumption that the rule is declarative of natural law. And this is true even when the decisional rule is invoked defensively as a basis for judicial *non*intervention, such as the trespass rule relied upon by a self-helping restaurant owner as a defense to a battery claim by a trespassing sit-in demonstrator.

It should be emphasized that, in all these cases, "no state action" is admittedly the appropriate response to a claim that the owner's *own* conduct is unconstitutional; that would be true whether the restaurant owner, his would-be customer, neither, or both were exercising natural or constitutional rights. If, however, what the plaintiff claims to be unconstitutional is the trespass rule itself, no-state-action ceases to be the proper response even on the assumption that the rule merely codifies natural law.

III. THE PUBLIC/PRIVATE DISTINCTION INVULNERABLE: CONDUCT PROHIBITED BY THE STATE

In view of the many harsh words that have been spoken about the public/private dichotomy during this symposium, I cannot resist noting one area in which that distinction, as embodied in the state action doctrine, seems to me invulnerable. Even if one were to conclude, with Brest, that private conduct in which the state acquiesces is state action, no such conclusion would be possible with respect to conduct that the state itself makes unlawful.

No one, I hope, would dream of arguing that ordinary homicide is a deprivation of life, ordinary kidnapping a deprivation of liberty, ordinary theft a deprivation of property, in violation of the fourteenth amendment, even when not committed by an employee of the state. The contrary view would not only disregard the clear language of the amendment, it would convert the Constitution into a comprehensive code of torts and crimes, duplicating or displacing the mass of state laws on these subjects and transferring to federal judges, now only a few hundred, a large part of the responsibilities currently borne by many thousand state judges. This distinction in treatment between the private and the public does not necessarily reflect a felt difference in culpability but a specialization of functions, a division of labor between the Constitution and other law. It is the business of the Constitution to control government, not to regulate that sea of primary activity one blushes, in these pages, to call "the private sector."

It might be replied that what prevents these garden-variety crimes from being constitutional violations is not that they are committed by private actors, but that the victims of such crimes are afforded "due process of law" through post-deprivation damage remedies, a fact that has been known to defeat constitutional claims even when directed against the conduct of public officials. Indeed, such a view would blur the public/private distinction by treating the misconduct of private individuals in the same way that recent Supreme Court decisions appear to have treated the misconduct of state officers.

Two decades ago, in *Monroe v. Pape*,²⁵ the Court held that the tortious behavior of police officers can violate the fourteenth amendment, and be actionable under 42 U.S.C. § 1983, even though it simultaneously violates and is actionable under state law. No decision could more plainly exemplify what Justice Rehnquist

²⁵ 365 U.S. 167 (1961).

called the "essential dichotomy"²⁶ between state action and private action, for it imposed on police officers a federal damage liability clearly not imposed on private actors in similar circumstances. More recently, however, the Court appears to have retreated from the broader implications of *Monroe*. In *Ingraham v. Wright*²⁷ it held that corporal punishment administered by school authorities did not amount to a deprivation of liberty without due process where a post-deprivation damage remedy was available to the victims in the state courts. And in *Parratt v. Taylor*²⁸ it reached a similar result with respect to the deprivation of an inmate's property through the negligence of prison authorities. To what extent these decisions may have eroded the *Monroe* principle is still unclear. It may be that the availability of state post-deprivation remedies will continue to be irrelevant in cases where the official has violated a specific constitutional provision—such as the fourth or eighth amendment—not containing the "without due process" qualification.²⁹ It may also be that in a straight fourteenth amendment case involving a purposeful deprivation of liberty less hallowed by tradition than corporal punishment, a post-deprivation damage remedy will fall short of "due process."

For our immediate purposes, however, the point to be stressed is that even if the Court were to go to the unlikely extreme of holding that an official who commits intentional torts violates the Constitution only if the state fails to provide suitable post-conviction relief, and that private action may likewise give rise to a constitutional violation in those same circumstances, it would still be misleading to say that the fourteenth amendment reads directly upon private action as though it began with the words "No person shall deprive" Because it is only the state that can provide or fail to provide "due process of law," it would be more appropriate to say that a state "deprives [a] person of life, liberty, or property without due process of law" when it permits him to be deprived of liberty without suitable legal redress—that is, when it breaches an affirmative duty to protect an individual from deprivation at the hands of other individuals.

