

1990

Constructing an Alternative to "State Action" as a Limit on State Constitutional Rights Guarantees: A Survey, Critique and Proposal

John Devlin

Louisiana State University Law Center, john.devlin@law.lsu.edu

Follow this and additional works at: https://digitalcommons.law.lsu.edu/faculty_scholarship



Part of the Law Commons

Repository Citation

Devlin, John, "Constructing an Alternative to "State Action" as a Limit on State Constitutional Rights Guarantees: A Survey, Critique and Proposal" (1990). *Journal Articles*. 266.

https://digitalcommons.law.lsu.edu/faculty_scholarship/266

This Article is brought to you for free and open access by the Faculty Scholarship at LSU Law Digital Commons. It has been accepted for inclusion in Journal Articles by an authorized administrator of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

CONSTRUCTING AN ALTERNATIVE TO “STATE
ACTION” AS A LIMIT ON STATE
CONSTITUTIONAL RIGHTS GUARANTEES:
A SURVEY, CRITIQUE AND PROPOSAL

*John Devlin**

I. INTRODUCTION	820
II. STATE CONSTITUTIONS AND STATE ACTION; DIVERGENT TEXTS AND CONFLICTING CASELAW	826
A. <i>Speech, Petition and Private Property</i>	828
1. State Constitutional Texts	828
2. Caselaw: Is State Action Required?	831
3. Caselaw: How Should State Action Be Defined?	836
B. <i>Private Discrimination and the Equality Ideal</i> ..	838
1. State Constitutional Texts	839
2. Caselaw: Is State Action Required?	841
3. Caselaw: How Should State Action Be Defined?	847
C. <i>Due Process and the Private Creditor</i>	849
1. State Constitutional Texts	850
2. Caselaw: Is State Action Required?	852
3. Caselaw: How Should State Action Be Defined?	854
D. <i>Summary and Analysis of the Caselaw</i>	857
III. PARSING THE ARGUMENTS: MUST STATE ACTION RE- QUIREMENTS BE READ INTO STATE CONSTITUTIONAL RIGHTS GUARANTEES?	860
A. <i>Arguments from the Plain Meaning of Constitu- tional Texts</i>	860
B. <i>Arguments from Constitutional History and Fram- ers' Intent</i>	862
C. <i>Arguments from the “General Principle” that Con- stitutions by Their Nature Bind Only Governments</i>	865

* Assistant Professor of Law, Paul M. Hébert Law Center of the Louisiana State University. B.A., 1977, Haverford College; J.D., 1980, Columbia University. I wish to thank my colleagues Eulis Simien, Ken Murchison, Raymond Diamond and Lee Hargrave for their counsel and suggestions, and thank Jamie Malcombe, Trish Snodgrass, Lewis Lauve and Jerry Johnson for their research and technical assistance.

D.	<i>Arguments from the Need to Avoid Interfering with the Liberties of Other Private Parties</i>	872
E.	<i>Arguments from Separation of Powers: That Private Infringement of Fundamental Rights Should Be Regulated by Legislatures, Not Courts</i>	876
IV.	CONSTRUCTING LIMITS FOR STATE CONSTITUTIONAL RIGHTS GUARANTEES: ARE THERE BETTER ALTERNATIVES TO "STATE ACTION?"	883
A.	<i>Constructing Alternative Limits: What Factors Are Relevant?</i>	884
B.	<i>Constructing Alternative Limits: How Should They Be Applied?</i>	889
C.	<i>Would Such Alternative Limits Be Preferable to State Action?</i>	891
V.	CONCLUSION	900

I. INTRODUCTION

*PruneYard Shopping Center v. Robins*¹ made clear that state courts may definitively interpret state constitutions to grant greater individual rights than the United States Constitution provides and to prevent interference with rights that ordinarily would not give rise to any claim under federal law.² Nonetheless, the specific issue that underlay *PruneYard* — whether state constitutions may be interpreted to protect rights from infringement by private actors who are not subject to restraint under current federal constitutional law — remains controversial.³

1. 447 U.S. 74 (1980), *aff'g* *Robins v. PruneYard Shopping Center*, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979). See *infra* notes 50-53 and accompanying text.

2. Admittedly, even to speak of constitutional "rights" or "guarantees" against private action inevitably prejudices the point in issue: whether general constitutional "rights" against private parties exist. However, in the absence of a more acceptable locution, those terms are used in this article as abbreviations for those interests and values generally acknowledged to be constitutionally protected from unreasonable government interference, and that perhaps should be constitutionally protected from certain private interferences.

3. For many years academic discussion has focused on the issues of integrating private non-governmental power into the legal scheme and protecting individual rights from infringement by those who wield such power. See, e.g., Berle, *Constitutional Limitations on Corporate Activity — Protection of Personal Rights From Invasion Through Economic Power*, 100 U. PA. L. REV. 933, 942-53 (1952); Miller, *The Constitutional Law of the "Security State,"* 10 STAN. L. REV. 620 (1958); Tobriner & Grodin, *The Individual and the Public Service Enterprise in the New Industrial State*, 55 CALIF. L. REV. 1247, 1253 & n.29 (1967). At the outset of the current upsurge of interest in state constitutions, commentators suggested that state declarations of rights can resolve these issues by providing a set of liberty enhancing norms applicable to non-governmental actors as well as

The "state action" limitation on the scope of federal constitutional rights posits an "essential dichotomy . . . between deprivations by the State, subject to scrutiny under [the Constitution], and private conduct, 'however discriminatory and wrongful' against which the federal Constitution generally offers no shield."⁴ Rooted in both a general view of the role of constitutions and the particular language of the federal Constitution, the state action doctrine is a generalized limitation on virtually all federal

governmental infringers. See, e.g., Countryman, *Why a State Bill of Rights?*, 45 WASH. L. REV. 454, 473-74 (1970). As the state action debate continues in the wake of *PruneYard*, some academic attention is still focused on the possibilities afforded by such state declarations in general. See, e.g., Skover, *The Washington Constitutional "State Action" Doctrine: A Fundamental Right to State Action*, 8 U. PUGET SOUND L. REV. 221 (1985); see also *Developments in the Law — Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983 (1963) [hereinafter *Developments*].

Notwithstanding the importance of the basic issues at stake, however, most recent commentaries touched upon these questions only in the context of a single factual setting or a particular state constitutional provision. Furthermore, except for articles discussing free speech issues, the treatment of state action under state constitutions has been brief. See, e.g., R. WILLIAMS, *STATE CONSTITUTIONAL LAW: CASES AND MATERIALS* 127-42 (1988); Berdon, *Protecting Liberty and Property Under the Connecticut and Federal Constitutions: The Due Process Clauses*, 15 CONN. L. REV. 41, 53-54 (1982) (Connecticut due process clause applies only to state action); Dolliver, *The Washington Constitution and "State Action:" The View of the Framers*, 22 WILLAMETTE L. REV. 445 (1986) (speech on private property); Heins, "The Marketplace and the World of Ideas:" *A Substitute for State Action as a Limiting Principle Under the Massachusetts Equal Rights Amendment*, 18 SUFFOLK L. REV. 347 (1984) (state equal rights amendment); Ragosta, *Free Speech Access to Shopping Malls Under State Constitutions: Analysis and Rejection*, 37 SYRACUSE L. REV. 1 (1986) (public free speech rights in shopping centers); Note, *The Constitutionality of New York's Garageman's Lien: A "Flexible" State Action Concept Under the State Due Process Clause*, 43 ALB. L. REV. 121 (1978) [hereinafter Note, "Flexible" State Action] (due process); Note, *Burning Tree Club, Inc. v. Bainum — State Action, Strict Scrutiny, and the "New Judicial Federalism,"* 47 MD. L. REV. 1219, 1221-27, 1240-46 (1988) [hereinafter Note, *Burning Tree*] (equal rights amendment); Note, *Sex Discrimination and State Constitutions: State Pathways Through Federal Roadblocks*, 13 N.Y.U. REV. L. & SOC. CHANGE 115, 122-26 (1985) [hereinafter Note, *Pathways*] (gender discrimination); Comment, *Speech Activists in Shopping Centers: Must Property Rights Give Way to Free Expression?*, 64 WASH. L. REV. 133 (1989) (speech on private property).

As this article goes to press, however, two articles have appeared that treat these issues in depth and reach conclusions similar to those advocated here. Cole, *Federal and State "State Action:" The Undercritical Embrace of a Hypercriticized Doctrine*, 24 GA. L. REV. 327 (1990); Friesen, *Should California's Constitutional Guarantees of Individual Rights Apply Against Private Actors?*, 17 HASTINGS CONST. L.Q. 111 (1990).

4. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974) (quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948)). Although these cases involved claims arising under the fourteenth amendment, the Supreme Court applied the same approach to state action questions regardless of the underlying substantive right at issue. See, e.g., *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (engaging in a single "state action" inquiry for first, fifth and fourteenth amendment claims).

constitutional rights.⁵ While scholars debate whether the federal concept of state action is “unitary” or whether its precise contours depend on the specific rights involved,⁶ it is clear that private parties are ordinarily subject to federal constitutional restraint only if they are directly influenced by, act in concert with, or stand in place of some government act or official. To be sure, federal and state statutes and common law limit private actions to some extent.⁷ But, because of state action restrictions on the federal Constitution, most non-governmental entities — even those which may own property invested with a public interest, provide services on which the public depends or otherwise wield significant *de facto* power over individuals — are permitted much greater leeway to impinge upon the federal constitutional rights of others than would be permitted for government agencies engaged in similar activities.⁸

However, as *PruneYard* indicated, analysis need not end with the federal Constitution. During the last dozen years, many state courts have considered whether state constitutional rights guarantees should be construed to limit infringements by private actors. The decisions are

5. The thirteenth amendment is an exception to this rule since the amendment and its enabling statutes apply to purely private as well as government actions. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437-39 (1968); *The Civil Rights Cases*, 109 U.S. 3, 20 (1883).

6. Compare L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1688-98 (2d ed. 1988) and Glennon & Nowack, *A Functional Analysis of the Fourteenth Amendment “State Action” Requirement*, 1976 SUP. CT. REV. 221 (federal state action decisions are not unitary; they mask a balancing of competing rights) with Leedes, *State Action Limitations on Courts and Congressional Power*, 60 N.C.L. REV. 747, 751-52 (1982) (state action is a unitary and necessary limit on judicial and congressional power).

7. See, e.g., *The Civil Rights Act of 1964*, 42 U.S.C. §§ 2000a-2000h-6 (1988), which prohibits, inter alia, private discrimination in housing, education and employment. Some states also have passed civil rights statutes that do not require any showing of state action. See, e.g., MASS. GEN. LAWS ANN. ch. 12, §§ 11H-11I (West 1986). Other statutes protect rights from private infringement in specific circumstances. See, e.g., CAL. LAB. CODE § 1152 (West 1989) (guaranteeing labor organizers access to private labor camps); MINN. STAT. ANN. § 211 B.20 (West Supp. 1990) (guaranteeing political candidates access to multiple dwellings).

Some common law doctrines, such as the traditional procedural restrictions on the ability of lienors to seize property or the obligation of common carriers to serve all customers, also may be seen as promoting basic norms of equality and due process. Such common law has also been a source of protection for speech rights. See, e.g., *Commonwealth v. Richardson*, 313 Mass. 632, 48 N.E.2d 678 (1943); *State v. Shack*, 58 N.J. 287, 277 A.2d 369 (1971). Nevertheless, these statutes and doctrines do not cover all circumstances in which private actors may infringe basic rights. See, e.g., *Illinois Migrant Council v. Campbell Soup Co.*, 574 F.2d 374, 378-79 (7th Cir. 1978).

8. In recent years this disparity has become more obvious and problematic as corporations and other private entities have grown in size and power. Moreover, governments have increasingly provided goods and services similar to those provided by private entrepreneurs, and simultaneously have “privatized” such activities as mail delivery and prison operations, which traditionally have been government responsibilities.

mixed: some state courts have applied their state charters to private entities that clearly would not satisfy any federal definition of state action;⁹ others have construed similar provisions to apply only to state actors;¹⁰ while yet others followed a split approach, providing protection against quasi-private infringement of some rights but not others,¹¹ or have vacillated, alternately rejecting and embracing traditional state action limitations in cases raising similar legal and factual issues.¹²

While some part of this divergence among states can be readily explained by obvious, well-documented and non-controversial differences in their respective constitutional texts, history or traditions,¹³ in most cases these factors provide no clear answers. Absent clear textual or historical guidance, courts must decide whether other reasons or presumptions exist to counsel them in determining the applicability of ambiguous state constitutional provisions to arguably private infringers. The divergent state court decisions reflect sharp divisions among those jurisdictions as to the interpretation and legitimate role of state constitutional rights guarantees.

During the years surrounding *PruneYard*, several state courts issued decisions either abandoning the state action requirement or interpreting the requirement broadly so as to apply their respective bills of rights to a range of private defendants, including shopping centers,¹⁴ universities,¹⁵ insurance companies,¹⁶ banks,¹⁷ utilities,¹⁸ private clubs¹⁹ and possessory

9. California, New Jersey and Pennsylvania are the most prominent of states applying guarantees to private action. See *infra* notes 50-60, 127-29, 135-48, 170-72 & 190-92 and accompanying text.

10. Connecticut and Michigan are among the most resistant. See *infra* notes 70-71, 118, 166, and accompanying text.

11. New York and Texas appear to follow a split approach. Compare *infra* text accompanying notes 64 & 83-85 (Texas takes a relatively expansive approach to speech guarantees) with *infra* text accompanying notes 119 & 123-25 (Texas continues to require some level of state action for equality guarantees). Compare *infra* text accompanying note 72 (New York requires an ostensibly traditional degree of state action for speech claims) with *infra* text accompanying notes 178-89 (New York creates an expansive definition of state action for due process claims).

12. Massachusetts and Washington illustrate this phenomenon. See *infra* text accompanying notes 61-62 & 76, respectively.

13. See *infra* text accompanying notes 37-48, 98-110, 155-62, 203-05 & 218.

14. E.g., *Batchelder v. Allied Stores Int'l*, 388 Mass. 83, 445 N.E.2d 590 (1983); *Alderwood Assocs. v. Washington Env'tl. Council*, 96 Wash. 2d 230, 635 P.2d 108 (1981) (plurality opinion).

15. E.g., *State v. Schmid*, 84 N.J. 535, 423 A.2d 615 (1980), *appeal dismissed*, 455 U.S. 100 (1982); *Peper v. Princeton Univ. Bd. of Trustees*, 77 N.J. 55, 389 A.2d 465 (1978); *Commonwealth v. Tate*, 495 Pa. 158, 432 A.2d 1382 (1981).

16. E.g., *Hartford Accident & Indem. Co. v. Insurance Comm'r*, 505 Pa. 571, 482 A.2d 542 (1984); *Welsch v. Aetna Ins. Co.*, 343 Pa. Super. 169, 494 A.2d 409 (1985).

lienors.²⁰ In the last several years, however, this trend has reversed. A majority of recent decisions have held,²¹ and many commentators have argued,²² that state guarantees of individual rights do not apply to any significant number of potential infringers not already included within the federal definitions of state actors. Where courts have continued to reach expansive results, they have done so on narrow grounds, either adopting

17. *E.g.*, *King v. South Jersey Nat'l Bank*, 66 N.J. 161, 330 A.2d 1 (1974).

18. *E.g.*, *Gay Law Students Ass'n v. Pacific Tel. and Tel. Co.*, 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979).

19. *E.g.*, *Burning Tree Club, Inc. v. Bainum*, 305 Md. 53, 501 A.2d 817 (1985). *See also* *Jonathan Club v. California Coastal Comm'n*, 197 Cal. App. 3d 884, 243 Cal. Rptr. 168 (1988).

20. *E.g.*, *Sharrock v. Dell Buick-Cadillac, Inc.*, 45 N.Y.2d 152, 379 N.E.2d 1169, 408 N.Y.S.2d 39 (1978).

21. *E.g.*, *Fiesta Mall Venture v. Mecham Recall Comm.*, 159 Ariz. 371, 767 P.2d 719 (Ariz. Ct. App. 1988); *Schreiner v. McKenzie Tank Lines, Inc.*, 432 So. 2d 567 (Fla. 1983); *Woodland v. Michigan Citizens Lobby*, 423 Mich. 188, 378 N.W.2d 337 (1985); *Under 21 v. City of New York*, 65 N.Y.2d 344, 482 N.E.2d 1, 492 N.Y.S.2d 522 (1985); *Western Pa. Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co.*, 512 Pa. 23, 515 A.2d 1331 (1986); *Southcenter Joint Venture v. National Democratic Pol'y Comm.*, 113 Wash. 2d 413, 780 P.2d 1282 (1989); *Jacobs v. Major*, 139 Wis. 2d 492, 407 N.W.2d 832 (1987).

