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STATE ACTION: CONSTITUTIONAL PHOENIX*

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It has become almost customary to begin discussions of the “state action doctrine” by noting Professor Charles Black’s comment that it is a “conceptual disaster area.”¹ Professor Laurence Tribe agrees that “the current status of the state action requirement . . . yields no coherent doctrine.”² My reaction to these assertions is not, of course, to question them, but to wonder what distinction is being made: What area of constitutional law might the speaker suggest that does not fit that description? All areas of constitutional law—at least, all areas in which the Supreme Court plays an active role—are conceptual disaster areas, and the interesting question is why that should be so. It is so, in a word, because constitutional law is a ruse, not the result of interpreting the Constitution, as the Court represents, but simply a cover for unauthorized policymaking by judges.³ As such, it does not depend upon and cannot be expected to produce intelligible principles or conceptual coherence.

I.

Constitutional law is the product of judicial review, the self-bestowed power of judges to invalidate the acts of other officials and institutions of government as inconsistent with the Constitution. Judicial review was born in sin in *Marbury v. Madison*⁴ in 1803, and while it could hardly sink much below, it has rarely risen above the circumstances of its birth. *Marbury*, like many leading constitutional cases, may have been brought

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1. See, e.g., Choper, *Thoughts on State Action: The “Governmental Function” and “Power Theory” Approaches*, 1979 WASH. U.L.Q. 757, 757 n.1 (citing Black, “State Action,” *Equal Protection and California’s Proposition 14*, 81 HARV. L. REV. 69, 95 (1967)).

2. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1699 (2d ed. 1988).

3. See Graglia, “*Constitutional Theory*”: *The Attempted Justification for the Supreme Court’s Liberal Political Program*, 65 TEX. L. REV. 789 (1987); Graglia, *How the Constitution Disappeared*, COMMENTARY, Feb. 1986, at 19. For a full demonstration in the context of the law of race and the schools, see L. GRAGLIA, *DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS* (1976).

4. 5 U.S. (1 Cranch) 137 (1803).

primarily for the purpose of producing a judicial decision.⁵ Chief Justice John Marshall heard and wrote the opinion in the case even though his own conduct as Secretary of State in the Adams administration—it was he who failed to deliver Marbury's commission—was crucially involved.⁶ Marshall used the case as an occasion to cast aspersion on his political opponent, President Jefferson, by asserting, vigorously and in detail, that Jefferson had violated Marbury's rights. Only after that did he announce that the Court was without jurisdiction over the case, making his earlier discussion entirely gratuitous.

The federal statute involved in *Marbury*, section 13 of the Judiciary Act of 1789, was passed by Madison and other framers of the Constitution during the first Congress, and signed by President Washington, who had presided at the constitutional convention. Marshall, nonetheless, did not accord section 13 the respect of quoting it in full or even of quoting the complete sentence from which he extracted the phrase he found inconsistent with the Constitution, an inconsistency that Madison and Washington, for example, had apparently failed to notice.⁷ Marshall in effect created a new statute by giving section 13 an interpretation—asserting it added to the Court's original jurisdiction—that it cannot bear when quoted in full.⁸ He then proceeded to find this imaginary statute in violation of an equally imaginary constitutional prohibition, there being nothing in the Constitution that prohibits Congress from adding to the Court's original jurisdiction.⁹ Finally, coming to the point of the whole

5. See D. DEWEY, *MARSHALL VERSUS JEFFERSON: THE POLITICAL BACKGROUND OF MARBURY V. MADISON* 86 (1970); *QUARRELS THAT HAVE SHAPED THE CONSTITUTION* (J. Garrity ed. 1987).

6. See Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 8.

7. See M. COHEN, *THE FAITH OF A LIBERAL* 178-80 (1946).

8. The full sentence of section 13 (with the words quoted by Marshall in italics), which speaks of appellate jurisdiction and does not as much as mention original jurisdiction, is as follows:

The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases hereinafter specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office under the authority of the United States.

Judiciary Act of 1789, § 13, 1 Stat. 73 (emphasis added).

9. The Constitution art. III, § 2, provides:

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. CONST. art. III, § 2. This can sensibly be read as guaranteeing the Court a minimum original

enterprise, he asserted the authority of the Court to question the validity of legislation on grounds that have been found persuasive by no one, such as the inherency of judicial review in a written Constitution, even though other nations had and have written constitutions without judicial review.

Law students begin the study of constitutional law with *Marbury* and other opinions of the Great Chief Justice. They cannot help but conclude that they are expected in their own careers as lawyers to emulate the practices of the most revered figure in American law. Such emulation, they will not fail to notice, will have the happy consequence of restraining almost not at all what they can do as lawyers.

The study of American constitutional law, from *Marbury* to the Court's most recent decisions, is largely the study of trickery. Students learn, for example, that to say that the constitutional authority of Congress to legislate is limited to its delegated powers with all remaining legislative power reserved to the states, as provided by the tenth amendment,¹⁰ is not to say that there is anything Congress cannot do, but only to say that there are many things Congress cannot do openly. They learn that Congress can actually do anything if it is willing to claim, for example, to be regulating interstate commerce,¹¹ and that the function of the good constitutional lawyer is to teach this to Congress. The products of this training, of course, go on to become judges. We must not be too surprised, therefore, to discover that judicial opinions in constitutional cases are rarely models of clarity and candor.

II.