CONCLUSION

Professor Brest's contention that state action and natural rights are "mutually sympathetic" doctrines is highly questionable. Al-

²⁶ *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974).

²⁷ 430 U.S. 651 (1977).

²⁸ 451 U.S. 527 (1981).

²⁹ See, e.g., *id.*

though both are based on respect for the values of privacy and personal autonomy, they differ and even clash in other respects. Natural rights jurisprudence expands the scope of constitutional protection and the role of the judiciary vis-a-vis the political branches of government, whereas the state action doctrine contracts both. And while full-blown natural rights theory holds that the state is affirmatively obligated to protect citizen against citizen, state action doctrine, broadly defined, tends in general to deny the existence of such affirmative duties. Brest's further contention that private conduct involving the exercise of a state-created right is an exercise of state power and therefore "state action" is at odds with our ordinary understanding of the difference between private and governmental action and unattractively totalitarian in its implications. Similarly, his suggestion that the governmental enforcement of a natural right is not "state action" is both conceptually awkward and practically unworkable. Finally, even if one agreed with Brest that all private conduct tolerated by the state is state action, the public/private distinction would still be left standing with respect to conduct *prohibited* by state law.

IV. A POSTSCRIPT TO PROFESSOR STONE ON GOVERNMENTAL TORT IMMUNITY

I wish, finally, to add a few words concerning Professor Christopher Stone's superb evaluation of the traditional distinction between public and private corporations with respect to damage liability for torts.³⁰ Professor Stone's discussion is a model of the kind of detailed and painstaking examination of possible rationales without which no meaningful conclusions about the public/private distinction are possible. I suggest, however, that Professor Stone has placed too little emphasis on what seems to me the strongest argument in favor of municipal tort liability while ignoring the strongest argument against it.

The consideration that most powerfully favors such liability is to be found, not in the deterrent function of the tort law, but in its compensatory function. To the tort victim seeking compensation, it makes no difference whether the mail truck that runs her over is owned by Purolator or the Post Office. The average municipality, moreover, is a better-than-average loss spreader. Admittedly, the familiar argument that, deterrence aside, the compensatory and risk-spreading goals of tort law would be better served if damages

³⁰ See Stone, *Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?*, 130 U. Pa. L. Rev. 1441 (1982).

were recoverable from a fund generated by tax revenues than from tortfeasors themselves is more persuasive when applied to the federal government, with its heterogeneous tax base and progressive rate structure, than to local governments, which in many cases represent low-income constituencies, are financed by relatively regressive property taxes, and, as Professor Ellickson reminds us in these pages,³¹ have but limited ability to adopt redistributive methods of taxation. Nevertheless, even municipal governments have more room to distribute costs on an ability-to-pay basis than their private counterparts and typically, one suspects, have larger and more varied clienteles than most business corporations. At all events, it is anomalous, if not morally offensive, that in a society where government at all levels is expected to, and generally does, render assistance of many kinds to persons victimized by circumstances beyond anyone's control, government should disclaim responsibility for compensating the victims of its own wrongdoing, even in circumstances where private tortfeasors are called upon to do so.

The desirability of compensation creates, in my view, a strong presumption in favor of municipal tort liability, a presumption rebuttable only by solid evidence that such liability would have a socially disadvantageous influence on the conduct of managers and employees of government enterprises. Even if one were to conclude, despite Professor Stone's argument to the contrary,³² that the threat of damage liability is an ineffective deterrent in the public sector—less effective, at any rate, than the alternative control mechanisms outlined by Stone—that conclusion would not justify a rule of tort immunity that left victims uncompensated. A possibility too readily dismissed by Stone, however, is that the threat of damage liability, rather than having too little deterrent effect, may have too much of one, discouraging public officials from acting in the public interest.