22. *See, e.g.*, *Dolliver, supra* note 3; *Ragosta, supra* note 3. *See also* *Simon, Independent But Inadequate: State Constitutions and Protection of Freedom of Expression*, 33 U. KAN. L. REV. 305 (1985) (criticizing expansive decisions in the speech context as *ad hoc* and as threatening balkanization of liberties); Note, *Post-Pruneyard Access to Michigan Shopping Centers: The "Malling" of Constitutional Rights*, 30 WAYNE L. REV. 93 (1983) [hereinafter Note, "*Malling*" of Constitutional Rights] (advocating retaining the state action limit in modified form); Comment, *supra* note 3, at 145-52 (criticizing expansive decisions as slighting property rights). *But see* *Cole, supra* note 3 (arguing that state courts should break free of federal analyses); *Friesen, supra* note 3 (arguing that California rights guarantees may apply to private infringers); *Margulies, A Terrible Beauty: Functional State Action Analysis and State Constitutions*, 9 WHITTIER L. REV. 723 (1988) (noting that state courts have not yet advanced convincing rationales or principled limits for expanding the application of state constitutional rights, but arguing that judicial intervention on behalf of individual rights is proper in some cases); *Skover, supra* note 3 (Washington state constitution imposes an affirmative duty on the state to preserve basic values from private infringement).

Recent reaffirmations of the need for a state action limitation on the scope of state bills of rights may be seen as part of a broader revisionist trend of scholars concerned over the possible adverse consequences of increasing reliance on and expansion of state constitutional rights. *See, e.g.*, *Hudnut, State Constitutions and Individual Rights: The Case for Judicial Restraint*, 63 DEN. U.L. REV. 85 (1985); *Maltz, False Prophet — Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429 (1988); *Maltz, The Dark Side of State Court Activism*, 63 TEX. L. REV. 995 (1985) [hereinafter *Maltz, Dark Side*].

definitions of state action only slightly broader than the federal definition²³ or avoiding the issue.²⁴

The reasons for this recent trend are not hard to discern. The underlying concern appears to be that if courts abandon threshold requirements of state action there will be no principled means to prevent the "constitutionalization" of an unacceptably broad range of private law and private relationships. More specifically, courts and commentators have argued that state action limits are required by the plain meaning of the particular state constitutional guarantees at issue, the framers' specific intent, general principles of constitutional interpretation, the need to preserve the competing rights of the allegedly infringing private parties, and in order to preserve an appropriate allocation of powers between courts and legislatures. Until these objections are resolved, few courts will follow the expansive lead of *PruneYard* and its progeny.²⁵

This article argues that there are no inherent or *a priori* reasons for generally imposing federal state action requirements onto state constitutional guarantees. To the contrary, where the text and history of a particular constitutional provision fail to show that it was intended to bind only the state government, alternative limits for appropriately delineating the circumstances in which state rights should apply can be established.²⁶ Part I of this article surveys the relevant state constitutional provisions and decisions, focusing on the three broad substantive areas of free speech,

23. See, e.g., *Sharrock v. Dell Buick-Cadillac, Inc.*, 45 N.Y.2d 152, 379 N.E.2d 1169, 408 N.Y.S.2d 39 (1978), discussed *infra* at text accompanying notes 178-89; *Jones v. Memorial Hosp. Sys.* 746 S.W.2d 891 (Tex. Ct. App. 1988), discussed *infra* at text accompanying notes 83-88.

24. See, e.g., *Lloyd Corp. v. Whiffen*, 89 Or. App. 629, 750 P.2d 1157 (1988), discussed *infra* at text accompanying notes 89-92.

25. This point was made explicit recently by the Washington Supreme Court, which refused to be swayed by "the recent writings of some legal commentators which present an array of theoretical arguments as to why they think that constitutional guarantees of individual liberties should not be limited to protecting against actions of the state," on the ground that constitutional interpretation "must spring not from pure intuition, but from a process that is at once articulable, reasonable and reasoned." *Southcenter Joint Venture v. National Democratic Pol'y Comm.*, 113 Wash. 2d 413, 427, 780 P.2d 1282, 1290 (1989) (citation omitted). Advocates of expansive interpretations of state bills of rights are presently at task to show that the rationale for such expansion is not a mere intuition, but is instead well grounded in history and reason.

26. Despite what may be its ultimate relevance, this article does not discuss whether or how "originalist" or "non-originalist" theories of interpretation should apply to state constitutions. It is assumed for purposes of argument that courts are bound to some extent to respect unambiguous constitutional texts and their drafters' clearly expressed intentions. See generally Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); Devlin, *Developments in the Law, 1986-1987 — Louisiana Constitutional Law*, 48 LA. L. REV. 335, 348-49 (1987); Maltz, *Dark Side*, *supra* note 22.

equal protection and due process. Part II critiques the arguments in favor of imposing a state action limitation on state constitutional rights and concludes that, while some limits on the scope of such rights are necessary, in most cases no compelling reasons for a threshold requirement of "state action" exist. Part III suggests an alternative set of limits on the application of state constitutional guarantees based on the nature of the parties and the competing rights involved.

II. STATE CONSTITUTIONS AND STATE ACTION: DIVERGENT TEXTS AND CONFLICTING CASELAW

A few basic principles govern interpretation of state constitutional rights. First, constitutional guarantees can be written to provide rights that even purely private parties may not infringe.²⁷ Second, state courts of last resort are the final authorities for the interpretation of their respective state constitutions and are free to interpret those state charters in ways that diverge from interpretations of the Constitution, even if the language is exactly the same.²⁸ Third, federal supremacy dictates that all state constitutional rights are subordinate to and may not be applied to conflict with federal statutory or constitutional rights.²⁹ Thus, state law may add to federal rights only if the additional rights granted to one litigant do not detract from the federally protected rights of another — a possibility that must always be considered when the conflict is between private parties.³⁰

27. For example, the thirteenth amendment forbids imposition of slavery or peonage by any person, regardless of the existence of state action. *See supra* note 5. Similar provisions clearly applicable to private action also exist in many state constitutions. *See, e.g.,* *Quinn v. Buchanan*, 298 S.W.2d 413, 419 (Mo. 1957) (interpreting MO. CONST. art. I, § 29); *Cooper v. Nutley Sun Printing Co.*, 36 N.J. 189, 196, 175 A.2d 639, 643 (1961) (discussing N.J. CONST. art. I, para. 19); *Mount Sinai Hospital v. Davis*, 18 Misc. 2d 311, 312, 190 N.Y.S.2d 870, 873 (N.Y. Sup. Ct. 1959) (discussing N.Y. CONST. art. I, § 17).

28. *See, e.g.,* *Breese v. Smith*, 501 P.2d 159, 167 (Alaska 1972); *People v. Brisendine*, 13 Cal. 3d 528, 548-52, 531 P.2d 1099, 1111-14, 119 Cal. Rptr. 315, 327-31 (1975); *Bulova Watch Co. v. Brand Distribs. of North Wilkesboro, Inc.*, 285 N.C. 467, 474, 206 S.E.2d 141, 146 (1974). If the state court expresses that it is not relying on federal law, the United States Supreme Court will not interfere unless the interpretation violates a federal right. *Michigan v. Long*, 463 U.S. 1032 (1983). *But cf.* *Right to Choose v. Byrne*, 91 N.J. 287, 301, 450 A.2d 925, 932 (1982) (emphasizing the persuasiveness of federal precedent and "the general advisability in a federal system of uniform interpretation of identical constitutional provisions").

29. U.S. CONST. art. VI, cl. 2.

30. For example, while state constitutions may require some private property owners to open their facilities to others, any attempt to require those property owners to sponsor or aid speakers presumably would infringe the owners' negative first amendment rights. *See Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1 (1986). *See also* Note, *Access to Private Fora and State Constitutions: A Proposed Speech and Property Analysis*, 46 ALB.

Since state constitutional rights operate only interstitially,³¹ whether they may be meaningfully applied to private infringers will depend upon the degree to which federal law has preempted the resolution of conflicts in a particular area. Despite the breadth of federal law, the "strategic space" available for state constitutional regulation is far from trivial in scope and importance. Since state law is the traditional and primary source for defining the private "property" and "liberty" interests protected by the federal due process clause, decisions imposing reasonable restraints on those interests in order to vindicate other state constitutional rights are legitimate exercises of the state's traditional regulatory authority and not impermissible interferences with federal law.³²

Although decisions regarding the application of state rights guarantees to private actors have arisen in many different factual and legal contexts, most cases have concerned three substantive issues: 1) whether private property owners can prohibit exercise of rights to speech, press, petition and assembly on their premises; 2) whether private entities may discriminate against members of disfavored groups; and 3) whether private creditors must afford their debtors some minimal due process before taking action against them. For purposes of clarity, this article reviews the constitutional texts and leading decisions in each of these areas *seriatim*.³³

L. REV. 1501, 1518-21 (1982) (discussing the conflict between speech and property rights in the shopping center context); Comment, *supra* note 3 (same).

31. Reference to the "interstitial" nature of state constitutional rights is not intended as a statement on whether state courts should adopt a "primacy" or "interstitial" approach to resolving cases where conduct arguably violates both federal and state constitutional norms. See Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980); Simon, *supra* note 22, at 315-18.

32. In *PruneYard*, the shopping center argued that requiring it to provide access to would-be speakers violated its property rights under the Constitution. On appeal, the United States Supreme Court held that no federal property rights were violated. Since the Constitution protects only property rights already created by state law and these rights are subject to reasonable state regulation, any burdens on the shopping center's property rights violate the Constitution only if they become so severe as to amount to an uncompensated "taking." *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82-85 (1980). See also *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (private commercial and fraternal organization enjoys first amendment associational rights, but those rights do not preclude application of a state anti-discrimination statute).

It has been argued that federal decisions since *PruneYard* have undercut its holding that the infringement of the shopping center owner's property rights was not so great as to constitute an uncompensated "taking." Comment, *supra* note 3, at 147-51 (discussing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) and *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987)).

33. State action issues have arisen in other contexts as well. For example, state guarantees of privacy have been particularly important. See, e.g., *Chico Feminist Women's*

A. *Speech, Petition and Private Property*

The first amendment facially prohibits only quintessentially governmental activity: passing any law to limit the freedoms it declares.³⁴ Although the United States Supreme Court once showed considerable willingness to expand the federal state action concept in order to vindicate freedoms of speech, assembly or petition,³⁵ those rights are not federally protected in the absence of state action, as currently defined.³⁶

1. State Constitutional Texts

Like their federal counterpart, virtually all state bills of rights guarantee freedom of speech and the press,³⁷ and the rights to peaceably assemble and petition for redress of grievances.³⁸ Although these provisions vary in form and wording, they can be grouped into three classes based on how clearly they indicate whether the rights granted are protected

Health Center v. Butte Glenn Medical Soc'y, 557 F. Supp. 1190, 1202 (E.D. Cal. 1983); *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123 (Alaska 1989); *People v. Zelinski*, 24 Cal. 3d 357, 594 P.2d 1000, 155 Cal. Rptr. 575 (1979); *Porten v. University of San Francisco*, 64 Cal. App. 3d 825, 829, 134 Cal. Rptr. 839, 842 (1976); *State v. Nelson*, 354 So. 2d 540 (La. 1978).

34. "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

35. In *Marsh v. Alabama*, 326 U.S. 501, 504-09 (1946), and *Amalgamated Food Employees v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 316-20 (1968), the Court held that since the privately owned company town and shopping center, respectively, had functionally replaced the traditional business district as a forum for expression, the properties were infused with a "public function" and the private owners were required to respect individuals' rights to engage in first amendment activities. The Court also has indicated that private civil suits charging violation of state tort law could implicate state action, at least if the state laws involved were applied to chill first amendment rights. *See, e.g.*, *NAACP v. Claiborne Hardware*, 458 U.S. 886, 916 n.51 (1982); *New York Times v. Sullivan*, 376 U.S. 254, 265 (1964).

36. The Court has held that the actions of private schools and private sector labor unions do not involve sufficient government action to require that they respect the free speech interests of their employees or members despite the significant degree of governmental regulation and de facto private coercive power present in both cases. *See, e.g.*, *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *United Steelworkers of Am. v. Sadlowski*, 457 U.S. 102, 121 n.16 (1982). In a sequence of cases that influenced the recent resurgence of interest in state constitutional rights, the Court reversed precedent and held that the Constitution does not require private owners of public shopping centers to permit the public to exercise first amendment freedoms on their premises. *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

37. Only the Delaware Constitution contains no explicit guarantee of freedom of speech. However, it grants a right to freedom of the press. DEL. CONST. art. I, § 5.

38. The constitutions of Minnesota and New Mexico do not explicitly guarantee the freedoms of petition or assembly.

from only government interference. For example, some states guarantee freedom of speech³⁹ and freedom of assembly and petition⁴⁰ with language that tracks the first amendment by providing only that "no law" shall be passed curtailing speech, or otherwise indicating that they apply only to governmental entities. Not surprisingly, state courts have consistently construed such provisions to require state action.⁴¹

In contrast to these few provisions, the language used by most states to guarantee speech, press, assembly and petition do not clearly indicate whether they apply to non-governmental infringers. For example, the freedoms of speech and press are guaranteed in many states through the simple statement that citizens have a right to "freely speak, write and publish on all subjects, being responsible for abuse of that liberty." Nineteen constitutions rely on this or similar language. The statement may appear alone,⁴² or combined with other language relating only to the press or libel.⁴³ Likewise, a majority of assembly and petition guarantees do not explicitly limit their application to government interference. Rather, these provisions usually state that citizens "have a right" to peaceably assemble

39. HAW. CONST. art. I, § 4; IND. CONST. art. I, § 9; OR. CONST. art. I, § 8; R.I. CONST. art. I, § 21; S.C. CONST. art. I, § 2; UTAH CONST. art. I, § 15; VA. CONST. art. I, § 12; W. VA. CONST. art. III, § 7.

40. HAW. CONST. art. I, § 4; IND. CONST. art. I, § 31; LA. CONST. art. I, § 9; N.Y. CONST. art. I, § 9; OR. CONST. art. I, § 26; R.I. CONST. art. I, § 21; S.C. CONST. art. I, § 2; VA. CONST. art. I, § 12.

41. See, e.g., *Reiter v. American Legion*, 189 Misc. 1053, 72 N.Y.S.2d 345 (N.Y. Sup. Ct. 1947); *State v. Spencer*, 289 Or. 225, 611 P.2d 1147 (1980). But see *Lloyd Corp. v. Whiffen*, 89 Or. App. 629, 634-35, 750 P.2d 1157, 1160 (1988) (court's action of issuing an injunction against persons seeking to exercise speech and petition rights within a large private shopping center constitutes sufficient "state action" to implicate the state constitutional guarantee of free speech); see *infra* notes 63-67. See Note, *Private Abridgment of Speech and the State Constitutions*, 90 YALE L.J. 165, 182 (1980) (even speech provisions phrased like the first amendment should not be interpreted to require state action).

42. ALASKA CONST. art. I, § 5; ARIZ. CONST. art. II, § 6; IDAHO CONST. art. I, § 9; WASH. CONST. art. I, § 5. See generally Utter, *The Right to Speak, Write and Publish Freely: State Constitutional Protection Against Private Abridgement*, 8 PUGET SOUND L. REV. 157, 171-80 (1985) (discussing the text and origins of the Washington speech guarantee).

Five other states use language in their constitutions differing from the standard provision quoted, yet they also appear to confer a right beyond prohibiting governmental restraints. See MASS. CONST. pt. I, art. 16 (as amended by MASS. CONST. amend. LXXVII 1948); MISS. CONST. art. III, § 13; N.H. CONST. pt. I, art. 22; N.C. CONST. art. I, § 14; VT. CONST. ch. I, art. 13th.

43. ARK. CONST. art. II, § 6; ILL. CONST. art. I, § 4; KAN. CONST. Bill of Rights, § 11; KY. CONST. Bill of Rights, § 1, 8; MD. CONST. Declaration of Rights, art. 40; MINN. CONST. art. I, § 3; NEB. CONST. art. I, § 5; N.D. CONST. art. I, § 4; S.D. CONST. art. VI, § 5; WYO. CONST. art. I, § 20.

and petition for redress of grievances,⁴⁴ or that such rights “shall never be abridged.”⁴⁵ The class of potential infringers to whom that command is addressed is not explicitly limited. Thus the plain texts of these constitutional provisions provide no mandate for limiting their application by a threshold requirement of state action.

In the final group of states, the textual language is arguably somewhat ambiguous because the constitutions contain more than one relevant provision. In these states, guarantees of speech and press like those quoted above appear with other language that parallels the Constitution or clearly refers to government action. One state constitution separates the two provisions,⁴⁶ while in others they are combined as separate clauses or sentences within a single provision.⁴⁷ For “dual” state constitutional guarantees of this type, purely textual arguments about their application to non-governmental actors depend on whether the two statements are read separately or together. If read together, as a reiteration of the same guarantee in different forms, the explicit restrictions in one statement could be considered implicit in the other. But if a statement regarding the right “to speak and publish freely” is read as an independent grant and not as mere surplusage, there is cause for construing that portion of the state’s

44. ALA. CONST. art. I, § 25; CAL. CONST. art. I, § 3; COLO. CONST. art. II, § 24; CONN. CONST. art. I, § 14; DEL. CONST. art. I, § 16; FLA. CONST. art. I, § 5; GA. CONST. art. I, § 1, para. 9; IDAHO CONST. art. I, § 10; ILL. CONST. art. I, § 5; IOWA CONST. art. I, § 20; KAN. CONST. Bill of Rights, § 3; KY. CONST. Bill of Rights, § 1; ME. CONST. art. I, § 15; MD. CONST. Declaration of Rights, art. 13 (no express provision regarding right to assemble); MASS. CONST. pt. 1, art. XIX; MICH. CONST. art. I, § 3; MO. CONST. art. I, § 9; MONT. CONST. art. II, § 6; NEV. CONST. art. I, § 10; N.H. CONST. pt. I, art. XXXII; N.J. CONST. of 1947 art. I, para. 18; N.C. CONST. art. I, § 12; N.D. CONST. art. I, § 5; OHIO CONST. art. I, § 3; OKLA. CONST. art. II, § 3; PA. CONST. art. I, § 20; R.I. CONST. art. I, § 21; TENN. CONST. art. I, § 23 (no express provision regarding the right to petition); TEX. CONST. art. I, § 27; VT. CONST. ch. I, art. 20th.