The Constitution is a short, simple, and practical document, the primary purpose of which was to create a national government able to prevent state interference with a national common market. It places few restrictions on the system of decentralized representative self-government that it created, and therefore provides judges with little basis, even assuming judicial review, for frequent intervention in the political process.

jurisdiction, not as Marshall read it as prohibiting Congress from adding to that jurisdiction. The Court in effect rejected Marshall's *Marbury* reasoning in *Bors v. Preston*, 111 U.S. 252 (1884), holding that Congress may add to the Court's appellate jurisdiction.

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." U.S. CONST. amend. X.

11. *See, e.g.*, *Perez v. United States*, 402 U.S. 146 (1971) (Congress can make "loansharking" a federal crime); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (Congress can prohibit racial discrimination in places of public accommodation); *Wickard v. Filburn*, 317 U.S. 111 (1942) (Congress can prohibit a farmer from growing food on his own land to feed his own family).

Because public officials are restricted very little by the Constitution and, being American citizens, share American values, they have little occasion and are little tempted to commit constitutional violations. The result is that examples of clearly unconstitutional laws are rare in our history,¹² even though rulings of unconstitutionality by courts are many and increasingly common.

The first and most important thing to understand about constitutional law is that it has little to do with the Constitution.¹³ Rulings of unconstitutionality by judges ordinarily reflect only that their policy preferences differ from those of a majority of their fellow citizens, and their insistence that their preferences prevail despite the resulting injury to the process of decentralized self-government created by the Constitution. When American judges declare a law or other official act invalid because it is prohibited by the Constitution, they must be understood to be saying, in constitutional law's typically disingenuous way, that they consider the policy expressed in the law or other official act to be mistaken. Because a finding of state action is typically a threshold requirement in constitutional decisionmaking, one would expect that the issue would be a particular focus of judicial manipulation, and that has indeed proven to be the case.

The state action doctrine expresses the general understanding that constitutional restrictions apply only to government—to acts of public officials—and not to the acts of private individuals. Ordinary law restrains individuals; constitutional limitations are needed only to restrain government. The second sentence of the first paragraph of the fourteenth amendment—the putative source of the vast bulk of contemporary constitutional law—expressly prohibits only the “State” from depriving any person of life, liberty, or property without due process of law or denying any person the equal protection of the laws.¹⁴ The doctrine reflects the perception that an injury is generally a more serious matter when it is the

12. The clearest example of such a law is probably the 1933 Minnesota Mortgage Moratorium Act, debtor relief legislation clearly prohibited by the contracts clause, U.S. CONST. art. I, § 10, challenged in *Home Bldg. & Loan Ass'n. v. Blaisdell*, 290 U.S. 398 (1934). In a five to four decision, however, the Court blew its best, if not its only, opportunity to exercise judicial review legitimately to invalidate a law by holding that the law was not unconstitutional.

13. See *supra* note 3.

14. 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.

U.S. CONST. amend. XIV, § 1.

result of government rather than private action; government action may have greater impact over a wider area, be more likely to recur, and be more difficult to escape or prevent. And, unlike private action, it cannot be justified as a tolerable, even if unfortunate, expression of individuality.

Because the state action requirement limits the scope of the fourteenth amendment, it serves the cause of separation of powers by limiting opportunities for judicial policymaking. It also serves the cause of federalism by limiting control by Congress—under its authority to enforce the fourteenth amendment—and the federal courts over matters otherwise left to the states. Because the courts no longer limit Congress' legislative authority on federalism grounds, however, and are unlikely to limit Congress' fourteenth amendment authority to counteract state action,¹⁵ the state action requirement protects state autonomy today, if at all, only against the federal courts. Finally, the state action requirement protects individual autonomy to the extent that it exempts individual conduct from judicial surveillance.

Of course, government action is not always more problematic than nongovernment action. The acts of a large corporation, for example, can obviously be as serious in their impact as the acts of a small municipality and are no more justifiable in terms of individual autonomy. It seems, therefore, that constitutional limits should apply to nongovernment action whenever it is not significantly distinguishable from government action in terms of effects and justification. That, however, does not state a rule of law but simply authorizes courts to make policy—to determine the applicability of constitutional restrictions—on a case-by-case basis. The state action doctrine attempts to state a rule, an objective standard that increases predictability and limits judicial discretion; but like all rules it does so at a cost of loss of flexibility. In effect, the question whether the challenged act was performed by a state actor serves as a proxy for the much more difficult and policy-oriented question whether the act's effects and justifications are such that constitutional limitations ought to apply.

Unfortunately, the state action doctrine often serves as a very poor proxy for direct consideration of the conflicting interests involved. Not only can private actions be as problematic as government actions, but government units obviously cannot be permitted to escape constitutional

15. *See* *United States v. Guest*, 383 U.S. 745 (1966) (dicta by six Justices that Congress can legislate to apply fourteenth amendment restrictions to private parties).

restrictions by simply privatizing some of their functions. For example, a municipality could not make coerced confessions admissible in its courts by simply leaving law enforcement to private security forces. The state can easily be said to be responsible for all such supposedly private acts, but the state can equally be said to be responsible for all acts which it permits and could constitutionally prohibit. The state action requirement can thus easily be made to disappear, as innumerable commentators have discovered,¹⁶ as a limit on the scope of constitutional restrictions, that is, as a limit on judicial supervision of all conduct.

III.

It is a very serious mistake, however, to assume, as constitutional analysts usually do, that elected officials will frequently behave unconstitutionally or otherwise improperly in the absence of judicial supervision. In fact, as I have said, constitutional violations have been and are extremely rare; states and cities rarely do such things as privatize police forces and give misbehaving private actors a free hand. American society is probably characterized by too much rather than too little statutory regulation. Only an extreme distrust of representative self-government can explain the extravagant growth of constitutional restrictions that has taken place in recent decades and that is generally defended and encouraged by constitutional scholars. Unfortunately, there once was a clear basis for such distrust as to one issue in one area—race discrimination in the South. The courts, however, have extended the attitudes, habits, and perceived proper role for judges that developed in that context to other areas of public policy where they are much less justifiable.