Let us assume that, for the reasons Professor Stone gives, government enterprises are no less effective than private ones in passing on to their managers, and through them to subordinates, the balance of incentives, both rewards and penalties, that the enterprise receives from the outside. Even on that assumption, there are important differences between public and private entities. The economic marketplace generally rewards the private firm for

³¹ See Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519 (1982).

³² See Stone, *supra* note 30, at 1463-67.

the social benefits it confers but less often penalizes the enterprise for the social costs it imposes. The result is a divergence between the self-interest of the firm and the interest of society. A major purpose of enterprise liability is to reduce that divergence by "internalizing" to the firm the social costs it would otherwise not calculate, thus improving the prospect that the firm, in attempting to maximize its own net profits, will simultaneously be maximizing net social benefits.

The public enterprise stands in a different position. For one thing, it is probably less able than its private counterpart to capture, through the political and budgetary processes, the social benefits it generates. Qualitative variations in public goods and services like education or police protection are typically more difficult for consumers and beneficiaries to evaluate than qualitative differences among private goods and services, and in any event the political process offers those consumers less opportunity to register sensitive preferences among alternative levels or qualities of service than do the price mechanisms of the economic marketplace. The result is that an increase in arrests or a reduction in crime seldom produces an increase in the budget or personnel of the police department; nor does an improvement in test scores guarantee an increase in the revenues (or even the popularity) of the school system. In contrast to the private case, there is probably no reason to assume that the external social costs of most municipal agencies exceed the external social benefits, so as to create a divergence between the enterprise's own interest and the general interest. In this setting, a system of government enterprise liability runs the risk of creating an imbalance in incentives rather than, as in the private case, redressing one.

Second, even if one assumes that agencies or municipalities do perceive a divergence between institutional advantage and the public interest, the prevailing norms—professional, institutional, and social—require them to disregard that advantage and act for the public. The private enterprise is expected to maximize its own good, rather than society's; the government enterprise is not. One possible conclusion from this is that public enterprise liability will exert no influence and do no harm; it will provide assured compensation to victims without creating the overdeterrent effects that might be feared from the imposition of large personal liability on individual officials. This is probably the strongest argument for curtailing the corporate tort immunity of public organizations while preserving or even strengthening the personal

immunity of the officials themselves. Another possible conclusion, however, is that there is no need for enterprise liability from the standpoint of deterrence and much risk that the prospect of crushing damage awards against the enterprise would swamp the norms requiring indifference to institutional self-interest and produce over-deterrence effects nearly as great as would personal liability for individual officials. Even if one leans, as I do, to the former conclusion, one must take the latter possibility very seriously.

The factors that militate against tort liability for public officials, and also public entities, are most clearly presented in the case of judges. No one suggests that judges should be liable in damages for (what other judges or juries might find to be) their unreasonable decisions. We expect that conscience, concern for reputation, professional ethics, oath of office, long or permanent tenure, and the absence of direct personal stake in the outcome, will induce them to act impartially and in the public interest even without financial incentives to do so. In this setting, the threat of damage liability, unless perceived by the judge to be uniform for all possible dispositions of the cases to be decided, becomes a source of bias rather than a cure for it.

The considerations that weigh against damage liability for formal adjudicative bodies apply also, though with diminished force, to governmental units engaged in executive operations such as education or law enforcement. If a school system must pay damages for every wrongful suspension of a student, fewer students will be suspended—fewer, perhaps, than might be desirable in the interest of sound education. Similarly, if a police department is liable in damages for wrongful arrest, and if this disincentive is passed along to its employees, there will be fewer arrests, both lawful and unlawful, as police officers steer clear of situations that might expose them to litigation or departmental disciplinary proceedings. The reduced arrest rate may or may not be closer to the socially optimal level, depending on the extent to which, in the absence of damage liability, other variables—the incentive structure of the department, the values and personalities of those self-selected for police work, and the normative climate of the job—are conducive to overzealous law enforcement and insensitivity to constitutional rights. Such questions can be answered, if at all, only after careful empirical examination. The modest point I am making is that familiar enterprise liability reasoning is not automatically transferable from the private to the public sector.