45. ALASKA CONST. art. I, § 6; ARIZ. CONST. art. II, § 5; ARK. CONST. art. II, § 4; MISS. CONST. art. III, § 11; NEB. CONST. art. I, § 19; S.D. CONST. art. VI, § 4; WASH. CONST. art. I, § 4; W. VA. CONST. art. III, § 16; WIS. CONST. art. I, § 4; WYO. CONST. art. I, § 21.

46. CONN. CONST. art. I, §§ 4, 5.

47. Most of these state provisions combine the affirmative statement with a direct prohibition on laws restraining speech. ALA. CONST. art. I, § 4; COLO. CONST. art. II, § 10; FLA. CONST. art. I, § 4; GA. CONST. art. I, para. 5; IOWA CONST. art. I, § 7; LA. CONST. art. I, § 7; ME. CONST. art. I, § 4; MICH. CONST. art. I, § 5; MO. CONST. art. I, § 8; MONT. CONST. art. II, § 7; NEV. CONST. art. I, § 9; N.J. CONST. of 1947 art. I, para. 6; N.M. CONST. art. II, § 17; N.Y. CONST. art. I, § 8; OHIO CONST. art. I, § 11; OKLA. CONST. art. II, § 22; PA. CONST. art. I, § 7; TENN. CONST. art. I, § 19; TEX. CONST. art. I, § 8; VA. CONST. art. I, § 12; WIS. CONST. art. I, § 3. In California, the “dual guarantee” is combined with additional matters. CAL. CONST. art. I, § 2.

guarantee as a right enforceable against any infringer rather than just a privilege against governmental interference.⁴⁸

2. Caselaw: Is State Action Required?

Several courts in the late 1970's and early 1980's capitalized on the expansive possibilities offered by the absence of explicit language requiring state action, applying their state's speech, petition and assembly guarantees to limit the power of certain private property owners to prohibit expressive or political activities on their premises.⁴⁹

The first and most celebrated of these cases was *Robins v. Pruneyard Shopping Center*,⁵⁰ which held that the guarantees of freedom of speech and petition in the California Constitution precluded the owner of a large private shopping center from closing that facility to otherwise orderly persons soliciting signatures for a petition addressed to the President and Congress. The United States Supreme Court previously held that such shopping centers did not involve state action and thus were not required by the Constitution to permit first amendment activity on their premises.⁵¹ Despite this, the court in *PruneYard* concluded that state guarantees of speech and petition could apply to private actors of this type. The California court declined to follow federal precedent essentially because of the divergent wording of the state's constitutional provisions and the special importance of "liberty of speech" in that state.⁵² However, the

48. *But see* *Jacobs v. Major*, 139 Wis. 2d 492, 505-07, 407 N.W.2d 832, 836-37 (1987) (the "plain meaning" of such a "dual" constitutional guarantee of speech is that it applies only to government infringement). *See infra* note 203.

49. For discussion of these cases see Ragosta, *supra* note 3, at 4-20; *Developments, supra* note 3, at 1401-03; Comment, *State Constitutional Rights of Free Speech on Private Property: The Liberal Loophole*, 18 GONZ. L. REV. 81 (1982-83).

50. 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd*, 447 U.S. 74 (1980).

51. *Hudgens v. NLRB*, 424 U.S. 507 (1976). Under federal law today private actors who perform "public functions" are bound by federal constitutional rights only if the public function is both "traditionally exclusively reserved to the State" and "traditionally associated with sovereignty." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352-53 (1974). The California Supreme Court also had previously adopted a similarly restrictive interpretation of the state constitution. *Diamond v. Bland*, 11 Cal. 3d 331, 521 P.2d 460, 113 Cal. Rptr. 468, *cert. denied*, 419 U.S. 885 (1974) (following federal precedent and concluding that state constitutional rights of speech and petition do not outweigh the property interests of a shopping center owner).

52. 23 Cal. 3d at 908-09, 592 P.2d at 346-47, 153 Cal. Rptr. at 859-60. The California Constitution guarantees freedom of speech through a single two-part provision: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." CAL. CONST. art. I, § 2. Although the court in *PruneYard* did not expressly discuss the point, it evidently interpreted these two sentences as independent sources of right: one

court was less explicit about its reasons for applying the state constitution. Although the court discussed the practical importance of shopping centers as one of the few places where people congregate and may effectively exercise expressive or petitioning rights, it did not clarify whether it rejected a state action requirement or simply broadened the federal definition of "state action" to embrace the peculiar facts of the case.⁵³

Subsequent California cases have not yet clarified the meaning of *PruneYard*. Most lower California courts have interpreted the case as abolishing the state action requirement in this context⁵⁴ and many also have shown a willingness to extend *PruneYard* to cases involving private infringers other than shopping center owners.⁵⁵ Others have indicated

parallel to the Constitution and the other intentionally going beyond that model. The court also relied on the state constitution's separate provision guaranteeing the right to petition: "The people have the right to instruct their representatives, petition government for the redress of grievances, and assemble freely to consult for the common good." CAL. CONST. art. I, § 3.

53. 23 Cal. 3d at 910 n.5, 592 P.2d at 346-47 n.5, 153 Cal. Rptr. at 859-60 n.5. Although the court emphasized that it was not considering "the property or privacy rights of an individual homeowner or proprietor of a modest retail establishment," it is not clear whether the court meant that in such cases the state constitutional rights found in *PruneYard* would not apply, or that the type of time, place and manner restrictions imposed depend on the nature of the private property involved.

54. See, e.g., *Horton Plaza Assocs. v. Playing for Real Theatre*, 184 Cal. App. 3d 10, 228 Cal. Rptr. 817 (1986), *appeal dismissed*, 736 P.2d 319, 236 Cal. Rptr. 905 (1987) (state constitution confers "affirmative expressive rights upon California citizens which they may exercise upon private property where they have a right to be," subject only to time, place and manner restrictions); *Leach v. Drummond Medical Group, Inc.*, 144 Cal. App. 3d 362, 375, 192 Cal. Rptr. 650, 658 (1983) (same). *But see Laguna Publishing Co. v. Golden Rain Found.*, 131 Cal. App. 3d 816, 838, 182 Cal. Rptr. 813, 825-26 (1982), *appeal dismissed*, 459 U.S. 1192 (1983) (noting the ambiguity in *PruneYard* but interpreting that case as simply broadening the definition of state action rather than abandoning the requirement entirely).

Most courts and commentators have interpreted *PruneYard* as abandoning any state action requirement. See, e.g., *Alderwood Assocs. v. Washington Env'tl. Council*, 96 Wash. 2d 230, 241-43, 635 P.2d 108, 114-15 (1981); *Ragosta*, *supra* note 3, at 4-7. *But see Note, Robins v. PruneYard Shopping Center: Free Speech Access to Shopping Centers Under the California Constitution*, 68 CALIF. L. REV. 641, 657-58 (1980) [hereinafter *Note, Robins*] (noting California's retention of modified state action requirements in the due process context and reading *PruneYard* similarly); *Note, Free Speech, Initiative and Property in Conflict — Four Alternatives to the State Action Requirement in Washington*, 58 WASH. L. REV. 587, 592-93 (1983) [hereinafter *Note, Four Alternatives*] (interpreting *PruneYard* as adopting a definition for state action similar to pre-*Hudgens* federal law).

55. See *Leach v. Drummond Medical Group, Inc.*, 144 Cal. App. 3d 362, 375-76, 192 Cal. Rptr. 650, 659 (1983) (incorporated private medical group with a de facto monopoly within a particular area); *Laguna Publishing Co. v. Golden Rain Found.*, 131 Cal. App. 3d 816, 182 Cal. Rptr. 813 (1982), *appeal dismissed*, 459 U.S. 1192 (1983) (private walled residential community). See also *Press v. Lucky Stores, Inc.*, 34 Cal. 3d 311, 667 P.2d 704,

hostility to such an extension.⁵⁶ Nevertheless, California law is clear: at least some large private entities must respect speech and petition rights as if those entities were state actors; these entities may impose time, place and manner restrictions on the exercise of such rights only to the same degree and for the same purposes as permitted to government entities;⁵⁷ and the right of access, which was originally recognized to protect petitioning and other forms of political activity, has been extended to protect other forms of speech as well.⁵⁸

In the wake of the United States Supreme Court's affirmance of *PruneYard*, the highest courts of New Jersey,⁵⁹ Pennsylvania⁶⁰ and Washington⁶¹ rendered decisions abandoning a threshold requirement of

193 Cal. Rptr. 900 (1983) (impliedly approving extension of *PruneYard* to a small shopping center).

56. See, e.g., *Franklin v. Leland Stanford Junior Univ.*, 172 Cal. App. 3d 322, 342 n.8, 218 Cal. Rptr. 228, 240 n.8 (1985) (in dictum, declining to independently apply the state constitution to a private university).

57. See, e.g., *H-CHH Assocs. v. Citizens for Representative Gov't*, 193 Cal. App. 3d 1193, 1208, 238 Cal. Rptr. 841, 850 (1987), *cert. denied*, 485 U.S. 971 (1988) (holding that *PruneYard* "did not establish a new standard of reasonableness to be applied to private property" and subjecting the shopping center to the same rigorous review of its proposed time, place and manner restrictions as would be applied to government regulation of speech); *Horton Plaza Assocs. v. Playing for Real Theatre*, 184 Cal. App. 3d 10, 228 Cal. Rptr. 817 (1986), *appeal dismissed*, 736 P.2d 319, 236 Cal. Rptr. 905 (1987) (same).

58. See, e.g., *Northern Cal. Newspaper Organizing Comm. v. Solano Assocs.*, 193 Cal. App. 3d 1644, 239 Cal. Rptr. 227 (1987) (labor union's distribution within shopping center of literature concerning labor dispute protected by California Constitution); *Laguna Publishing Co. v. Golden Rain Found.*, 131 Cal. App. 3d 816, 837-38, 182 Cal. Rptr. 813, 825-26 (1982), *appeal dismissed*, 459 U.S. 1192 (1983) (rights extend to commercial speech).

59. *State v. Schmid*, 84 N.J. 535, 569, 423 A.2d 615, 633 (1980), *appeal dismissed sub nom. Princeton Univ. v. Schmid*, 455 U.S. 100 (1982). See generally Note, *supra* note 30, at 1512-18. See also *Zelenka v. Benevolent and Protective Order of Elks*, 129 N.J. Super. 379, 324 A.2d 35 (App. Div.), *certif. denied*, 66 N.J. 317, 331 A.2d 17 (1974) (violates public policy to permit a purely private club to expel a member solely because of free speech rights).

60. *Commonwealth v. Tate*, 495 Pa. 158, 175, 432 A.2d 1382, 1391 (1981) (holding that the state guarantees of freedom of speech and assembly precluded enforcement of trespass laws against persons peacefully handing out leaflets at a public event on a private college campus).

This decision was significantly limited in *Western Pa. Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co.*, 512 Pa. 23, 515 A.2d 1331 (1986), where the court held that the state constitution did not require a large private shopping mall to permit access for a political candidate seeking signatures on a nominating petition.

61. *Alderwood Assocs. v. Washington Envtl. Council*, 96 Wash. 2d 230, 243-44, 635 P.2d 108, 115-16 (1981). The court held, in a plurality opinion garnering four votes, that state action is not required for claims brought under the speech and initiative provisions of the state constitution. Accordingly, the owners of a large private shopping center could not exclude a nondisruptive group soliciting signatures on an initiative petition.

state action for claims arising under their state guarantees of speech, assembly and petition. Massachusetts abandoned the requirement with respect to petitioning activities protected by a related state constitutional guarantee of free and fair elections.⁶² Appellate courts in Oregon⁶³ and Texas,⁶⁴ also have recently rendered similarly expansive decisions that apply state constitutional speech and petition rights to limit infringement by private actors.⁶⁵ In each case however, the state court failed to provide a complete rationale for departing from a state action requirement. Instead the opinions restated only uncontroversial points: that the rights at stake were traditionally regarded as particularly important; that state courts may interpret their constitutions independently of federal law; that the state constitutional provisions in issue included no express language requiring state action; and that state courts, unburdened by federalism concerns or the need for nationally uniform rules, can exercise greater interpretive freedom than federal courts.⁶⁶ But these factors only establish

From its inception, the analysis and results in *Alderwood* have been hotly debated. See, e.g., Dolliver, *supra* note 3; Skover, *supra* note 3, at 241-47; Utter, *supra* note 42, at 181-89; Note, *Four Alternatives*, *supra* note 54, at 594-608. See also Lobsenz & Swanson, *The Residential Tenant's Right to Freedom of Expression*, 10 U. PUGET SOUND L. REV. 1, 20-27 (1986) (advocating expansion of the *Alderwood* analysis to tenants).

The Washington Supreme Court has recently modified *Alderwood* in *Southcenter Joint Venture v. National Democratic Pol'y Comm.*, 113 Wash. 2d 413, 780 P.2d 1282 (1989). See *infra* note 76.

62. *Batchelder v. Allied Stores Int'l, Inc.*, 388 Mass. 83, 445 N.E.2d 590, 593 (1983). This decision was limited in *Commonwealth v. Hood*, 389 Mass. 581, 452 N.E.2d 188 (1983), indicating that state action is required for claims arising under the state constitutional guarantee of free speech.

63. *Lloyd Corp. v. Whiffen*, 89 Or. App. 629, 750 P.2d 1157 (1987), *aff'd*, 307 Or. 674, 773 P.2d 1294 (1989) (finding sufficient "state action" to trigger the state speech guarantee merely because the private shopping center owner could seek a court injunction to enforce his decision to exclude political speakers from the premises). See *infra* text accompanying notes 89-90.

64. *Right to Life Advocates, Inc. v. Aaron Women's Clinic*, 737 S.W.2d 564, 567 (Tex. Ct. App. 1987), *cert. denied*, 109 S. Ct. 71 (1988) (based on *PruneYard*, *Schmid*, *Tate* and *Alderwood*, "[a]lthough private property is involved in this case, it is not determinative of" a claim of violation of the Texas constitutional guarantee of free speech).

65. The Supreme Court of Alaska also has hinted at such a result. *Johnson v. Tait*, 774 P.2d 185, 190 (Alaska 1989) (state constitutional guarantee of free speech did not apply to preclude a private bar owner from prohibiting patrons from wearing motorcycle club colors on the premises because the small proprietor's right of autonomy outweighed the patron's constitutional right of expression, leaving open the question of how these competing rights would be balanced in the context of shopping centers or other similar fora).

66. See, e.g., *Batchelder*, 388 Mass. at 87-93, 445 N.E.2d at 592-95; *State v. Schmid*, 84 N.J. 535, 553-60, 423 A.2d 615, 624-28 (1980), *appeal dismissed sub nom.* *Princeton Univ. v. Schmid*, 455 U.S. 100 (1982); *Commonwealth v. Tate*, 495 Pa. 158, 168-73, 432 A.2d 1382, 1387-90 (1981); *Alderwood Assocs. v. Washington Env'tl. Council*, 96 Wash. 2d 230, 234-44, 635 P.2d 108, 111-16 (1981).

that state courts may interpret state action differently than the Supreme Court; they do not indicate whether state action should be required and, if so, how it should be defined. As to these points, the courts decided only that each case presented a conflict of private rights that the court should resolve on the merits.⁶⁷

In contrast, other states that considered the issue, including North Carolina,⁶⁸ Oklahoma,⁶⁹ Connecticut,⁷⁰ Michigan,⁷¹ New York,⁷² Wisconsin,⁷³ Arizona⁷⁴ and, apparently, Missouri,⁷⁵ concluded that their constitutional guarantees of speech, assembly, petition and related rights do not extend beyond prohibiting government infringement, and do not grant any right of access to private property.⁷⁶ Courts that have taken such restrictive approaches have articulated a number of reasons for their refusal to interpret their constitutions more broadly than the Bill of Rights. Prominent among those rationales are the courts' contentions that extending state constitutional rights beyond protection against the government violates a general principle of American constitutional law,⁷⁷ that

67. In *Alderwood*, the court explicitly noted that the absence of constraints applicable under federal law allowed the state court to "evaluate in each case the actual harm to the speech and property interests" at stake in the case. 96 Wash. 2d at 243, 635 P.2d at 115. In other decisions, a similar view of the court's role is implied by the extensive balancing of the competing interests and the concern for fashioning time, place and manner restrictions to maximize both parties' interests.

68. *State v. Felmet*, 302 N.C. 173, 273 S.E.2d 708, 711 (1981). See Simon, *supra* note 22, at 327-28 (the North Carolina provision "reads more affirmatively than most").

69. *Oklahomans For Life, Inc. v. State Fair of Okla., Inc.*, 634 P.2d 704, 708 n.15 (Okla. 1981).

70. *Cologne v. Westfarms Assocs.*, 192 Conn. 48, 469 A.2d 1201 (1984).