Judicial review is generally a bad idea, inevitably in conflict with both federalism and representative self-government, the essential principles of our constitutional scheme and the basis of our prosperity and freedom. To permit an electorally unaccountable individual to exercise the kind of policymaking power that Justice Brennan, for example, has exercised for more than thirty years, is, as all human experience indicates, inconsistent with political health.¹⁷ Justice Brennan's actual exercise of that power—

16. See, e.g., Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment State Action Requirement*, 1976 SUP. CT. REV. 221, and articles cited therein at 227 notes 24-25; Rowe, *The Emerging Threshold Approach to State Action: Trying to Make Sense of Flagg Brothers, Inc. v. Brooks*, 69 GEO. L.J. 745 (1981).

17. At the establishment of our constitutions, the judiciary bodies were supposed to be the most helpless and harmless members of our government. Experience, however, soon showed in what way they were to become the most dangerous; that the insufficiency of the

for instance, by consistently creating or favoring more extensive protections for the criminally accused—does not provide us with a different experience.¹⁸

If judicial review is justifiable at all in our society, however, it is justified in regard to questions of race. Judicial review was born in sin in *Marbury v. Madison*, but the nation itself can be said to have been born in sin because of the Constitution's acceptance and protection of slavery.¹⁹ This is so even granting that the framers and ratifiers had little choice but to accept slavery if a single nation was to be created. Judicial review is uniquely justifiable in connection with race for several reasons. Mistreatment of blacks is the unique and overwhelming evil of our history. The denial of legal equality to a minority population on racial grounds is indefensible by any standard; thus, a major part of the Constitution, the thirteenth, fourteenth, and fifteenth amendments, is primarily concerned with protecting blacks. Violations of the constitutional rights of blacks can occur and have occurred. Most important, there has been a national consensus since at least mid-century that discrimination against blacks must end, even at the cost of removing the issue from local control, and that the South must conform to a national standard in this regard. This consensus has been difficult to effectuate politically because of arguable defects—such as congressional committee chairmanships based on seniority—in the political process. Such defects make it possible to justify judicial intervention as not only consistent with, but even as an aid to self-government.

For all these reasons, the end of discrimination against blacks, even if not clearly state imposed, has seemed so clearly right and necessary as to justify whatever was required to bring it about. Yet, the courts' efforts to end such discrimination have greatly distorted our constitutional law in general and, most particularly, the state action doctrine. Happily, nearly all significant discrimination against blacks by nongovernmental actors is

means provided for their removal gave them a freehold and irresponsibility in office . . . In truth, man is not made to be trusted for life, if secured against all liability to account.

Letter to Mr. Coray, Oct. 31, 1823, *THE WRITINGS OF THOMAS JEFFERSON* 486-87 (A. Bergh ed. 1907).

18. See, e.g., *Green v. County School Bd. of New Kent County*, 391 U.S. 430 (1968) (imposing a requirement of racial discrimination in the operation of public school systems in the name of enforcing the prohibition of such discrimination required by *Brown v. Board of Educ.*, 347 U.S. 483 (1954)).

19. U.S. CONST. art. I, § 2 ("three fifths" clause), § 9 (importation of slaves not to be prohibited until 1808); art. IV, § 2 (return of escaped slaves).

now prohibited by federal and state statutory law, with the result that the distorting pressure of “private” race discrimination on the state action doctrine has been much relaxed. Indeed, the state action doctrine, after having been virtually obliterated as an impediment to judicial intervention, has now been reinvigorated. It can now be used to serve the essential, albeit illogical, function of limiting the application of unjustifiable constitutional restrictions that have resulted from decades of judicial hyperactivity.

IV.

State action is obviously present and usually will not even be mentioned by a court when an officer or employee of the state or other unit of government performs the challenged act. It is clearly present when the challenged act is a rule of law, since lawmakers—legislative, judicial, or administrative—are government officials. The state action doctrine can be seen, therefore, as the theories that have developed to find state action when it is not obviously present—such as when the challenged act is not by a government official—and thereby to make constitutional restrictions apply. Two basic theories have evolved: private action will constitute state action when either the state is sufficiently “involved” or “entangled” with the private action or when the private action constitutes the performance of a “public function.” As already noted, however, a state can be said to be involved in whatever it permits or protects; that is, in all conduct that a state could prohibit because it is not constitutionally protected. The public function notion is almost equally elastic because it is no better defined in this than in other areas of constitutional law.²⁰ The result is that the two concepts have proven highly manipulable and permit a finding of state action on demand. From the 1940s through the 1960s, the Court expanded these concepts, primarily to enable it to act against race discrimination, but since the 1970s it has narrowed them to limit the scope of federal judicial surveillance.

Although it was always understood or assumed that constitutional restrictions apply only to the government, one may trace the origins of the state action doctrine to the Court’s decision in the *Civil Rights Cases* in 1883.²¹ The Court invalidated the 1875 Civil Rights Act that prohibited

20. See, e.g., *National League of Cities v. Usery*, 426 U.S. 833 (1976) (“integral governmental functions”), *overruled by* *Garcia v. Metropolitan Transit Auth.*, 469 U.S. 528 (1985); *Nebbia v. New York*, 291 U.S. 502 (1934) (“businesses affected with a public interest”).

21. 109 U.S. 3 (1883).

race discrimination in privately owned as well as state-owned places of public accommodation. The Court held that the fourteenth amendment applies only to "State legislation, and State action of every kind,"²² and that Congress' authority to enforce the amendment is limited to remedying prohibited state action. It is virtually certain that the Supreme Court would not follow this latter holding today,²³ but the decision is still authoritative insofar as it limited the fourteenth amendment's independent reach. Although there is language in the opinion indicating that the Court might find state action in the failure of a state to prohibit or protect against certain private acts,²⁴ the holding, as it applies to the facts of some of the cases involved, indicates otherwise.²⁵ In any event, the Court has long interpreted the decision to establish that the fourteenth amendment restricts "only such action as may fairly be said to be that of the States."²⁶

The Court first expanded the state action doctrine under the irresistible pressure of the white primary cases. In these cases, the Court, quite properly, showed that it was determined to invalidate all arrangements that effectively denied blacks the right to vote guaranteed them by the fifteenth amendment. The fifteenth amendment had long been virtually a dead letter in the South because only Democratic Party candidates could win elections, and blacks were excluded from participation in the Democratic Party primaries. The progression of the white primary cases nicely illustrates how little difference the presence or absence of a state actor or state legal requirement can make—that state action can be a mere formality of no substantive significance.

In 1927, in *Nixon v. Herndon*,²⁷ the Court invalidated a Texas statute that explicitly prohibited blacks from participating in Democratic Party primaries. The Democratic Party then simply continued to exclude blacks, though no longer legally required to do so. In 1932, in *Nixon v. Condon*,²⁸ the Court disallowed this, too, finding state action on the

22. *Id.* at 11.

23. See *supra* note 15 and accompanying text.

24. The Court stated that the invalidated federal statute "applies equally to cases arising in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which have arisen in States that may have violated the prohibition of the amendment." 109 U.S. at 14.

25. See L. TRIBE, *supra* note 2, at 1695 n.16 (one of the states to which the statute would have applied "had specifically repealed the common law rule of equal access").

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

27. 273 U.S. 536 (1927).

28. 286 U.S. 73 (1932).

somewhat shaky ground that a new Texas law “authorized” the party to determine the qualifications of members for voting in primaries. Race discrimination temporarily won this chess match, however. Texas simply repealed all laws having to do with primary elections and, in 1935, the Court in *Grovey v. Townsend*²⁹ declared that it was unable to find the necessary state action in the Democratic Party’s continued exclusion of blacks. In *Smith v. Allwright*³⁰ in 1944, however, the Court checkmated Texas’ move by holding that when a state delegates to a party the power to fix qualifications of primary elections, it is a delegation of a state function and “the State makes the action of the party the action of the State.”³¹

Thus, the public function rationale for the imposition of constitutional restrictions on non-state actors was born. Another way of stating the reason for the result in *Smith v. Allwright* and *Nixon v. Condon*, directly and free of technical jargon, is that to permit the discrimination would be to make the fifteenth amendment almost completely ineffective, a result that cannot be correct. The Court did not give this reason, I suggest, because the holding seems easier to contain when stated in state function jargon. This jargon makes it appear that the Court is doing something other than simply looking to the merits of the case and making a policy judgment that the interest protected by the fifteenth amendment outweighs the injury to the Democratic Party’s associational interests.

If the Court’s stated test had involved simply the effectiveness of the fifteenth amendment, it clearly would have invited other challenges to election laws on the same ground. Multimember districts, for example, might soon be challenged, as they later were anyway³²—a challenge that the Court should, in my view, reject as involving not race discrimination but simply a policy choice between different theories of representation. This illustrates a jurisprudential dilemma: rules stated in apparently definite and objective terms, such as the state action requirement, are often easily evaded, but rules requiring or permitting direct consideration of the conflicting interests that create the problem are merely grants of policymaking power to judges. This is a powerful practical argument against judicially enforceable constitutional restrictions on self-government. To avoid evasions of apparently clear rules, judges are forced to make them

29. 295 U.S. 45 (1935).

30. 321 U.S. 649 (1944).

31. *Id.* at 664-65.

32. *See, e.g., Whitcomb v. Chavis*, 403 U.S. 124 (1971).

less clear and make increasingly pure policy decisions. Judicial policymaking in the form of ordinary law, changeable by legislative act, is one thing; judicial policymaking in the form of constitutional law is another, and is almost inevitably inconsistent with the maintenance of a democratic system of government.

The public function theory of state action was used again, and much less justifiably, in *Marsh v. Alabama* in 1946.³³ In an opinion by the still young and highly activist Justice Black, the Court held that a Jehovah's Witness could not be prohibited from distributing religious literature on the streets of a company-owned town by state court enforcement of state trespass law at the request of the town's owner. Exclusion of the plaintiff by an ordinary town, Black said, would violate the first and fourteenth amendments—the “incorporation” ruse was already well established as to the first amendment. The Court found that the company-owned town had “all the characteristics of any other American town,”³⁴ even though, of course, it did not—for example, the town collected no taxes and the residents elected no mayor.

The Court also partly relied on the public function theory in its 1966 holding in *Evans v. Newton*³⁵ that blacks could not be excluded from a park which had been devised to the city of Macon, Georgia on the condition that it be used by whites only. State action was found even though private individuals replaced the former city trustees assigned under the will. Whatever the theory used to disallow the discrimination, a whites-only municipal park seems plainly inconsistent with the purpose of the equal protection clause—to guarantee blacks the basic civil rights enjoyed by whites. Because it is hard to imagine that the state or city would permit such discrimination against any but a disfavored group, it is realistic, I think, to treat the state's permission as itself racially discriminatory.