71. *Woodland v. Michigan Citizens Lobby*, 423 Mich. 188, 378 N.W.2d 337 (1985).

72. *Shad Alliance v. Smith Haven Mall*, 66 N.Y.2d 496, 488 N.E.2d 1211, 498 N.Y.S.2d 99 (1985).

73. *Jacobs v. Major*, 139 Wis. 2d 492, 407 N.W.2d 832 (1987).

74. *Fiesta Mall Venture v. Mecham Recall Comm.*, 159 Ariz. 371, 767 P.2d 719 (1988).

75. *Kugler v. Ryan*, 682 S.W.2d 47, 51 (Mo. Ct. App. 1984).

76. In addition, Washington, one of the states that had initially upheld a right of access to private property subsequently held that the state's speech and assembly guarantees do require state action. *Southcenter Joint Venture v. National Democratic Pol'y Comm.*, 113 Wash. 2d 413, 780 P.2d 1282 (1989). *Southcenter* did not disavow the result in *Alderwood*, but it did explicitly overrule the plurality's reasoning. In *Southcenter* the court followed Justice Dolliver's concurring opinion in *Alderwood* by drawing a sharp distinction between guarantees in the state declaration of rights and other provisions of the state constitution. However, in light of the court's vociferous insistence in *Southcenter* that applying guarantees against private action would be "to act contrary to the fundamental nature" of state constitutions, this distinction between rights is tenuous.

77. See, e.g., *Woodland v. Michigan Citizens Lobby*, 423 Mich. 188, 204-05, 378 N.W.2d 337, 344 (1985); *Shad Alliance v. Smith Haven Mall*, 66 N.Y.2d 496, 502-03, 488 N.E.2d 1211, 1215, 498 N.Y.S.2d 99, 103 (1985); *Southcenter*, 113 Wash. 2d at 422-23,

such an extension would ignore the particular historical origins of the provisions, and the framers' intentions,⁷⁸ that such an extension would result in arbitrary distinctions between large and small businesses,⁷⁹ that the rights of private property owners would be disproportionately impaired,⁸⁰ and that the legislature should balance such conflicting rights.⁸¹

3. Caselaw: How Should State Action Be Defined?

Courts that interpret state constitutional guarantees of speech and petition to require state action differ in defining the requirement. While some courts adhere closely to federal precedent,⁸² other courts expand their definition to include entities not considered state actors under the federal constitution.

For example, in *Jones v. Memorial Hospital System*⁸³ the Texas Court of Appeals considered a nurse's claim that she was discharged from a large private hospital in retaliation for writing a newspaper article, thereby violating her right of free speech under the Texas Constitution. The court did not decide whether the state constitution applied to wholly private entities, but did hold that the affirmative provisions of the Texas Constitu-

780 P.2d at 1286-87; *Alderwood Assocs. v. Washington Envtl. Council*, 96 Wash. 2d 230, 347-53, 635 P.2d 108, 118-19 (1981) (Dolliver, J., concurring); *Jacobs*, 139 Wis. 2d at 506-13, 407 N.W.2d at 837-41.

78. *Cologne v. Westfarms Assocs.*, 192 Conn. 48, 60-62, 469 A.2d 1201, 1207-08 (1984); *Woodland*, 96 Mich. 2d at 204-09 & n.25, 378 N.W.2d at 345-46 & n.25; *Shad Alliance*, 66 N.Y.2d at 500, 504 n.6, 488 N.E.2d at 1213-14, 1216 n.6, 498 N.Y.S.2d at 101-02, 104 n.6. However, the justices do not always interpret the historical record similarly. See, e.g., *Shad Alliance*, 66 N.Y.2d at 510-11, 488 N.E.2d at 1220-21, 498 N.Y.S.2d at 108-09 (Wachtler, J., dissenting).

79. See, e.g., *Cologne*, 192 Conn. at 64, 469 A.2d at 1209; *Jacobs*, 139 Wis. 2d at 518, 407 N.W.2d at 843.

80. See, e.g., *Woodland*, 423 Mich. at 210-11, 378 N.W.2d at 347 (citing L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1149 (1st ed. 1978)); *Southcenter*, 113 Wash. 2d at 430, 780 P.2d at 1290-91.

81. See, e.g., *Cologne*, 192 Conn. at 65, 469 A.2d at 1210; *Woodland*, 423 Mich. at 211-12, 378 N.W.2d at 347-48; *Shad Alliance*, 66 N.Y.2d at 504-05, 488 N.E.2d at 1216-17, 498 N.Y.S.2d at 105; *Southcenter*, 113 Wash. 2d at 425-26, 780 P.2d at 1288-89; *Alderwood*, 96 Wash. 2d at 250, 635 P.2d at 119 (Dolliver, J., concurring).

82. No state court is bound to adopt federal standards in interpreting their own state constitutions. Even courts that rely heavily on federal precedent in defining government action acknowledge that it is only persuasive authority. *Schreiner v. McKenzie Tank Lines Inc.*, 432 So. 2d 567, 569 (Fla. 1983). Some courts have been persuaded by the extensively developed, though often confusing, federal "state action" jurisprudence. See, e.g., *Cologne*, 192 Conn. 48, 469 A.2d 1201; *State v. Felmet*, 302 N.C. 173, 273 S.E.2d 708 (1981).

83. 746 S.W.2d 891 (Tex. Ct. App. 1988) (reversing the trial court's grant of summary judgment in favor of the defendant hospital on the ground that it was not a state actor). Cf. *Gibbons v. State*, 775 S.W.2d 790 (Tex. Ct. App. 1989) (treating a private driveway as a non-public forum for speech purposes).

tion permitted it to "adopt a test that requires a lower threshold of public activity."⁸⁴ Applying this lower threshold, the court stated if the hospital was "substantially involved with state and federal activity" it should be treated as a public entity for state constitutional purposes.⁸⁵ Plaintiff's allegations, which if proved would satisfy the state action requirement, amounted to commonplace factors such as state licensing and regulation of the hospital, state and federal grants to the hospital, and a number of contractual and other relationships with the government. The decision to terminate the nurse's employment was made independently by the managers of the hospital without involvement by state officials.⁸⁶

The result in *Jones* would have been different if the court had applied federal standards. Where state action is alleged on the basis of "entanglement" between the government and private actor, a plaintiff who wishes to state a federal constitutional claim must show that the state is "responsible" for the "specific conduct" of the private entity because of its exercise of coercive power or significant encouragement. Mere acquiescence by the state in decisions independently reached by private parties is insufficient to imbue them with "state action."⁸⁷ Under this definition, the United States Supreme Court has held that entities similar to the defendant hospital in *Jones* will not be regarded as "state actors" for federal constitutional purposes absent the kind of official involvement that apparently was not alleged in *Jones*.⁸⁸

The Oregon Court of Appeals recently reached a result similar to *Jones* by effectively expanding the definition of state action. *Lloyd Corp. v. Whiffen*⁸⁹ held that the state constitution's free speech guarantee precluded a state judge from enjoining a political speech and signature gathering in a large shopping center.⁹⁰ The court avoided a direct confrontation with the state action question. However, since all private rights are ultimately defined and enforced by courts, a finding of state action based on nothing more than one private citizen seeking judicial

84. *Id.* at 895. The relevant provision in the Texas Bill of Rights is a "dual" provision. The first clause states that "[e]very person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege," and the second clause provides that "no law shall ever be passed curtailing the liberty of speech or of the press." TEX. CONST. art. I, § 8.

85. 746 S.W.2d at 895.

86. *Id.* at 895-96.

87. See, e.g., *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); *Moose Lodge No. 107 v. Iris*, 407 U.S. 163, 176-77 (1972).

88. *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Blum*, 457 U.S. 991.

89. 89 Or. App. 629, 750 P.2d 1157 (1988), *aff'd*, 307 Or. 674, 773 P.2d 1294 (1989).

90. *Id.* at 632, 750 P.2d at 1159.

assistance to protect his rights against violation by another private citizen would considerably expand the concept of state action. While the United States Supreme Court once appeared to embrace such a theory for certain federal constitutional purposes,⁹¹ today such facts would be insufficient to find state action under the first amendment.⁹²

B. *Private Discrimination and the Equality Ideal*

The issue of whether state constitutional guarantees of equal protection create rights enforceable against non-governmental entities has aroused far less judicial activity and scholarly scrutiny than have speech and private property rights.⁹³ In light of federal and state statutes specifically requiring private and government actors to treat some disfavored classes equally, it is unlikely that state constitutional law will play a dominant role in this field. However, the statutes do not protect all persons, and there are indications that some state courts are expanding the class of arguably private entities constitutionally required to treat others equally.⁹⁴

The fourteenth amendment unequivocally states that it applies only to government activity;⁹⁵ accordingly, the Supreme Court has never wavered

91. *Barrows v. Jackson*, 346 U.S. 249 (1953) (judicial award of damages for breach of a racially restrictive covenant constituted state action); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (judicial enforcement of a racially restrictive covenant constituted state action under the fourteenth amendment).

92. Although the above cases were not overruled, courts have not followed them. They are best understood as a response to the unique problems of racial discrimination and the balance of substantive rights at issue in those cases. See, e.g., Glennon & Nowack, *supra* note 6, at 238-43; Henkin, *Shelley v. Kraemer: Notes For a Revised Opinion*, 110 U. PA. L. REV. 473, 474-79 (1962); Leedes, *supra* note 6, at 763-70.

93. Issues regarding the origin and substantive interpretation of state constitutional equality guarantees have received substantial scholarly attention. See, e.g., Schuman, *The Right to "Equal Privileges and Immunities: A State's Version of "Equal Protection,"* 13 VT. L. REV. 221 (1988); Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195 (1985). However, few commentators have directly addressed the issue of whether such guarantees are limited by any state action requirement. See, e.g., Heins, *supra* note 3, at 349-65; Note, *Burning Tree*, *supra* note 3, at 1240-46; Note, *Pathways*, *supra* note 3, at 125-26.

94. The lack of statutory protection of women and of gay and lesbian individuals, for example, has forced these groups to explore the possibility that state constitutions might afford relief from private actors. See, e.g., *Gay Law Students Ass'n v. Pacific Tel. and Tel. Co.*, 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979); *Peper v. Princeton Univ. Bd. of Trustees*, 77 N.J. 55, 389 A.2d 465 (1978) (gender discrimination).

95. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

The Constitution contains no language expressly prohibiting the federal government from denying equal protection of the laws to citizens. However, a prohibition on federal discrimination, paralleling the prohibition of state discrimination under the fourteenth amendment, has been read into the "due process" clause of the fifth amendment.

in its holding that private discrimination is beyond its scope. While the Supreme Court once demonstrated a willingness to expand the boundaries of the state action concept to reach cases of racial discrimination,⁹⁶ the Burger Court's restrictive approach to the state action concept in other contexts today extends to federal equality rights as well.⁹⁷

1. State Constitutional Texts

State constitutional provisions guaranteeing equality are so variable in their wording as to defy definite categorization.⁹⁸ Nevertheless, as with state constitutional guarantees of speech and petition, state equality provisions can be grouped according to the extent to which they facially indicate whether they apply to private conduct.⁹⁹ Some either expressly state¹⁰⁰ or clearly imply¹⁰¹ an intent to restrict only discrimination by some

Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). The fifth amendment, like the fourteenth amendment, was intended to restrict only government action.

96. In cases such as *Reitman v. Mulkey*, 387 U.S. 369 (1967), *Evans v. Newton*, 382 U.S. 296 (1966), *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 724-25 (1961), *Terry v. Adams*, 345 U.S. 461 (1953), and *Shelley v. Kraemer*, 334 U.S. 1 (1948), the Court articulated several new and expansive theories by which otherwise private entities were held to be sufficiently related to the state to be required to observe fourteenth amendment norms of racial neutrality. Although the Court has never stated that the threshold for state action would vary depending on the nature of the constitutional rights allegedly infringed, it has been noted that the Court at one time appeared more willing to find state action in racial discrimination cases. See *Gay Law Students Ass'n*, 24 Cal. 3d at 473 n.9, 501 P.2d at 601-02 n.9, 156 Cal. Rptr. at 23-24 n.9.

97. See, e.g., *San Francisco Arts and Athletics v. United States Olympic Comm.*, 483 U.S. 522 (1987); *Moose Lodge v. Irvis*, 407 U.S. 163 (1972); *Evans v. Abney*, 396 U.S. 435 (1970).

98. However, courts have tended to interpret these facially divergent provisions in ways that render them similar in substance. See generally *Williams*, *supra* note 93.

99. Some commentators have argued that such differences in phrasing are significant in determining whether a particular practice violates the provision. See, e.g., *Williams*, *supra* note 93, at 1210-12 (arguing that provisions prohibiting "discrimination" in the exercise of civil rights implies broader substantive protection than is given under the federal equal protection doctrine); Note, *Pathways*, *supra* note 3, at 125-26. As discussed below, it does not appear that such variances in wording are often determinative of whether a provision can apply to private actors. See *infra* notes 111-36 and accompanying text. Nevertheless, the cases indicate that the phrasing of the state guarantee may have some impact on the arguments raised, and state provisions will be grouped in this fashion for clarity.

100. N.H. CONST. art. 2d; PA. CONST. art. I, § 26; VA. CONST. art. I, § 11. Virginia also relies on a separate constitutional provision prohibiting special legislation. VA. CONST. art. IV, § 14. Virginia's constitution, however, grants no greater protection than the federal Constitution. See, e.g., *Boyd v. Bulala*, 647 F. Supp. 781, 786 (W.D. Va. 1986). Cf. *Carson v. Maurer*, 120 N.H. 925, 930-31, 424 A.2d 825, 830 (1980) (locating the state equal

level of government upon a showing of state action. Other provisions impose explicit obligations on private as well as government actors.¹⁰²

Unlike state guarantees of speech and petition, however, the majority of state equality provisions do not facially indicate whether state action is required. Such provisions can be classified into two groups: those following the federal Constitution by phrasing the right as a right to "equal protection of the law;"¹⁰³ and those that phrase the right as one of "equality under the law," "equality before the law," or the equivalent.¹⁰⁴ In addition, many state constitutions lack express constitutional guarantees of equality, instead reading such rights into more general constitutional language including guarantees of "natural" or "inalienable" rights,¹⁰⁵ or due process;¹⁰⁶ requirements that laws shall have "uniform operation;"¹⁰⁷

protection guarantee in the combination of articles 2d and 12th of the New Hampshire Constitution).

101. See, e.g., LA. CONST. art. I, § 3; N.C. CONST. art. I, § 19; R.I. CONST. art. I, § 2. The Louisiana Bill of Rights also contains a separate provision prohibiting discrimination in access to public accommodations, LA. CONST. art. I, § 12, which was intended by its drafters to apply to private infringements. See generally Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 6-10, 37-40 (1974).

102. ALASKA CONST. art. I, §§ 1 & 3; MONT. CONST. art. II, § 4; N.Y. CONST. art. I, § 11. Surprisingly, some of these provisions also have been interpreted to require state action, despite their texts. See *infra* notes 111-12 and accompanying text.

103. CAL. CONST. art. I, § 7; CONN. CONST. art. I, § 20; GA. CONST. art. I, § 1, para. 2; HAW. CONST. art. I, § 5; ILL. CONST. art. I, § 2; ME. CONST. art. I, § 6-A; MICH. CONST. art. I, § 2; S.C. CONST. art. I, § 3. See Margulies, *A Lawyer's View of the Connecticut Constitution*, 15 CONN. L. REV. 107, 108-09 (1982) (identifying three additional sections of the Connecticut Constitution that also protect rights of equality to some degree).

104. ARK. CONST. art. II, § 3; FLA. CONST. art. I, § 2; MASS. CONST. Declaration of Rights, art. I; MO. CONST. art. I, § 2; N.M. CONST. art. II, § 18; TEX. CONST. art. I, § 3a. Several states also have adopted separate constitutional provisions explicitly prohibiting discrimination based on gender, the majority of which guarantee equality of rights "under the law," regardless of sex. See, e.g., MD. CONST. Declaration of Rights, art. 46; N.M. CONST. art. II, § 18; PA. CONST. art. I, § 28; WASH. CONST. art. XXXI, § 1. For background and discussion of the various provisions, see generally Comment, *Equal Rights Provisions: The Experience Under State Constitutions*, 65 CALIF. L. REV. 1086 (1977).

105. See, e.g., Colorado Anti-Discrimination Comm'n v. Case, 151 Colo. 235, 380 P.2d 34 (1962) (construing COLO. CONST. art. II, § 3); State *ex rel.* Tomasic v. Kansas City, 237 Kan. 572, 583, 701 P.2d 1314, 1326 (1985) (KAN. CONST. art. I, § 1); State v. Michalski, 221 Neb. 380, 384, 377 N.W.2d 510, 514 (1985) (NEB. CONST. art. I, § 1); Peper v. Princeton Univ. Bd. of Trustees, 77 N.J. 55, 79, 389 A.2d 465, 477 (1978) (N.J. CONST. of 1947 art. I, para. 1); Milwaukee Brewers Baseball Club v. Wisconsin Dep't of Health and Social Serv., 130 Wis. 2d 79, 83, 387 N.W.2d 254, 256 (1986) (WIS. CONST. art. I, § 1).