Shelley v. Kraemer,³⁶ decided in 1948, is surely the most famous and most criticized of the Supreme Court's state action decisions—the *Finne-gan's Wake* of constitutional law, according to Professor Kurland. The Court purported to find unconstitutional state action in state court enforcement of racially restrictive covenants prohibiting the sale of real estate to nonwhites. The Court said that state court enforcement of a

33. 326 U.S. 501 (1946).

34. *Id.* at 502.

35. 382 U.S. 296 (1966).

36. 334 U.S. 1 (1948).

private contract in accordance with state law constitutes state action, citing cases and arguing to establish what was undeniable and undenied. But the mystery is, why was such state action unconstitutional? The Court did not adopt the unmanageably broad and unappealing proposition that a state may not enforce a private contract involving discrimination that the state could not itself practice, such as a will leaving money to a church. Nor did it attempt to fit the case into public function jargon, as it might plausibly have done, by asserting that the state had in effect delegated its power of residential zoning to the private parties³⁷—a rationale that would also have had broad implications. Instead, the Court eased its way to the decision it was obviously determined to reach by simply asserting the presence of discriminatory “state action.”³⁸

The result was to make *Shelley* famous, not for the result the Court reached, but for the disconcerting way that it arrived there. It is disconcerting because it illustrates with stark clarity both the Court’s belief and the truth that it is exempt from any requirement that its opinions make sense. We know that the Court is supreme, for it has told us so, in exposition of the law of the Constitution.³⁹ Thoughtful persons might be happier not to know that so powerful an institution is also supreme over logic and fact.

Judicial review is frequently justified on the theory that it serves as an obstacle to the enactment into law of transient popular passions.⁴⁰ In fact, the small coterie of lawyers-would-be-intellectuals that make up the Court are far more subject to fads and fancies than the bulk of the American people. Intellectuals, both real and self-supposed, at home in a world of words, are capable of insane notions—for example, that East Germany, which prevents escape, is a morally acceptable nation although South Africa, which limits entry, is not—literally unthinkable by the average person. For a long time, and to the enthusiastic applause of academics, the Court has behaved lawlessly in the cause of ending racial discrimination.⁴¹ The habits and status it acquired in the process

37. See Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960).

38. 334 U.S. at 19.

39. See, e.g., *Cooper v. Aaron*, 358 U.S. 1 (1958).

40. See, e.g., Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4 (1936) (opportunity for a “sober second thought”).

41. For example, the Court has perverted the various titles of the 1964 Civil Rights Act from measures designed to end racial discrimination into measures permitting or even requiring racial discrimination. See *Steelworkers v. Weber*, 443 U.S. 193 (1979); *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

have enabled it to continue to behave lawlessly in the service of many other more questionable causes, such as the enactment of a national regime of abortion on demand.⁴² The applause has continued.

Burton v. Wilmington Parking Authority,⁴³ decided in 1961, is the leading Supreme Court decision on the state involvement theory of state action. The Court there held that a privately owned restaurant that operated in leased space in a publicly owned parking garage violated the equal protection clause by refusing to serve blacks. Is it therefore the rule that constitutional restrictions apply to private businesses operating on publicly owned property? The Court was certainly not willing to say that. Did liability attach because, in addition, national and state flags flew over the property, as the Court took pains to point out? The Court was not willing to say that, either. In fact, the Court was unwilling or unable to explain its decision at all.⁴⁴

In perhaps the most frequently quoted statement in state action law, the Court said in *Burton*: "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."⁴⁵ The statement, unfortunately, is vacuous in the absence of some theory of what gives any particular fact or circumstance relevance or weight. The sit-in cases, overturning on a variety of near ludicrous grounds the trespass convictions of protesters against race discrimination in stores and eating places, demonstrated even more clearly that integrity in the performance of public office must sometimes be sacrificed to a greater good.⁴⁶ The Court, after all, was on a moral crusade, and moral crusades are not to be discomfited by mere requirements of law. To be the supreme expositor of the law, the Court is well aware, is to be above the law.

Reitman v. Mulkey,⁴⁷ decided in 1967, is as inexplicable as *Shelley v.*

See also L. GRAGLIA, DISASTER BY DECREE, *supra* note 3; Graglia, *The "Remedy" Rationale for Requiring or Permitting Otherwise Prohibited Discrimination: How the Court Overcame the Constitution and the 1964 Civil Rights Act*, 22 SUFFOLK U.L. REV. 569 (1988); Graglia, *When Honesty is "Simply Impractical" for the Supreme Court: How the Constitution Came to Require Busing for School Racial Balance*, 85 MICH. L. REV. 1153 (1987).

42. *Roe v. Wade*, 410 U.S. 113 (1973).

43. 365 U.S. 715 (1961).

44. See Lewis, *Burton v. Wilmington Parking Authority—A Case Without a Precedent*, 61 COLUM. L. REV. 1458 (1961).

45. 365 U.S. at 772.

46. See Paulsen, *The Sit-in Cases of 1964: "But Answer Came There None,"* 1964 SUP. CT. REV. 137.

47. 387 U.S. 369 (1967).

Kraemer, except as another demonstration of raw judicial power. The California legislature, reflecting the unhappy fact that the lawyers who dominate American legislatures simply like law and are much more favorably disposed to legal restrictions than are the nonlawyers they purportedly represent, enacted legislation prohibiting race discrimination by private individuals in the sale or rental of housing. By referendum, the people of California then voted overwhelmingly to amend the California constitution to disallow such legislation and restore and guarantee previously enjoyed individual rights. The California Supreme Court, vying at the time with the United States Supreme Court for the title of most activist, held the amendment inconsistent with the equal protection clause of the federal Constitution. The United States Supreme Court affirmed, in a five to four decision, with the majority opinion by the mercurial Justice White, joined by the indomitable combination of Chief Justice Warren and Justices Douglas, Brennan, and Fortas.

The *Reitman* majority saw no reason to overturn the California Supreme Court's determination that the amendment "will significantly encourage and involve the State in private discriminations."⁴⁸ The Court did not feel obliged to explain how repealing the prohibition of an activity encourages it, while refusing to prohibit it does not. The result is that a state may be constitutionally prohibited from repealing a law it was not constitutionally required to enact. The important thing for the Court's committed moralists was, of course, that the Court extend its long record of not failing to find state action in cases involving race discrimination. Legal scholars had busied themselves finding rationalizations for *Shelley v. Kraemer*, and they could be counted upon to find rationalizations for this decision as well. Indeed, Professor Charles Black, Sterling Professor of Law at Yale, soon found such a rationalization.⁴⁹

V.

The battle against racial discrimination was finally won in this country with the passage of the great civil rights statutes of the 1960s. The 1964 Civil Rights Act in effect ratified the *Brown* prohibition of race discrimination by government. The Act applied to public schools, where segregation by law—which *Brown* had allowed to continue under the "all

48. *Id.* at 381.

49. See Black, *supra* note 1.

deliberate speed” formula⁵⁰—quickly came to an end. It applied as well to all federally assisted activities and programs. The Act even extended to private discrimination in places of public accommodation and employment. The felt need to combat private race discrimination by constitutional law through expansion of the state action doctrine then greatly lessened. Some of the Justices, led by then Justice Rehnquist, began to try to contain the extravagant proliferation of constitutional restrictions produced by decades of judicial activism. These restrictions could not be cut back directly; five votes were not available to overturn a single one of the Warren Court’s major innovations.⁵¹ They could, however, at least be contained by halting or reversing the wild inflation of the state action doctrine that resulted from the race cases.

Rehnquist’s campaign for the deflation of the state action doctrine began with his opinion for the Court in *Moose Lodge No. 107 v. Irvis*⁵² in 1972. Justices Douglas, Brennan, and Marshall, the Justices most responsible for the Court’s greatly expanded control of American society through constitutional law, dissented. Moose Lodge, a private club regulated by and holding a liquor license issued by the Pennsylvania Liquor Control Board, refused service to a black guest of a member. Because the Board limited the number of licenses available in each municipality, Moose Lodge’s license could affect the availability of liquor elsewhere in the municipality.

Rejecting the state involvement theory of state action, the Court held that the facts of *Moose Lodge* presented “nothing approaching the symbiotic relationship”⁵³ that existed between the restaurant and the state in *Burton*. It also found that the club did not perform a function “that would otherwise in all likelihood be performed by the State.”⁵⁴ What the Court says is much less important, of course, than what it does, and what it did was permit discrimination against blacks—which Professor Black had predicted after *Reitman* it would not do again⁵⁵—despite the state’s regulation of the discriminator and grant of a limited resource. If symbiosis was now the test for sufficient state involvement in private acts, it might, outside of the biological world, prove difficult to find.

50. *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

51. See BLASI, *THE COUNTER-REVOLUTION THAT WASN'T* (1983).

52. 407 U.S. 163 (1972).

53. *Id.* at 175.

54. *Id.*

55. See Black, *supra* note 1, at 95-100.

Two years later, in *Jackson v. Metropolitan Edison Co.*,⁵⁶ Justice Rehnquist's opinion for the Court reaffirmed and strengthened *Moose Lodge's* narrow view of the state involvement theory, and adopted a narrow view of the public function theory as well. Metropolitan Edison, a regulated public utility, sold and delivered electricity under a certificate of convenience and necessity issued by the Pennsylvania Public Utility Commission. Its general tariff, filed with and approved by the Commission, included a provision regarding the termination of service to nonpaying customers. Petitioner claimed that the company's termination of service to her residence without notice and an opportunity to be heard deprived her of property without due process of law in violation of the fourteenth amendment.

With Justices Douglas, Brennan, and Marshall again dissenting, the Court rejected the claim. That the company was subject to "extensive and detailed"⁵⁷ regulation and enjoyed monopoly status did not, the Court said, make its acts those of the state. The test was whether there was "a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."⁵⁸ Although the Commission approved the company's termination provision in its general tariff, the provision was never "a subject of a hearing or other scrutiny by the Commission,"⁵⁹ and mere approval did not supply the necessary nexus "where the Commission has not put its weight on the side of the proposed practice by ordering it."⁶⁰ The Court thus held in effect that there is no state involvement theory of state action; a state is responsible only for what it requires, not for that with which it is otherwise involved.

Petitioner also contended that Metropolitan Edison's actions constituted state action because, as the sole provider of an essential public service, it performed a public function. The Court, however, read its white primary and other public function cases, *Marsh v. Alabama* and *Evans v. Newton*, as involving a private entity's exercise of "power traditionally exclusively reserved to the State,"⁶¹ and providing utility service was not, it found, "traditionally the exclusive prerogative of the state."⁶² The

56. 419 U.S. 345 (1974).

57. *Id.* at 350.

58. *Id.* at 351.

59. *Id.* at 354.

60. *Id.* at 357.

61. *Id.* at 352.