106. See, e.g., State v. Good Samaritan Hosp., 299 Md. 310, 326-27 n.7, 473 A.2d 892, 900 n.7 (Ct. App. 1984) (MD. CONST. Declaration of Rights, art. 23); Thompson v. Estate of Petroff, 319 N.W.2d 400 (Minn. 1982) (MINN. CONST. art. I, § 2); T.I.M. Co. v. Oklahoma Land Title Ass'n, 698 P.2d 915, 920-21 (Okla. 1984) (OKLA. CONST. art. II, § 7); Nichols v. Tullahoma Open Door, Inc., 640 S.W.2d 13, 18 (Tenn. 1982) (TENN. CONST. art. I, § 8); State *ex rel.* Harris v. Calendine, 160 W. Va. 172, 179 233 S.E.2d 318, 324

denials of "arbitrary power;"¹⁰⁸ populist inspired provisions initially drafted to forbid granting of special privileges or emoluments,¹⁰⁹ or a combination of several of these or other state constitutional rights.¹¹⁰ Not surprisingly, these provisions provide little unambiguous textual guidance as to whether state action should be required.

2. Caselaw: Is State Action Required?

A great majority of state courts have held that state constitutional equality provisions require state action. They have done so regardless of

(1977) (W. VA. CONST. art. III, § 10). In Mississippi, the situation is unclear. *See, e.g., Genesco, Inc. v. J.C. Penny Co.*, 313 So. 2d 20 (Miss. 1975) (rejecting a challenge to Sunday closing laws as violative of due process and equal protection under the fourteenth amendment and MISS. CONST. art. 3, § 14, without clearly construing the reach of the state provision).

107. *See, e.g., Malan v. Lewis*, 693 P.2d 661, 669-70 (Utah 1984) (UTAH CONST. art. I, § 24).

108. *See, e.g., Pattie A. Clay Infirmary Ass'n v. First Presbyterian Church*, 605 S.W.2d 52, 55 (Ky. App. 1980). (KY. CONST. Bill of Rights, § 2).

109. Such provisions generally state that "no law shall be passed" granting any citizen or class of citizens "privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." *See, e.g., Valley Nat'l Bank of Phoenix v. Glover*, 62 Ariz. 538, 554-55, 159 P.2d 292, 299 (1945) (ARIZ. CONST. art. 2, § 13); *Cunningham v. Aluminum Co. of Am.* 417 N.E.2d 1186, 1191 (Ind. 1981) (IND. CONST. art. I, § 23); *Waterloo v. Selden*, 251 N.W.2d 506, 509 (Iowa 1977) (IOWA CONST. art. I, § 6); *State v. Buckley*, 16 Ohio St. 2d 128, 133, 243 N.E.2d 66, 70 (1968), *appeal dismissed and cert. denied*, 395 U.S. 163 (1969) (OHIO CONST. art. I, § 2); *State v. Freeland*, 295 Or. 367, 370-72, 667 P.2d 509, 512 (1981) (OR. CONST. art. I, § 20); *Roden v. Solem*, 411 N.W.2d 421, 422 (S.D. 1987) (S.D. CONST. art. VI, § 18); *Darrin v. Gould*, 85 Wash. 2d 859, 868, 540 P.2d 882, 887-88 (1975) (WASH. CONST. art. I, § 12).

Similar provisions exist in the constitutions of several other states, including some that guarantee equality or freedom from discrimination in more familiar language. *See, e.g.,* CONN. CONST. art. I, §§ 1 & 20; KY. CONST. Bill of Rights, § 3; VA. CONST. art. I, § 4. On the origin and development of such provisions, see generally Schumann, *supra* note 93, at 222-26; Williams, *supra* note 93, at 1206-08.

110. *See, e.g., Hueytown v. Jiffy Chek Co.*, 342 So. 2d 761, 762 (Ala. 1977) (construing a general right of equality from the combination of ALA. CONST. art. I, §§ 1, 6 & 22, which respectively concern inalienable rights, due process and criminal procedural rights, and forbidding "special privileges"); *State v. Russell*, 103 Idaho 699, 700, 652 P.2d 203, 204 (1982) (construing a general equality guarantee from the combination of IDAHO CONST. art. I, §§ 1, 13, & 18, which respectively speak of inalienable rights, due process and access to courts for the redress of injuries); *State v. Eighth Judicial Dist. Ct.*, 101 Nev. 658, 708 P.2d 1022 (1985) (construing NEV. CONST. art. I, § 1 & art. IV, § 21, which respectively address inalienable rights and uniform application of laws); *Nygaard v. Robinson*, 341 N.W.2d 349, 357 & n.1 (N.D. 1983) (construing N.D. CONST. art. 1, §§ 21 & 22, which respectively forbid special privileges and require general laws to be uniform in operation). *Cf. Du Pont v. Family Court*, 153 A.2d 189, 192 (Del. 1959) (construing a right to non-discriminatory access to courts from DEL. CONST. art. I, §§ 7 & 9, which concern due process and access to courts, respectively).

how the provision in issue is framed. In one extreme example involving a gender discrimination claim against a large civic organization, the Alaska Supreme Court held, despite a state equality guarantee expressly placing its "obligations" on "all persons," that a showing of government action was, nevertheless, a prerequisite for any claim brought thereunder.¹¹¹ In so holding, the court did not define the "all persons" language, nor did it present any evidence of the intentions of the state constitution's drafters or ratifiers. Rather, the decision invoked a general axiom of "American constitutional theory" that constitutions restrain governments only.¹¹²

Although arguably ambiguous on their faces,¹¹³ equality guarantees framed like the federal Constitution in terms of "equal protection of the laws," have been universally construed to apply only to state actors. In *Gay Law Students Association v. Pacific Telephone and Telegraph Co.*,¹¹⁴ the

111. *United States Jaycees v. Richardet*, 666 P.2d 1008, 1013 (Alaska 1983) (challenging the association's policy of excluding women from membership, as, *inter alia*, violative of ALASKA CONST. Declaration of Rights, art. I, §§ 1 & 3).

112. *Richardet*, 666 P.2d at 1013. The court cited no authority for this axiom other than its own dictum in a prior case. *See also* *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E.2d 541 (1949). In this early case involving a race discrimination claim against a large privately owned but state aided urban redevelopment project, the New York Court of Appeals construed a rather complex constitutional equality provision, N.Y. CONST. art. I, § 11. The court held that to the extent the guarantee is phrased in terms of a right to "equal protection of the laws," it applied only to governmental actors. Despite the existence of other language indicating an intent to protect civil rights from private as well as government discrimination, the New York court relied on what it took to be "the plain meaning of plain words." In addition, it relied on the identity of language between the state and federal provisions and on some historical evidence that the framers of the New York provision intended to track the substantive scope of the fourteenth amendment to reach that result. *Dorsey*, 299 N.Y. at 530-31, 87 N.E.2d at 548.

113. Most of these provisions consist of only a statement of the right without further elaboration or restriction. In five states, the equality guarantee is combined in a single section with a guarantee of due process. CAL. CONST. art. I, § 7; HAW. CONST. art. I, § 5; ILL. CONST. art. I, § 2; ME. CONST. art. I, § 6-A; N.M. CONST. art. II, § 18. In another seven constitutions, the equality provision appears either alone or in combination with other matters. ARK. CONST. art. II, § 3; CONN. CONST. art. I, § 20; FLA. CONST. art. I, § 2 (combined with a guarantee of inalienable rights and other matters); MASS. CONST. Declaration of Rights, art. I (combined with a guarantee of inalienable rights); MICH. CONST. art. I, § 2; S.C. CONST. art. I, § 3 (due process and inalienable rights); TEX. CONST. art. I, § 3a. In either case, nothing on the face of the provisions, other than that they refer to equality "of the laws," seems to suggest that only state actors must observe their precepts.

Other state guarantees are written to obligate the government to enforce the right to equality, but do not indicate against whom this enforcement is to be directed. GA. CONST. art. I, § 1, para. 2; MO. CONST. art. I, § 2. While these provisions expressly refer to governments rather than to private actors, it is not clear that they bar only government infringements. Indeed, if these provisions are construed to impose an affirmative governmental duty to prevent discriminatory action by non-governmental actors, they could have the same effect as an equality guarantee directly enforceable against private infringers.

114. 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979).

California Supreme Court recognized that the state's equal protection guarantee, though phrased in terms of "equal protection of the laws," differed from its federal counterpart in that it contained no explicit requirement of government action.¹¹⁵ The court, nevertheless, held that a limitation should be read into the state constitution because the drafting history of the equality provision failed to demonstrate a specific intention on the part of the drafters to reach private conduct.¹¹⁶ Courts in Illinois, Michigan and Connecticut, which also have constitutional guarantees phrased in terms of "equal protection of the laws," reached similar conclusions on less analysis. The Illinois Appellate Court relied on no more than the assertion, without citation, that "[i]t is fundamental" that state constitutional guarantees "apply only to governments and not to individuals."¹¹⁷ The Michigan District Court and the Connecticut Supreme Court relied on a reaffirmation, without discussion, that the state and federal equal protection provisions "have the same meaning and the same limitations."¹¹⁸ The unexpressed presumption appears to be that a state constitutional provision framed in the same words as a federal provision was intended to apply exactly like its federal model.

State equality provisions phrased in terms of "equality under the law"

115. *Id.* at 468, 595 P.2d at 598, 156 Cal. Rptr. at 20.

116. *Id.* (relying on *Kruger v. Wells Fargo Bank*, 11 Cal. 3d 352, 366-67, 521 P.2d 441, 449-50, 113 Cal. Rptr. 449, 457-58 (1974) (similar conclusion in the context of a claim of violation of the due process protections of the state constitution)). The argument that the record's silence speaks against applying the constitutional guarantee to non-governmental actors is somewhat persuasive in the context of a claim brought under the California constitution's guarantee of due process before the 1974 amendments. The relevant language existed as part of what was then article I, section 13, a provision that explicitly referred to criminal procedural rights and other matters that only a state could infringe. The implication that the due process guarantee was originally implicitly limited to state action, and that any attempt to broaden its applicability by amendment should have been indicated in the amendment's history, seems persuasive in that context. However, such an argument is less persuasive with respect to that state constitution's guarantee of equal protection, which was essentially a new provision.

117. *Aldridge v. Boys*, 98 Ill. App. 3d 803, 808, 424 N.E.2d 886, 889 (1981).

118. *Caldor's, Inc. v. Bedding Barn Inc.*, 177 Conn. 304, 314, 417 A.2d 343, 349 (1979); *Lockwood v. Killian*, 172 Conn. 496, 500, 375 A.2d 998, 1001 (1977) (quoting *Karpv. Zoning Bd. of Stamford*, 156 Conn. 287, 295, 240 A.2d 845, 849 (1968)). *See also Schroederv. Dayton-Hudson Corp.*, 448 F. Supp. 910, 915 (E.D. Mich. 1977), *modified in part*, 456 F. Supp. 650 (E.D. Mich. 1979) (equal protection clause in the state constitution was intended to provide same rights as its federal counterpart).

The courts' reliance in *Caldor's* and *Schroeder* on this principle of substantive identity between state and federal provisions seems less than a complete answer to the issue in those cases. Although two provisions forbid the same substantive conduct, in the absence of the explicit "state action" language limiting its federal counterpart, it does not necessarily follow that they must apply to exactly the same classes of potential infringers. *See infra* notes 220-21 and accompanying text.

also have been interpreted as applying only to governmental actors. Courts in Texas,¹¹⁹ Florida¹²⁰ and Maryland¹²¹ held that state equality guarantees framed in this fashion implicitly apply only to state actors. Several other states have implied as much.¹²² Although both the Texas and Florida courts argued that restrictive readings were required in order to comply with their framers' intent, neither provided persuasive documentation that the drafters did in fact intend to impose such a government action limitation.¹²³ The conclusion that government action of some kind is required seems to have resulted more from the courts' various perceptions that the phrase "under the law" implicitly refers to some kind of government action,¹²⁴ that it would be a radical departure from prior law to

119. See, e.g., *Lincoln v. Mid-Cities Pee Wee Football Ass'n*, 576 S.W.2d 922, 925 (Tex. Civ. App. 1979); *Junior Football Ass'n of Orange v. Gaudet*, 546 S.W.2d 70, 71 (Tex. Civ. App. 1976). See also *Zentgraf v. Texas A. & M. Univ.*, 492 F. Supp. 265, 272 (S.D. Tex. 1980).

120. *Schreiner v. McKenzie Tank Lines & Risk Mgmt. Servs. Inc.*, 408 So. 2d 711, 715-16 (Fla. Dist. Ct. App. 1982), *aff'd*, 432 So. 2d 567 (Fla. 1983). The Florida Constitution contains two separate statements regarding equality within a single section. The first states that "[a]ll natural persons are equal before the law," and the second that "[n]o person shall be deprived of any right because of race, religion or physical handicap." FLA. CONST. art. I, § 2. The appellate opinion focused on the interpretation of the latter clause. 408 So. 2d at 716-17. The Florida Supreme Court's affirmance focused on the former. 432 So. 2d at 569-70. See *infra* notes 133-34 and accompanying text.

121. *Burning Tree Club, Inc. v. Bainum*, 305 Md. 53, 63-64, 501 A.2d 817, 822-23 (1985).

122. See, e.g., *United States Jaycees v. Massachusetts Comm. Against Discrimination*, 391 Mass. 594, 609 n.9, 463 N.E.2d 1151, 1160 n.9 (1984); *Garcia v. Albuquerque Public Schools Bd. of Educ.*, 95 N.M. 391, 393, 622 P.2d 699, 701 (1980); *MacLean v. First Nw. Indus. of Am., Inc.*, 96 Wash. 2d 338, 347, 635 P.2d 683, 688 (1981).

123. *Lincoln*, 576 S.W.2d at 925; *Junior Football Ass'n*, 546 S.W.2d at 71. The Florida court referred only to comments from the floor debate of the Constitutional Revision Committee to the effect that "the section was intended to function in a manner similar to" the fourteenth amendment. *Schreiner*, 408 So. 2d at 716.

124. *Schreiner*, 408 So. 2d at 715-16; *Lincoln*, 576 S.W.2d at 925; *Junior Football Ass'n*, 546 S.W.2d at 71. The court in *Schreiner* was the most explicit in relying on such a construction of the language: "The first sentence [of the Florida equal protection clause] specifically states that all persons 'are equal before the law.' This clause indicates that this section deals with the relationship between the people and the state." *Schreiner*, 408 So. 2d at 715.

The court in *Lincoln* seems to have reached essentially the same conclusion by the negative argument that the framers of the Texas constitution had not clearly indicated to the contrary that application to non-governmental entities was intended. *Lincoln*, 576 S.W.2d at 925. The opinion in *Junior Football Ass'n*, later quoted and followed in *Lincoln* and *Zentgraf*, was even more laconic, confining itself to a conclusory statement that "under the law" meant that the discrimination be by state action or private conduct "encouraged by, enabled by, or closely interrelated in function with state action." *Junior Football Ass'n*, 546 S.W.2d at 71. It appears that these courts reasoned that any reference to "law" is implicitly a restriction to applications against those who make, interpret or enforce the law.

interpret the state constitution to apply to non-governmental infringers, and that it would risk infringing on individuals' cultural and religious views, particularly in cases alleging gender discrimination.¹²⁵ The Maryland court was even more laconic, stating only that its state equal rights amendment does not, "of course," apply unless the requirements of the government action doctrine are met.¹²⁶

While clearly dominant, this trend is not unanimous. The Pennsylvania Supreme Court held that state action in its federal sense is irrelevant to a claim brought under a state equal rights amendment phrased in terms of "equality under the law."¹²⁷ The court determined that the amendment must be interpreted on its own terms, in light of its own language. The court did not give any general definition of the phrase "under the law" or discuss whether the phrase should be interpreted to impose a requirement of government action. Instead, it held only that the state provision applied in a case in which the private insurer made the operative rate-setting decision on its own and the state's involvement was limited to the Insurance Commissioner's approval of those discriminatory rates.¹²⁸ Despite the court's reticence, however, if it is willing to find the constitutional guarantee applicable under such circumstances, it has effectively read the phrase "under the law" out of the provision as a meaningful threshold restriction. In any event, subsequent lower court decisions in Pennsylvania

125. *Lincoln*, 576 S.W.2d at 925. While the validity of such arguments will be discussed below, *see infra* notes 254-68 and accompanying text, it is worth noting that the defendants in all of these cases were not private individuals but large institutions or associations with significant state contacts.

126. *Burning Tree Club, Inc. v. Bainum*, 305 Md. 53, 63, 501 A.2d 817, 822 (1985). Although the opinion of the court spoke for only a three judge majority, it appears that the court was unanimous that some sort of state action doctrine must apply. *See Note, Burning Tree, supra* note 3.

127. *Hartford Accident & Indem. Co. v. Insurance Comm'r*, 505 Pa. 571, 586, 482 A.2d 542, 549 (1984). The court held that plaintiff's challenge to a private insurer's automobile insurance rates, which discriminated on the basis of gender, stated a claim under the Pennsylvania Equal Rights Amendment. That provision, in words virtually identical to its Texas and Florida counterparts, provides that "[e]quality of rights under the law shall not be denied or abridged . . . because of the sex of the individual." PA. CONST. art. I, § 28. *Hartford* effectively overruled the prior appellate decision in *Murphy v. Harleysville Mut. Ins. Co.*, 282 Pa. Super. 244, 257, 422 A.2d 1097, 1104 (1980), *cert. denied*, 454 U.S. 896 (1981), which has been cited in academic literature for the proposition that the Pennsylvania Equal Rights Amendment applies only to state action. *Id.* *See also* *Welsch v. Aetna Ins. Co.*, 343 Pa. Super. 169, 174, 494 A.2d 409, 412 (1985) (after *Hartford*, "*Murphy* must now be viewed as no longer followed with respect to its analysis of the E.R.A.").