62. *Id.* at 353.

only example the Court gave of such a power, the power of eminent domain, indicates that it is likely to be a narrow category. This conclusion is supported by the Court's decision two years later in *Hudgens v. NLRB*.⁶³ In *Hudgens*, with Justices Brennan and Marshall dissenting, the Court overruled its 1968 decision in *Logan Valley Plaza*⁶⁴ which extended *Marsh* to hold that private operators of shopping centers perform a public function.

The Court illustrated the much narrowed scope of the state action doctrine in its 1982 decisions in *Blum v. Yaretsky*⁶⁵ and *Rendell-Baker v. Kohn*.⁶⁶ In *Blum*, patients in privately owned nursing homes, subsidized by Medicaid, complained that they had been discharged or transferred to lower levels of care by the nursing homes without being given advance notice and an opportunity to be heard, as allegedly required by the due process clause of the fourteenth amendment. The discharges and transfers were pursuant to detailed state regulations adopted to minimize nursing home costs. Justice Rehnquist pointed out that the regulations did not, however, "dictate the decision to discharge or transfer in a particular case."⁶⁷ A state "normally can be held responsible for a private decision," he concluded, "only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."⁶⁸ The state's "mere approval or acquiescence"⁶⁹ in the challenged act was not enough. Thus, the Court did not find state action, and, fortunately for a heavily burdened Court and the nursing homes, did not have to decide the due process question.

In *Rendell-Baker*, a privately owned school for problem students discharged petitioners because of their expressions of disagreement with school policies, allegedly in violation of the due process clause of the fourteenth amendment, which supposedly incorporates the first amendment. The school received as much as ninety-nine percent of its funds from the state, was subject to detailed regulation by the state, and was supervised by the state in some of its hiring decisions. Chief Justice Burger, following *Blum*, wrote for the Court that the school was, none-

63. 424 U.S. 507 (1976).

64. *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968).

65. 457 U.S. 991 (1982).

66. 457 U.S. 830 (1982).

67. *Blum*, 457 U.S. at 1010.

68. *Id.*

69. *Id.* at 1004.

theless, not subject to constitutional restraints. The discharges, the Court said, "were not compelled or even influenced by any state regulation,"⁷⁰ and the school's relationship with the state was, as in *Blum*, not "symbiotic."⁷¹

The limited current reach of the involvement theory of state action was illustrated just last year in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*.⁷² The United States Olympic Committee (USOC) is a private corporation chartered by an act of Congress, which imposes certain special requirements upon it. For example, it may not amend its constitution without providing notice and an opportunity for a hearing, and it must allow certain groups reasonable representation in its membership. The USOC may apply to the Secretary of Commerce for government grants up to \$16 million, and was granted \$10 million after the American boycott of the 1980 Olympic Games. Another federal statute, the Amateur Sports Act of 1978, grants the USOC exclusive rights to the word "Olympic," exceeding the rights granted under ordinary trademark law.⁷³ The USOC successfully sued San Francisco Arts & Athletics, Inc. (SFAA) to enjoin it from using the word "Olympic" in connection with its promotion of the "Gay Olympic Games." The SFAA thereupon filed suit claiming the USOC discriminated against it in violation of the "equal protection component" of the due process clause of the fifth amendment.⁷⁴

In a five to four decision, the Court held that the federal charter, federal regulation, federal funding, and federal grant of exclusive rights did not constitute sufficient federal involvement with the USOC to make the fifth amendment applicable to its acts. The government had neither coerced nor encouraged the challenged act, as is necessary under *Blum* to find government responsibility. Neither did the USOC perform a public function, although its activities were in the public interest and pursuant to the Amateur Sports Act. Public functions are those, as stated in *Jackson* and emphasized in *Blum*, that have been "traditionally the exclusive prerogative"⁷⁵ of government. Conducting and coordinating amateur

70. *Rendell-Baker*, 457 U.S. at 841.

71. *Id.* at 842.

72. 483 U.S. 522 (1987).

73. Amateur Sports Act of 1978, 36 U.S.C. § 380 (1982).

74. 483 U.S. at 523.

75. *Id.* at 527.

sports, the function of the USOC, has not been a traditional function, much less an exclusive function, of the federal government.

Finally, there is *Flagg Bros. Inc. v. Brooks*,⁷⁶ another, but less successful, effort by Justice Rehnquist to cut back the state action doctrine. When Shirley Brooks and her family were evicted from their home in Mt. Vernon, New York, her furniture was stored in the warehouse of Flagg Brothers, Inc. Flagg Brothers later wrote to Brooks that unless she paid storage charges, it would sell her furniture, as was permitted by the New York Uniform Commercial code. Brooks brought suit for damages and an injunction on the ground that the sale would deprive her of her property without due process of law. Her claim rested on the fact that she would not receive notice and an opportunity to be heard on the issue of the underlying debt, as a series of Supreme Court decisions on creditor remedies apparently required.⁷⁷ In a five to three decision, the Court, in an opinion by Justice Rehnquist, with Justices White, Marshall, and Stevens dissenting and Justice Brennan not participating, dismissed the action on the ground that no state action was shown. The Court pointed out that no public official was made a defendant, illustrating the "total absence of overt official involvement."⁷⁸ Plaintiff claimed that New York had delegated to Flagg Brothers the "public function" of "dispute resolution," a function "traditionally exclusively reserved to the State."⁷⁹ The Court responded that the challenged procedure lacked "the feature of exclusivity"⁸⁰ that was supposedly present in the white primary cases and *Marsh*, because New York law provided alternative means of resolving such disputes. Nor was New York responsible for Flagg Brothers' actions on the ground that the New York Uniform Commercial Code "authorized and encouraged" them; as *Jackson and Moose Lodge* made clear, a state's mere acquiescence in private acts does not make them the acts of the state.