128. *Hartford Accident*, 505 Pa. at 586, 482 A.2d at 549.

concluded that claims under the state constitution need not always allege any degree of government or official involvement at all.¹²⁹

Where a state constitutional guarantee of equality is not express, but construed from other provisions, textual arguments shed little light on the question whether the guarantee applies to private infringers. However, it does appear that equality protections derived from due process clauses or other provisions prohibiting the passage of any "law" inconsistent with their terms, implicitly require some form of government action to invoke their protections. In contrast, equality rights inferred out of guarantees of inalienable rights may stand on a different footing. A number of state cases during the pre-incorporation period applied such generalized guarantees of fundamental rights against private as well as governmental infringers.¹³⁰ Nothing in the language or the concept of "inherent," "natural" or "inalienable" rights requires restriction of only governmental infringers.

Regardless of such arguments from text, however, most state guarantees of this type also have been interpreted to apply only to government actors. The Supreme Court of Arizona, for example, held that the guarantee of equality that has been read into that state's due process provision must be interpreted like the fourteenth amendment to apply only to state action.¹³¹ In *Schreiner v. McKenzie Tank Lines and Risk Management Services, Inc.*,¹³² the Supreme Court of Florida similarly rejected arguments that the "inalienable rights" and "deprivation" clauses, which guarantee basic rights under the state's constitution, might apply to private as well as government infringements.¹³³ While recognizing that nothing in the language of those clauses mandated any state action requirement, the court in *Schreiner* held that the historical record did not make it clear that the constitution's drafters intended or communicated to the public an intention to engage in what the court deemed a "major policy change."¹³⁴

129. *Welsch*, 343 Pa. Super. at 174, 494 A.2d at 412; *Bartholomew v. Foster*, 115 Pa. Commw. 430, 437, 541 A.2d 393, 396 (1988). Since both of these cases, like *Hartford*, involved the heavily regulated insurance industry, it is possible that the "equality under the law" language may apply only to private institutions that are heavily regulated by the state, perform important public functions or are otherwise connected with the state. However, the Pennsylvania courts have not yet announced any such restriction.

130. See *infra* notes 232-44 and accompanying text.

131. *Niedner v. The Salt River Project Agric. Improvement & Power Dist.*, 121 Ariz. 331, 332, 590 P.2d 447, 448 (1979). The court gave no reasons for this conclusion but merely stated that the state constitution is to be interpreted like the fourteenth amendment.

132. 432 So. 2d 567 (Fla. 1983).

133. *Id.* at 569-70 (construing FLA. CONST. art. 1, § 2, which also provides that "[a]ll persons are equal before the law").

134. *Id.* As the court itself noted, however, at least some evidence from the historical

At least one exception to this trend may exist for provisions of this type also. The Supreme Court of New Jersey, which has read an equality guarantee into an "inalienable rights" provision, held in *Peper v. Princeton University Board of Trustees*,¹³⁶ that a female employee could maintain an action for sex discrimination against a private university directly under that provision. Unfortunately, the court, like the Pennsylvania court in *Hartford*, did not explain in detail why government action was not required. The court noted only that it was necessary to permit Peper's claim in order to prevent the rights guaranteed by the inalienable rights provision from being rendered "hollow."¹³⁶

3. Caselaw: How Should State Action Be Defined?

As with state speech and petition rights, courts that have interpreted state equality guarantees to apply against only state actors differ as to defining that requirement. Most state courts followed federal precedents.¹³⁷ Some courts, however, have accepted the argument that a showing of state action is required, but have defined that requirement expansively to reach certain powerful private actors.

For example, in the *Gay Law Students* decision mentioned above, the California Supreme Court considered whether a public utility's refusal to hire homosexuals violated their state constitutional right to "equality under the law."¹³⁸ Although the utility was privately owned, the court

record indicated that an expansive interpretation was intended. *Id.* at 570. *Cf.* *State ex rel. Nyitray v. Industrial Comm'n of Ohio*, 2 Ohio St. 3d 173, 175, 443 N.E.2d 962, 964 (1983) (holding, in a case not raising state action issues, that the "limitations placed upon governmental action by the Equal Protection Clauses [of the state and federal governments] are essentially the same"); *Darrin v. Gould*, 85 Wash. 2d 859, 870-71, 540 P.2d 882, 889 (1975) (implying in dictum that government action is required for a claim either under WASH. CONST. art. I, § 12, which prohibits laws granting "special privileges and immunities," or under the state equal rights amendment).

135. 77 N.J. 55, 389 A.2d 465 (1978). For a further discussion of *Peper* see Note, *Pathways*, *supra* note 3, at 124-25.

136. *Peper*, 77 N.J. at 79-80, 389 A.2d at 477-78. *See also* *Gray v. Serruto Builders, Inc.*, 110 N.J. Super. 297, 305-06, 265 A.2d 404, 409 (Ch. Div. 1970) (finding as an alternative holding that the non-discrimination clause of the New Jersey constitution, N.J. CONST. of 1947 art. I, §§ 1 & 9, is applicable to a claim of racial discrimination against a private landlord).

137. *See, e.g.*, *Lockwood v. Killian*, 172 Conn. 496, 500-07, 375 A.2d 998, 1001-04 (1977); *Pattie A. Clay Infirmary Ass'n v. First Presbyterian Church*, 605 S.W.2d 52 (Ky. App. 1980); *Burning Tree Club, Inc. v. Bainum*, 305 Md. 53, 501 A.2d 817 (1985); *Under 21 v. City of New York*, 65 N.Y.2d 344, 359-64, 482 N.E.2d 1, 7-10, 492 N.Y.S. 2d 522, 528-31 (1985).

138. *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 24 Cal. 3d 458, 466-75, 595 P.2d 592, 597-602, 156 Cal. Rptr. 14, 19-24 (1979). *See supra* notes 114-16 and accompanying text.

found sufficient “state action” to trigger state constitutional protection from the facts that the utility held a state franchise that gave it a near monopoly on telephone services, that it was subject to a high degree of state regulation, and that it enjoyed certain quasi-governmental powers such as the power of eminent domain.¹³⁹ The court also relied on the importance of the right to work, the degree of injury done to the plaintiffs, and the insulation that defendant’s monopoly status provided against attempts by the plaintiffs or the public to use ordinary market mechanisms to register disapproval of or effectively change the utility’s policies.¹⁴⁰ The utility’s decision not to employ homosexuals apparently was reached independently by the utility company since there was no allegation that any state official, law, or policy contributed to the decision.

It is clear, according to current law, that the facts in *Gay Law Students* would not demonstrate sufficient state action to trigger application of the fourteenth amendment. As the United States Supreme Court held in *Jackson v. Metropolitan Edison Co.*,¹⁴¹ state granted monopolies — even those which are subject to extensive public regulation and receive significant benefits from the state — do not, without more, constitute state actors.¹⁴² The additional element required to trigger constitutional rights, precisely what was absent in *Gay Law Students*, is some exercise of the state’s “coercive power” over the utility or some other “significant encouragement, either overt or covert,” of the particular decision of the private entity.¹⁴³ Mere state acquiescence in decisions independently reached even by regulated monopolies is not sufficient.

In departing from federal precedent, the court in *Gay Law Students* did not explicitly reject the reasoning or the results of the federal cases. The court also did not explain why or under what circumstances the concept of state action should be defined differently for state than for federal constitutional purposes. On the contrary, the court stated that federal cases on this question constituted persuasive precedent.¹⁴⁴ Moreover, it took pains to distinguish *Jackson* on its particular facts¹⁴⁵ and to find older

139. *Id.* at 469-70, 595 P.2d at 597-99, 156 Cal. Rptr. at 21-22.

140. *Id.* at 470-72, 595 P.2d at 599-600, 156 Cal. Rptr. at 21-22.

141. 419 U.S. 345 (1974).

142. *Id.* at 358; *See also* *San Francisco Arts & Athletics v. United States Olympic Comm.*, 483 U.S. 522 (1987); *Moose Lodge v. Irvis*, 407 U.S. 163 (1972).

143. *San Francisco Arts & Athletics*, 483 U.S. at 546.

144. *Gay Law Students*, 24 Cal. 3d at 472, 595 P.2d at 600, 156 Cal. Rptr. at 22.

145. *Id.* at 473 n.9, 595 P.2d at 601 n.9, 156 Cal. Rptr. at 23 n.9. The court noted that *Jackson* was inapposite because the right allegedly infringed in that case was less important than the issues of employment discrimination present in the instant case. Regardless of whether one agrees with this assessment of relative importance, it is clear that such

federal precedent that could arguably support its conclusion.¹⁴⁶ Nevertheless, *Gay Law Students* clearly expanded the federal definition of state action in result, if not in theory. While subsequent California decisions have refrained from aggressively extending the results in *Gay Law Students* to other situations or other rights,¹⁴⁷ a few lower California courts have expanded, at least covertly, the category of state actors required to observe state constitutional norms of non-discrimination.¹⁴⁸

California does not stand alone. Courts in other states, while refusing to find state action in the cases before them, also have implied that they could interpret their tests for state action more broadly than allowable under current federal law.¹⁴⁹

C. *Due Process and the Private Creditor*

The final area of inquiry concerns whether state constitutional guarantees against the taking of property without "due process" create procedural rights enforceable against private or quasi-private entities. This question, like the issue of the applicability of state equality guaran-

arguments go to the merits of the underlying dispute and have nothing to do with the threshold question of whether the defendant is a "private" or a "public" actor.

146. *Id.* at 472-73, 595 P.2d at 600-01, 156 Cal. Rptr. at 22-23 (discussing *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944) and *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)).

147. The decision in *Gay Law Students* continues to be good law in California. Some subsequent decisions, however, construe the *Gay Law Students* state action holding as applying only to the specific facts of the case. *See, e.g.*, *King v. Meese*, 43 Cal. 3d 1217, 1229 n.12, 743 P.2d 889, 896 n.12, 240 Cal. Rptr. 829, 837 n.12 (1987). California courts also have refused to extend the rationale in *Gay Law Students* beyond the equal protection context to other substantive state constitutional rights. *See, e.g.*, *Pasillas v. Agricultural Labor Relations Bd.*, 156 Cal. App. 3d 312, 349, 202 Cal. Rptr. 739, 760 (Cal. Ct. App. 1984), *appeal dismissed*, 469 U.S. 1145 (1985) (refusing to extend *Gay Law Students* to case claiming violation of the state constitutional rights to freedom of speech and association).

148. *See, e.g.*, *Jonathan Club v. California Coastal Comm'n*, 197 Cal. App. 3d 884, 243 Cal. Rptr. 168 (Cal. Ct. App. 1988), *appeal dismissed*, 488 U.S. 881 (1988). The court in *Jonathan Club* held that where a private club leased beachfront property from the state for the exclusive use of the club's members, the club was sufficiently "entangled" with the state to become a state actor for purposes of both the federal and the state equality guarantees, although nothing in the facts showed that any government official or policy had anything to do with "coercing" or "encouraging" the club's decision to discriminate.

149. *See, e.g.*, *Lincoln v. Mid-Cities Pee Wee Football Ass'n*, 576 S.W.2d 922 (Tex. Civ. App. 1979) (taking a "middle ground" approach by defining state action as any "private conduct [that] is encouraged by, enabled by or closely interrelated in function with state action"); *United States Jaycees v. Massachusetts Comm'n Against Discrimination*, 391 Mass. 594, 609 n.9, 463 N.E.2d 1151, 1160 n.9 (1984) (for state constitutional purposes court might "take a broader view of what constitutes State action than has the United States Supreme Court"). *See generally* Heins, *supra* note 3.

tees, has aroused comparatively little scholarly scrutiny.¹⁵⁰ Nonetheless, a few state courts have expanded the class of arguably private entities that are bound to provide the procedural safeguards of notice and an opportunity to be heard before depriving others of their interests in property.¹⁵¹ As was the case with the substantive rights already considered, the context and language of the fifth and fourteenth amendments, which guarantee that persons will not be deprived of "life, liberty, or property without due process of law," indicate that the prohibition was intended to apply only to government activity.¹⁵² While the United States Supreme Court repeatedly held that the federal due process clauses apply to some state aided attempts by private creditors to seize their debtors' assets,¹⁵³ it is equally clear that state action remains a threshold requirement for this substantive right as well.¹⁵⁴

1. State Constitutional Texts

Paralleling the United States Constitution, forty-four state constitutions contain explicit provisions guaranteeing that no one will be deprived

150. *But see* Berdon, *supra* note 3, at 53-54 (advocating a broadened definition of state action for state due process purposes); and Comment, *Civilian Thoughts On U.C.C. Section 9-503 Self-Help Repossession: Reasoning in a Historical Vacuum*, 42 LA. L. REV. 239, 264-266 (1981) (arguing that U.C.C. self-help remedies would violate the Louisiana due process guarantee).

The parallel question of whether creditors' self-help remedies constitute sufficient state action under the Constitution to trigger application of the fourteenth amendment's due process clause was considered in several influential articles in the 1970's. *See, e.g.*, Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment (Part III)*, 47 S. CAL. L. REV. 1 (1973); Mentschikoff, *Peaceful Repossession Under The Uniform Commercial Code: A Constitutional and Economic Analysis*, 14 WM. & MARY L. REV. 767 (1973).

151. Procedural due process has long been held to encompass two essential elements: "notice" at a meaningful time and in a meaningful manner; and an "opportunity to be heard" by an appropriate trier of fact. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (citing *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223 (1863)).

152. The due process clause of the fifth amendment is co-joined with other provisions governing criminal procedure and condemnation for public use, both of which are exclusively governmental activities. The provision was historically intended to restrict only the activities of the nascent federal power. The parallel clause of the fourteenth amendment is even more explicit, providing that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

153. *See, e.g.*, *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *Sniadach v. Family Finance Corp.* 395 U.S. 337 (1969).

154. *See, e.g.*, *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978). *Flagg Bros.* held that a warehouseman's sale of its debtor's property pursuant to statutory authorization did not constitute "state action" sufficient to trigger federal due process rights. The court distinguished the *Sniadach* line of cases on the ground that "[i]n each of those cases a government official participated in the physical deprivation." *Id.* at 160 n.10.

of life, liberty or property without due process of law or, in an older, equivalent phrasing, that such deprivations will not occur except in accord with the "law of the land."¹⁵⁵ The constitutions of twenty-five of those states indicate that some kind of government action is required for their due process provisions.¹⁵⁶ In contrast, the due process clause of the South Dakota Constitution appears in a single section along with a "right to work" clause that is clearly directed at private entities, and may indicate that the due process provision should be construed similarly.¹⁵⁷ In the constitutions of the remaining eighteen states the text of the due process guarantee does not explicitly indicate the nature of the entities to which it applies. This ambiguity exists because the due process provision appears in a separate section by itself,¹⁵⁸ or because it appears in a single section with a guarantee of equality that similarly fails to refer to potential private infringers or to exclusively governmental action.¹⁵⁹

155. Six states use the older "law of the land" phrasing in their guarantees of procedural protection for life, liberty and property. ARK. CONST. art. 2, § 21; KY. CONST. Bill of Rights, § 11; N.C. CONST. art. I, § 19; TENN. CONST. art. I, § 8; TEX. CONST. art. I, § 19; VT. CONST. ch. I, art. 10. The constitutions of New York and Minnesota each contain two applicable provisions: one that speaks of "the law of the land" and a second that parallels the federal language. N.Y. CONST. art. I, §§ 1 & 6; MINN. CONST. art. 1, §§ 2 & 7. It is well established, by both federal and state decisions, that "due process of law" and "the law of the land" are interchangeable terms embodying equivalent legal rights. *Davidson v. New Orleans*, 96 U.S. 97 (1877); *Bulova Watch Co., Inc. v. Brand Distribs. of North Wilkesboro, Inc.*, 285 N.C. 467, 474, 206 S.E.2d 141, 146 (1974).

156. In these constitutions, the due process or "law of the land" provision appears in a single section together with provisions regarding criminal procedure or other constitutional rights that only governments are in a position to infringe. ALA. CONST. art. I, § 6; ALASKA CONST. art. I, § 7; ARK. CONST. art. II, § 21; CAL. CONST. art. I, § 7; CONN. CONST. art. I, § 8; DEL. CONST. art. I, § 7; FLA. CONST. art. I, § 9; IDAHO CONST. art. I, § 13; IOWA CONST. art. I, § 9; KY. CONST. Bill of Rights, § 11; MD. CONST. Declaration of Rights, art. 24; MASS. CONST. Declaration of Rights, art. XII; MICH. CONST. art. I, § 17; MINN. CONST. art. I, § 7; NEV. CONST. art. I, § 8; N.H. CONST. pt. 1, art. 15; N.Y. CONST. art. I, § 6; N.C. CONST. art. I, § 19; N.D. CONST. art. I, § 12; PA. CONST. art. I, § 9; R.I. CONST. art. I, § 2; TENN. CONST. art. I, § 8; TEX. CONST. art. I, § 19; VT. CONST. ch. I, art. 10th; VA. CONST. art. I, § 11.

157. S.D. CONST. art. VI, § 2.

158. ARIZ. CONST. art. II, § 4; COLO. CONST. art. II, § 25; GA. CONST. art. I, § 1, para. 1; LA. CONST. art. I, § 2; MISS. CONST. art. III, § 14; MO. CONST. art. I, § 10; MONT. CONST. art. II, § 17; NEB. CONST. art. I, § 3; OKLA. CONST. art. II, § 7; UTAH CONST. art. I, § 7; WASH. CONST. art. I, § 3; W. VA. CONST. art. III, § 10; WYO. CONST. art. I, § 6. *But see Garfinkle v. Superior Court of Contra Costa County*, 21 Cal. 3d 268, 282 n.19, 578 P.2d 925, 934 n.19, 146 Cal. Rptr. 208, 217 n.19 (1978), *cert. denied*, 439 U.S. 1104 (1979) (rejecting an argument that the existence of a state due process clause in a separate section might indicate that it applies to private parties).

159. HAW. CONST. art. I, § 5; ILL. CONST. art. I, § 2; ME. CONST. art. I, § 6-A; N.M. CONST. art. II, § 18; S.C. CONST. art. I, § 3. *But see, e.g., USA I Lehndorff Vermoegenverwaltung v. Cousins Club, Inc.*, 64 Ill. 2d 11, 20, 348 N.E.2d 831, 835 (1976) (Illinois due process guarantee limits only government action).

The six states without an explicit due process clause have all construed other provisions of their respective state constitutions to provide equivalent protections. Provisions used for this purpose include guarantees that courts and legal processes shall be available for the redress of grievances,¹⁶⁰ provisions guaranteeing "natural" or "inherent" rights to life, liberty and the pursuit of happiness,¹⁶¹ or a combination of several different state constitutional rights.¹⁶² These texts also provide little guidance as to the requirement of state action.

2. Caselaw: Is State Action Required?

Courts construing these various due process provisions have disagreed to some extent with each other and with the United States Supreme Court regarding whether state action is present in particular circumstances.¹⁶³ They have been virtually unanimous, however, in concluding that the requirement must be met in some fashion before private creditors will be required to afford their debtors any of the rights guaranteed by state due process clauses. This principle has extended to possessory liens by garagemen, mechanics and others;¹⁶⁴ non-judicial sales by such lienors;¹⁶⁵ non-judicial foreclosures of mortgages or deeds of trust;¹⁶⁶ self-help

160. IND. CONST. art. I, § 12; KAN. CONST. Bill of Rights, § 18; OR. CONST. art. I, § 10 ("procedural" due process only). *See, e.g.*, *State ex rel. McCormick v. Superior Court of Knox County*, 229 Ind. 118, 95 N.E.2d 829 (1951); *Harrison v. Long*, 241 Kan. 174, 734 P.2d 1155 (1987); *Carr v. Saif Corp.*, 65 Or. App. 110, 670 P.2d 1037 (1983). *But see* *Roberts v. Gray's Crane & Rigging, Inc.*, 73 Or. App. 29, 34-35, 697 P.2d 985, 988-89 (1985) (noting that older cases found an equivalent of substantive due process in the "equality of privileges" language of OR. CONST. art. I, § 20. *See generally* Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 135-46 (1970) (arguing that Oregon has no state "due process" clause).

161. These provisions go beyond the concerns of standard due process language. N.J. CONST. of 1947 art. I, § 1; WIS. CONST. art. I, § 1. *See, e.g.*, *King v. South Jersey Nat'l Bank*, 66 N.J. 161, 330 A.2d 1 (1974); *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273, *cert. denied*, 414 U.S. 976 (1973); *Pennsylvania-Reading Seashore Lines v. Board of Public Utility Comm'rs*, 5 N.J. 114, 74 A.2d 265, *cert. denied*, 340 U.S. 876 (1950).

162. *See generally* *Peebles v. Clement*, 63 Ohio St. 2d 314, 317, 408 N.E.2d 689, 691 (1980); *State ex rel. Heller v. Miller*, 61 Ohio St. 2d 6, 399 N.E.2d 66 (1980) (construing a due process guarantee into OHIO CONST. art. I, §§ 1, 2, 16 & 19).

163. *See infra* notes 178-92.

164. *See, e.g.*, *Reinertsen v. Porter*, 242 Ga. 624, 627, 250 S.E.2d 475, 477 (1978); *Barry Properties, Inc. v. Fick Bros. Roofing Co.*, 277 Md. 15, 22, 353 A.2d 222, 227 (1976).

165. *See, e.g.*, *Adams v. Department of Motor Vehicles*, 11 Cal. 3d 146, 152, 520 P.2d 961, 964, 113 Cal. Rptr. 145, 148-49 (1974); *Sharrock v. Dell Buick-Cadillac, Inc.*, 45 N.Y.2d 152, 159-60, 379 N.E.2d 1169, 1173-74, 408 N.Y.S.2d 39, 43-44 (1978).

166. *See, e.g.*, *Garfinkle v. Superior Court*, 21 Cal. 3d 268, 282, 578 P.2d 925, 934, 146 Cal. Rptr. 208, 217 (1978), *cert. denied and appeal dismissed*, 439 U.S. 1104 (1979); *Cramer v. Metropolitan Savings & Loan*, 401 Mich. 252, 259, 258 N.W.2d 20, 23 (1977), *cert. denied*, 436 U.S. 958 (1978); *Federal Nat'l Mortgage Ass'n v. Howlett*, 521 S.W.2d

repossessions;¹⁶⁷ bank set offs;¹⁶⁸ and various other methods of non-judicial debt collection.¹⁶⁹

The sole possible exception to this otherwise consistent requirement may be found in *King v. South Jersey National Bank*,¹⁷⁰ in which the New Jersey Supreme Court held that the statute authorizing self-help repossession of plaintiff's automobile did not constitute state action sufficient to trigger federal due process protections, and that the practice "would not . . . involve a question of fundamental rights, nor . . . be offensive to" the state constitution's guarantee of inalienable rights.¹⁷¹ It was unclear from this language whether the failure to find a violation of the state constitution was based on the absence of state action or on the merits of the claim. However, the subsequent use of *King* in opinions on private infringement of other state constitutional rights may indicate that due process rights under the New Jersey Constitution can be invoked without a threshold showing of anything approaching a federal standard of state action.¹⁷²

Notwithstanding this exception, however, the differences in the texts of various state constitutional due process provisions have little bearing on whether state action is required.¹⁷³ Courts have required the same showing of state action for constitutional provisions phrased in terms of "the law of

428, 439 (Mo.), *appeal dismissed*, 423 U.S. 909 (1975); *Kennebec, Inc. v. Bank of the West*, 88 Wash. 2d 718, 725-26, 565 P.2d 812, 816 (1977); *Dennison v. Jack*, 304 S.E.2d 300, 306 (W. Va. 1983).

167. *See, e.g.*, *Crouse v. First Trust Union Bank*, 86 A.D.2d 978, 978, 448 N.Y.S.2d 329, 330 (1982); *Helfinstine v. Martin*, 561 P.2d 951, 958 (Okla. 1977).

168. *See, e.g.*, *Kruger v. Wells Fargo Bank*, 11 Cal. 3d 352, 357, 531 P.2d 441, 442, 113 Cal. Rptr. 449, 450 (1974); *Meyer v. Idaho First Nat'l Bank*, 96 Idaho 208, 209, 525 P.2d 990, 991 (1974); *Allied Sheet Metal Fabricators, Inc. v. Peoples Nat'l Bank of Washington*, 10 Wash. App. 530, 541, 518 P.2d 734, 741, *cert. denied*, 419 U.S. 967 (1974).

169. *See, e.g.*, *Donahoo v. Household Finance Corp.*, 472 F. Supp. 353, 354-55 (E.D. Mich. 1979) (wage assignments); *USA I Lehndorff Vermoegensverwaltung v. Cousins Club, Inc.*, 64 Ill. 2d 11, 20, 348 N.E.2d 831, 835 (1976) (lessor's distraint); *Montalvo v. Consolidated Edison Co.*, 92 A.D.2d 389, 393, 460 N.Y.S.2d 784, 787 (1983) (utility's refusal to provide service until disputed bill is first paid); *North Carolina Nat'l Bank v. Burnette*, 297 N.C. 524, 534-35, 256 S.E.2d 388, 394 (1979) (sale of collateral by secured party).

170. 66 N.J. 161, 177-78, 330 A.2d 1, 9-10 (1974).

171. *Id.* at 178, 330 A.2d at 10.

172. Justice Pashman, dissenting in *King*, explicitly rejected any state action limit on N.J. CONST. of 1947 art. I, para. 1, arguing that, "New Jersey courts have long found support for intervention to prevent purely private interference with property rights in" that provision. 66 N.J. at 194, 330 A.2d at 18.

Subsequent New Jersey cases dealing with alleged private infringement of fundamental state constitutional rights have paid respectful attention to Justice Pashman's dissent. *See, e.g.*, *State v. Schmid*, 84 N.J. 535, 559-60, 423 A.2d 615, 628 (1980); *Peper v. Princeton Univ. Bd. of Trustees*, 77 N.J. 55, 76-77, 389 A.2d 465, 476 (1978).

173. Differences in wording may, however, be important for determining how willing

the land,"¹⁷⁴ or in even more general language,¹⁷⁵ as for the more common "due process of law" language, and have done so regardless of whether the provision appears alone,¹⁷⁶ or in the context of criminal rights guarantees or other language implying that the drafters were concerned with only governmental infringements.¹⁷⁷

While courts have not extensively explained the reasons for their insistence upon state action, two seem at least implicit in most due process decisions. First, the concept of due process "of law" is presumed to inherently refer to legal, and thus governmental, activity. Secondly, concerns paralleling those raised in speech and equality cases exist: the need to avoid judicial interference with the competing rights of other private parties; a general view of constitutions as inherently limited to governments; and concerns about infringing on an area more appropriate for legislative regulation.

3. Caselaw: How Should State Action Be Defined?

Despite their near unanimity in requiring state action, state courts have differed over how to define this requirement. While many courts have adhered to federal precedents, a few have expressly rejected the narrow federal definition of state action when interpreting state constitutional due process guarantees. A leading example of this expansive approach is *Sharrock v. Dell Buick-Cadillac, Inc.*,¹⁷⁸ in which the New York Court of Appeals held unconstitutional the portion of the state's lien law that permitted a private garageman to enforce its lien by an *ex parte* auction of plaintiff's property without granting plaintiff a prior opportunity to be heard. Recognizing that the facts of the case might not constitute state

a court will be to find sufficient state action in ambiguous circumstances. *See* discussion *infra* notes 178-95.

174. *See, e.g.*, *Brandt v. St. Vincent Infirmary*, 287 Ark. 431, 434, 701 S.W.2d 103, 105 (1985); *North Carolina Nat'l Bank v. Burnette*, 297 N.C. 524, 534-35, 256 S.E.2d 388, 394-95 (1979); *Kittrell v. Kittrell*, 409 S.W.2d 179, 181 (Tenn. Ct. App. 1966);

175. *See, e.g.*, *Peebles v. Clement*, 63 Ohio St. 2d 314, 317, 408 N.E.2d 689, 691 (1980); *Carr v. Saif Corp.*, 65 Or. App. 110, 670 P.2d 1037, 1040 (1983).

176. *See, e.g.*, *Niedner v. Salt River Proj. Agric. Improvement & Power District*, 121 Ariz. 331, 332, 590 P.2d 447, 448 (1979); *Reinertsen*, 242 Ga. 624, 250 S.E.2d 475.

177. *See, e.g.*, *Barry Properties, Inc. v. Fick Bros. Roofing Co.*, 277 Md. 15, 353 A.2d 222 (1976); *Cramer v. Metropolitan Savings & Loan*, 401 Mich. 252, 258 N.W.2d 20 (1977); *Campbell v. St. Mary's Hosp.*, 312 Minn. 379, 384-85, 252 N.W.2d 581, 585 (1977); *Duffley v. New Hampshire Interscholastic Athletic Ass'n*, 122 N.H. 484, 490-91, 446 A.2d 462, 466 (1982).

178. 45 N.Y.2d 152, 379 N.E.2d 1169, 408 N.Y.S.2d 39 (1978).

action for federal purposes,¹⁷⁹ the court stated that differences in the language, history and purposes of the federal and state constitutions permitted state courts to apply a more "flexible" definition of the state action requirement than would be possible under the fourteenth amendment.¹⁸⁰ As the court phrased it, the question for state purposes is whether the state "has so entwined itself into the debtor-creditor relationship as to constitute sufficient and meaningful State participation which triggers the protections afforded by our Constitution."¹⁸¹ The court found sufficient state action on the facts before it because the statute expanded upon the creditor's common law rights by allowing it to sell as well as seize the debtor's property, because the very existence of the statute permitting such self-help remedies served to "encourage" the creditor to use this remedy and thereby violate the debtor's rights, and because the statute effectively transferred to the private creditor what had been the traditional, sovereign and exclusive power of the state to resolve legal disputes other than by consent.¹⁸²

These facts would not have been sufficient to find state action under federal standards. Only a few months prior to *Sharrock*, the United States Supreme Court had held that New York's version of section 7-210 of the Uniform Commercial Code — which similarly permitted a warehouseman to unilaterally foreclose a lien by *ex parte* sale without affording the debtor any opportunity to be heard as to the validity of the debt — did not involve sufficient "state action" to implicate the fourteenth amendment.¹⁸³ In so concluding, the Court specifically rejected each of the arguments that prevailed in *Sharrock*.¹⁸⁴ The New York court distinguished its facts from

179. *Id.* at 157-59, 379 N.E.2d at 1172-73, 408 N.Y.S.2d at 42-43. See also Note, "Flexible" State Action, *supra* note 3.

180. 45 N.Y.2d at 159-61, 379 N.E.2d at 1173-74, 408 N.Y.S.2d at 44. The court in *Sharrock* noted the word "state" does not appear in the New York due process guarantee, which provides only that "no person shall be deprived of life, liberty or property without due process of law." *Id.*; N.Y. CONST. art. I, § 6. See *supra* note 156 and accompanying text. The New York court also relied on the difference between the central purpose of the fourteenth amendment and the broader purposes of the state constitution. The federal provision was intended to provide minimum standards of protection for individuals "against the potential abuses of a monolithic government, whether that government be national, State or local." Conversely, the *Sharrock* court saw the state constitution as granting fundamental rights good against the world: "In contrast, State Constitutions in general, and the New York Constitution in particular, have long safeguarded any threat to individual liberties, irrespective of from what quarter that peril arose." *Sharrock*, 45 N.Y.2d at 160-61, 379 N.E.2d at 1174, 408 N.Y.S.2d at 44.

181. 45 N.Y.2d at 161, 379 N.E.2d at 1174, 408 N.Y.S.2d at 44.

182. *Id.* at 161-63, 379 N.E.2d at 1174-76, 408 N.Y.S.2d at 45-46.

183. *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978).

184. *Id.* at 161-66.

those in *Flagg Bros.* by pointing to the need for state cooperation in recording the transfer of title to automobiles.¹⁸⁵ However, as many courts have noted, this distinction is too frail a reed on which to rest the existence of a right to due process.¹⁸⁶

Subsequent New York decisions have partially extended the "flexible" state action rationale of *Sharrock* to find sufficient state action to trigger state, though not federal, due process protections in a case involving a private *ex parte* sale of bailed goods pursuant to section 7-210.¹⁸⁷ Nonetheless, where a statute authorizing the private creditor's actions did not change pre-existing common law rights,¹⁸⁸ or where the state's regulatory bodies merely failed to affirmatively require a private utility to afford a customer notice and a hearing on a disputed bill before refusing new service,¹⁸⁹ courts have found insufficient state action to trigger the due process protections of the New York Constitution.

California courts also have been willing to expand the concept of state action in limited situations. In a series of cases predating *Flagg Bros.*, the California courts held that private creditors exercising statutory self-help remedies greater than common law remedies were engaged in state action sufficient to trigger both federal and state due process protections.¹⁹⁰

185. *Sharrock*, 45 N.Y.2d at 159 n.2, 379 N.E.2d at 1173 n.2, 408 N.Y.S.2d at 43 n.2. Some courts have accepted similar arguments. *See, e.g.*, *Adams v. Department of Motor Vehicles*, 11 Cal. 3d 146, 152, 520 P.2d 961, 965, 113 Cal. Rptr. 145, 149 (1974).

186. Most courts addressing the issue have rejected this argument essentially because the state's action of issuing new title documents or recording the transfer of title amounts to nothing more than noting a fact already accomplished by private action. *See, e.g.*, *Smith v. Spradling*, 532 S.W.2d 202, 204-05 (Mo. 1976), *appeal dismissed*, 429 U.S. 803 (1976) (citing *inter alia* *Nichols v. Tower Grove Bank*, 362 F. Supp. 374 (E.D. Mo. 1973), *aff'd*, 497 F.2d 404 (8th Cir. 1974)). *See generally* *Burke & Reber, supra* note 150, at 19-23.

187. *Svensden v. Smith's Moving and Trucking Co.*, 76 A.D.2d 504, 431 N.Y.S.2d 94 (1980), *aff'd*, 54 N.Y.2d 865, 429 N.E.2d 411, 444 N.Y.S.2d 904 (1981), *cert. denied*, 455 U.S. 927 (1982).