All of this, unfortunately, is confused and beside the point. The state action requirement was met in *Flagg Bros.*, not because the private party's challenged actions constituted performance of a public function or because the state acquiesced in them, but simply because plaintiff's

76. 436 U.S. 149 (1978).

77. See, e.g., *North Georgia Finishing, Inc. v. Di-Chem*, 419 U.S. 601 (1975); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969).

78. 436 U.S. at 157.

79. *Id.*

80. *Id.* at 159.

claim was that a New York law was unconstitutional. Justice Rehnquist attempted to dispose of this central issue in a footnote, stating:

It would intolerably broaden, beyond the scope of any of our previous cases, the notion of state action under the fourteenth amendment to hold that the mere existence of a body of property law in a State, 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.⁸¹

Law exists in a state, however, only if enacted by state legislative, judicial, or administrative officials, and the acts of such officials are indubitably state actions.

Flagg Bros. differs from *Shelley v. Kraemer* in that the problem with *Shelley*, as noted above, is not that there was no state action in the existence of state contract law, but that the plaintiff did not challenge the constitutionality of that law; a state may constitutionally enforce contracts. In *Flagg Bros.*, the plaintiff *did* challenge the law; according to the Supreme Court, a state may not permit creditors to seize a debtor's property without providing the debtor notice and a hearing. It is difficult to understand why a state's law of creditor remedies can be challenged constitutionally when the creditor brings a dispute to court, as the Court has many times held,⁸² but not when the debtor does. Similarly, the Court had no difficulty in finding state action in, for example, *New York Times Co. v. Sullivan*,⁸³ where it permitted a fourteenth amendment challenge to state law in the context of a private dispute. Again, it would seem to make no difference that under the relevant state law in *New York Times* the party trying to obtain property had to go to court, while in *Flagg Bros.* it was the party trying to retain property.

The Court's 1982 decision in *Lugar v. Edmonson Oil Co.*⁸⁴ indicates that Rehnquist's attempt in *Flagg Bros.* to limit the state action doctrine was not as successful as his efforts in *Moose Lodge* and *Jackson*. In an opinion by Justice White with Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor dissenting, the Court saw no state action impediment to a constitutional challenge to a state law permitting a creditor to obtain a prejudgment attachment of a debtor's property by filing a petition with a court clerk. That the "total absence of overt official involvement" does not explain the result in *Flagg Bros.*, even to Justice

81. *Id.* at 160 n.10.

82. *See supra* note 76.

83. 376 U.S. 254 (1964).

84. 457 U.S. 922 (1982).

Rehnquist, is indicated by the fact that he joined Justice Powell's dissenting opinion, which insisted that state action was not present in *Lugar* either, despite the participation of a state official. The dissenters in *Lugar* are certainly right that the presence of the court clerk should not make a difference, but the dissenters in *Flagg Bros.* are equally right that his absence there should also have made no difference. *Lugar* falls in the Court's time-honored tradition of dealing with irrational distinctions by making further irrational distinctions.

VI.

Justice Rehnquist is often accused by liberals of being a judicial activist of the right. This accusation is usually made in response to the accusation by conservatives, entirely justified, that Justice Brennan and others are activists of the left. The response is inadequate; abuse of office by some officials cannot be justified by showing abuse of office by other officials, even if the two groups act for opposite ends.⁸⁵ It is also inaccurate; with very few exceptions, such as, most notably, *National League of Cities v. Usery*⁸⁶—no one is totally immune from the corruptions of power—Rehnquist has not attempted to return us to the *Lochner*⁸⁷ era. On the contrary, he would, like the Constitution itself, leave nearly all policy decisions to the political process. *Flagg Bros.* might be seen as another example of judicial activism by Rehnquist; it certainly reflects a strenuous effort to reach a desired result. But, if so, it is judicial activism in the service of restraining judicial activism, activism in its only excusable form.

The Court's "procedural due process" decisions—the very oddity of the label indicates that something has gone wrong—beginning with *Goldberg v. Kelly*⁸⁸ and continuing through the creditors' remedies decisions, are clear examples of the Court devising constitutional restrictions out of whole cloth, on no other basis than a misguided ideological egalitarianism.⁸⁹ Rehnquist has made a valiant effort to get rid of those cases by insisting that rights come only from enacted law and that it is not

85. See Graglia, *Judicial Activism: Even on the Right, It's Wrong*, THE PUBLIC INTEREST, Spring 1989, at 57.

86. See *supra* note 20.

87. *Lochner v. New York*, 198 N.Y. 45 (1905).

88. 397 U.S. 254 (1970).

89. See Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85; Graglia, *Would the Court Get "Procedural Due Process" Cases Right If It Knew What "Liberty" Really Means?*, 1 NOTRE DAME J. L., ETHICS & PUB. POL'Y 813 (1985).

appropriate for Brennan and others to create additional rights, to enforce their views of natural law in the name of the Constitution.⁹⁰ Unfortunately, after some initial successes on Rehnquist's part, the forces of natural law again triumphed.⁹¹ In *Flagg Bros.* he attempted to contain that triumph. It is not surprising that *Flagg Bros.* makes no sense, given that the decisions it sought to limit also make no sense but are apparently immune from attack on that ground. Nor is it surprising, of course, that one result of this struggle is a state action doctrine of less than total conceptual coherence.

90. See *Arnett v. Kennedy*, 416 U.S. 134 (1974).

91. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).