188. *See, e.g.*, *Jefferds v. Ellis*, 132 A.D.2d 398, 522 N.Y.S.2d 398 (1987), *appeal dismissed*, 70 N.Y.2d 1002, 521 N.E.2d 445, 526 N.Y.S.2d 438 (1988) (U.C.C. §§ 9-503 and 9-504 do not involve state action because self-help repossession under a chattel mortgage permitted at common law); *accord* *Crouse v. First Trust Union Bank*, 86 A.D.2d 978, 448 N.Y.S.2d 329 (1982).

189. *See, e.g.*, *Montalvo v. Consolidated Edison of N.Y.*, 92 A.D.2d 389, 460 N.Y.S.2d 784 (1983), *aff'd*, 61 N.Y.2d 810, 462 N.E.2d 149, 473 N.Y.S.2d 972 (1984).

190. *See, e.g.*, *Connolly Dev., Inc. v. Superior Court of Merced County*, 17 Cal. 3d 803, 814-15, 553 P.2d 637, 644-45, 132 Cal. Rptr. 477, 484-85 (1976), *appeal dismissed*, 429 U.S. 1056 (1977); *Kruger v. Wells Fargo Bank*, 11 Cal. 3d 352, 359-63, 521 P.2d 441, 444-47, 113 Cal. Rptr. 449, 452-55 (1974); *Adams v. Department of Motor Vehicles*, 11 Cal. 3d 146, 152, 520 P.2d 961, 965, 113 Cal. Rptr. 145, 149 (1974). *But see* *Connolly*, 17 Cal. 3d at 815 n.14, 553 P.2d at 645 n.14, 132 Cal. Rptr. at 485 n.14 (acknowledging criticism of the constitutional distinction between common law and statutory creditor's rights). *See infra* notes 337-44.

Although *Flagg Bros.* made it impossible for courts to maintain that position with respect to the Constitution, California courts have adhered to the broader definition for state due process purposes.¹⁹¹ In other areas of due process law, however, the California courts have found federal state action precedent persuasive.¹⁹²

D. Summary and Analysis of the Caselaw

Examined as a whole, the decisions interpreting state constitutional guarantees of speech, petition, equality and due process justify a few general propositions about how state courts have approached the state action issue, and the reasons for their conclusions.

1. Applying state constitutional guarantees against private infringers not already subject to federal restraint is not an issue that is confined to specific substantive rights or fact patterns. Rather, it is an issue of general concern across the spectrum of substantive rights. The frequency of expansive interpretations varies depending on the substantive right involved, with expansive interpretations more common in cases involving speech and petition rights than in cases involving equality or due process guarantees. Courts' rationales and approaches also have varied. Some courts reached expansive results by rejecting state action limits entirely, while others merely rejected restrictive federal definitions of those limits. All of the substantive areas studied, however, include examples of courts that took an expansive approach to the questions of whether and under what circumstances non-governmental entities must respect the state constitutional rights of others.

2. The expansive approach adopted by some courts appears to rest on two underlying perceptions: that non-governmental entities may be in a position to curtail the liberties of others such that an expansive approach is necessary to prevent encroachment on state constitutional rights;¹⁹³ and that for structural reasons involving the absence of federalism concerns,

191. *Martin v. Heady*, 103 Cal. App. 3d 580, 586-88, 163 Cal. Rptr. 117, 121-22 (1980) (creditor's *ex parte* sale of collateral pursuant to California's Aircraft Lien Law constituted state action for state due process purposes even though no state official took any action in connection therewith, and even though *Flagg Bros.* made clear that these facts would not constitute state action under the fourteenth amendment). See also *King v. South Jersey Nat'l Bank*, 66 N.J. 161, 191-95, 330 A.2d 1, 17-19 (1974) (Pashman, J., dissenting) (arguing that the court "need not impose [as] rigorous a requirement of state action" under the New Jersey due process clause as under federal law).

192. See, e.g., *Garfinkle v. Superior Court*, 21 Cal. 3d 268, 281-82, 578 P.2d 925, 934, 146 Cal. Rptr. 208, 217, *appeal dismissed*, 439 U.S. 949 (1978).

193. See, e.g., *Robins v. PruneYard Shopping Center*, 23 Cal. 3d 899, 906-07, 592 P.2d 341, 345, 153 Cal. Rptr. 854, 858 (1979), *aff'd*, 447 U.S. 74 (1980).

state courts and constitutions are in a better position than their federal counterparts to restrict private parties.¹⁹⁴ These points are uncontroverted by even the most restrictive of courts.

3. The differences in outcomes among courts appear to result not just from differences in particular constitutional texts or histories, but from basic legal and philosophical divergences as well. Courts interpreting identical or virtually identical provisions have reached opposite conclusions regarding state action.¹⁹⁵ Some courts demonstrated a general willingness to expand the application of their state constitution beyond

194. One of the traditional reasons for imposing a state action limitation on the Bill of Rights is the potential impact on the issue of federalism. State law has traditionally governed the rights and responsibilities of private parties *inter se*; imposing federal constitutional standards on such relationships would effectively shift power away from state to federal law. The Civil Rights Cases, 109 U.S. 3, 11-13 (1883).

There are, however, no such federalism constraints on state constitutional guarantees. Moreover, state courts construing these provisions are in a better institutional position to expand the coverage of such rights because they are unconstrained by the need for uniform nationwide applicability. States serve as laboratories, free to consider how to apply such guarantees in light of local circumstances or traditions. *See generally* Maltz, *Individual Rights and State Autonomy*, 12 HARV. J.L. & SOC. POL'Y 161 (1989) (emphasizing the importance of the "structural" federalism issues in construing the federal and state constitutions).

195. *Compare* *Fiesta Mall Venture v. Mecham Recall Comm.*, 159 Ariz. 371, 767 P.2d 719 (1988) (Arizona's affirmative free speech guarantee of ARIZ. CONST. art. II, § 6 does not apply to private conduct) *with* *Alderwood Assocs. v. Washington Envtl. Council*, 96 Wash. 2d 230, 635 P.2d 108 (1981) (identical language in WASH. CONST. art. I, § 5 does so apply). *Compare* *State v. Schmid*, 84 N.J. 535, 423 A.2d 615 (1980), *appeal dismissed*, 455 U.S. 982 (1982) ("dual" speech guarantee of N.J. CONST. of 1947 art. I, para. 6 applies to private infringers) *and* *Robins*, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd*, 447 U.S. 74 (1979) (CAL. CONST. art. I, § 2 applies to private action) *with* *Oklahomans For Life, Inc. v. State Fair of Oklahoma, Inc.*, 634 P.2d 704, 708 n.15 (Okla. 1981) ("dual" guarantee of OKLA. CONST. art. II, § 22 applies only to state actors); *Woodland v. Michigan Citizens Lobby*, 423 Mich. 188, 378 N.W.2d 337 (1985) (same, MICH. CONST. art. I, § 5); *Shad Alliance v. Smith Haven Mall*, 66 N.Y.2d 496, 488 N.E.2d 1211, 498 N.Y.S.2d 99 (1985) (same, N.Y. CONST. art. I, § 8) *and* *Jacobs v. Major*, 139 Wis. 2d 492, 407 N.W.2d 832 (1987) (same, WIS. CONST. art. I, § 3). *Compare* *Welsch v. Aetna Ins. Co.*, 343 Pa. Super. 169, 494 A.2d 409 (1985) (guarantee of "[e]quality of rights under the law" does not require state action) *and* *Bartholomew ex rel. Bartholomew v. Foster*, 115 Pa. Commw. 430, 541 A.2d 393 (1988), *aff'd*, 522 Pa. 489, 563 A.2d 1390 (1989) (same) *with* *Schreiner v. McKenzie Tank Lines, Inc.*, 408 So. 2d 711 (Fla. Dist. Ct. App. 1982), *aff'd*, 432 So. 2d 567 (Fla. 1983) (Florida's guarantee that "persons are equal before the law," requires state action); *Lincoln v. Mid-Cities Pee Wee Football Ass'n*, 576 S.W.2d 922 (Tex. Civ. App. 1979) (guarantee of "[e]quality under the law" requires state action) *and* *Junior Football Ass'n of Orange County v. Gaudet*, 546 S.W.2d 70, 71 (Ct. Civ. App. 1976) (same). *Compare* *Schreiner*, 432 So. 2d at 567 (Florida's "inalienable rights" guarantee requires state action) *with* *Peper v. Princeton Univ. Bd. of Trustees*, 77 N.J. 55, 389 A.2d 465 (1978) (similar provision in the New Jersey constitution had no such requirement).

federal models,¹⁹⁶ while others flatly refused to do so,¹⁹⁷ regardless of the substantive right or particular provision at issue.

4. All courts, even those most expansive in their interpretations, have been cautious in extending the reach of their state constitutions. Expansion has been accomplished more often by the less radical method of redefining the scope of the state action requirement than by abandoning the requirement entirely.¹⁹⁸ Even those courts that rejected state action requirements have resisted extending those results much beyond the particular fact patterns of the paradigm cases, or their obvious analogs.

5. The recent trend has been away from expanding the reach of state constitutional rights. With some exceptions, most of the decisions taking an expansive approach were decided between five and fifteen years ago.¹⁹⁹

Most recent cases have continued to require a showing of state action, using a definition similar to the federal courts' definition, before applying state constitutional rights.²⁰⁰ Even the relatively few recent decisions that have effectively extended state constitutional rights to cover private infringements have often done so in silence²⁰¹ or by subterfuge,²⁰² rather

196. California and New Jersey have widened the scope of their respective constitutions in several substantive areas. *See, e.g., Robins*, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (speech); *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979) (equality); *Martin v. Heady*, 103 Cal. App. 3d 580, 586-88, 163 Cal. Rptr. 117, 121-22 (1980) (due process); *Schmid*, 84 N.J. 535, 423 A.3d 615 (speech); *Peper*, 77 N.J. 55, 389 A.2d 465 (equality); *King v. South Jersey Nat'l Bank*, 66 N.J. 161, 191-95, 330 A.2d 1, 17-19 (1974) (inalienable rights).

197. Courts in Connecticut and Michigan, for example, have rejected claims that various substantive provisions of their respective state constitutions apply to private infringers. *See, e.g., Cologne v. Westfarms Assocs.*, 192 Conn. 48, 469 A.2d 1201 (1984) (speech); *Lockwood v. Killian*, 172 Conn. 496, 375 A.2d 998 (1977) (equal protection); *Woodland v. Michigan Citizens Lobby*, 423 Mich. 188, 378 N.W.2d 337 (1985) (speech); *Schroederv. Dayton-Hudson Corp.*, 448 F. Supp. 910, 915 (E.D. Mich. 1977) (quoting *Fox v. Employment Sec. Comm'n*, 379 Mich. 579, 153 N.W.2d 644, 647 (1967)) (equality); *Donahoo v. Household Fin. Corp.*, 472 F. Supp. 353, 354-55 (E.D. Mich. 1979) (due process).

198. *See supra* notes 82-92, 137-49 & 178-91.

199. The major cases expanding on federal definitions of state action for due process purposes — *King*, *Sharrock*, *Connolly* and *Martin* — were decided between 1974 and 1980. The most important cases expanding speech and petition rights on private property — *Robins*, *Schmid*, *Tate*, *Alderwood* and *Batchelder* — were all decided between 1979 and 1983. The cases providing the most expansive applications of equality guarantees — *Gay Law Students*, *Peper* and *Hartford* — were decided between 1978 and 1984.

200. Most of the important state action cases decided since 1984 involved speech rights on private property, and many of these imposed rigorous state action requirements. *See supra* notes 68-77 and accompanying text. *See also United States Jaycees v. Richardet*, 666 P.2d 1008 (Alaska 1983) (imposing a state action requirement on a state equality guarantee).

201. *E.g., Hartford Accident & Indem. Co. v. Insurance Comm'r*, 505 Pa. 571, 482 A.2d 542 (1984), discussed *supra* note 127.

than by any straightforward reexamination or modification of the state action requirement.

6. This recent trend away from expansive interpretations does not appear to have resulted from any lessening of courts' awareness of the growth of private power. Rather, such fears have been overlain by contrary concerns that abandoning or weakening the state action requirement may violate the traditional understanding of the purpose of constitutions, that it represents a slippery slope likely to lead to the inappropriate imposition of constitutional restraints on a broad range of private relations among individuals, and that altering state action requirements could violate the appropriate allocation of powers between courts and legislatures. If state constitutions are to serve as a systematic protection against private infringement of individual rights, these concerns must be addressed.

III. PARSING THE ARGUMENTS: MUST STATE ACTION REQUIREMENTS BE READ INTO STATE CONSTITUTIONAL RIGHTS GUARANTEES?

The arguments against expanding the reach of state constitutional rights beyond the confines of state action have been of many types. The most common elements include not only instrumental arguments that consider the need to avoid interference with the competing rights of other private parties, but also appeals to the "plain meaning" of the state constitutional texts, the specific drafting history of particular provisions, asserted general principles of constitutional interpretation that would *a priori* limit their application to state actors, and arguments concerning separation of powers. Before discussing alternate means of defining the reach of state rights guarantees, it is necessary to consider each of these arguments and determine whether they require a state action limitation.

A. Arguments from the Plain Meaning of Constitutional Texts

Instances exist in which a particular state provision clearly indicates that it protects rights against infringement by any party, private or governmental.²⁰³ Other provisions equally clearly indicate by their words²⁰⁴ or context²⁰⁵ that they apply only to governmental actors. In most cases, however, the provisions leave open the question of to whom they

202. *E.g.*, *Lloyd Corp. v. Whiffen*, 89 Or. App. 629, 750 P.2d 1157 (1988), discussed *supra* notes 89-91 and accompanying text.

203. *See supra* notes 102 & 157 and accompanying text.

204. *See supra* notes 39-40 & 100 and accompanying text.

205. *See supra* notes 101 & 156 and accompanying text.

apply. For example, state guarantees of freedom of speech expressed in language that citizens have a right to “freely speak, write and publish on all subjects, being responsible for abuse of that liberty,”²⁰⁶ or presumably absolute statements that persons have “inalienable rights” to equality²⁰⁷ or due process,²⁰⁸ can support interpretations extending their application to at least some private actors. A significant number of courts have interpreted them in this manner.²⁰⁹

A more difficult interpretive problem is posed by provisions stating, in otherwise absolute terms, that citizens are entitled to equality “before the law” or “under the law,”²¹⁰ or by provisions that conclusively prohibit loss of liberty or property absent “due process of law” or the equivalent.²¹¹ Some courts and commentators have argued that the reference to “law” in such provisions implies that those provisions refer only to the relation between the claimant and the state in its law making or law enforcing capacity.²¹² Such a reading, while plausible, is by no means compelled by the texts. Any guarantee of freedom expressed as being “of law” or “under law” could equally be interpreted as constituting no more than a direction that the right should be vindicated by legal processes, or a pledge that the law will operate to vindicate such a right, or that no one, public or private, may use the forms and methods of law to violate such rights.²¹³

206. See *supra* notes 41-47 and accompanying text. *But see* *Jacobs v. Major*, 139 Wis. 2d 492, 503-04, 407 N.W.2d 832, 836-37 (1987), construing a “dual” constitutional guarantee of speech — free speech language combined with a separate statement that the legislature should pass “no law” abridging speech. Interpreting these clauses in light of the “presumption” that the state bill of rights applies only to state action, the court found the “plain meaning” of these clauses to preclude application to private actors. It is noteworthy that this “plain meaning” was derived not from the provision’s text, but from an *a priori* presumption.

207. See *supra* notes 105 & 130-36 and accompanying text (inalienable rights).

208. See *supra* notes 161 & 170-72 and accompanying text (absolute rights to equality).

209. See *PruneYard Shopping Center v. Robins*, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff’d*, 447 U.S. 74 (1980), discussed *supra* notes 50-67 (regarding speech and assembly guarantees); *Peper v. Princeton Univ. Bd. of Trustees*, 77 N.J. 55, 389 A.2d 465 (1978), discussed *supra* notes 135-36 (regarding equality rights inferred into a state guarantee of inalienable rights); and *King v. South Jersey Nat’l Bank*, 66 N.J. 161, 191-93, 330 A.2d 1, 18 (1974) (Pashman, J., dissenting), discussed *supra* notes 170-72 (regarding due process rights inferred from a state guarantee of inalienable rights).

210. See *supra* notes 104 & 119-29 and accompanying text.

211. See *supra* notes 158-59 and accompanying text.

212. See, e.g., Note, *Pathways*, *supra* note 3, at 125-26; *Schreiner v. McKenzie Tank Lines, Inc.*, 408 So. 2d 711, 715 (Fla. App. 1982).

213. Most courts that have considered provisions such as these have concluded that they apply only to state actors of some kind. See *supra* notes 119-26 & 174-76 and accompanying text. However, these courts have not relied on a “plain meaning” analysis. The possibility of expansive interpretation of this or similar language was at least implicitly

Notwithstanding the debate over alternative readings, the basic problem with a reliance on textual arguments or an asserted plain meaning of state constitutional guarantees is the inability of any such approach to predict results. Relying on the plain meaning of their constitutional provisions, states with virtually identically phrased guarantees have interpreted them in divergent ways.²¹⁴ Courts that wish to impose a state action requirement will do so even in the face of constitutional language clearly indicating that no such limitation is required.²¹⁵ States that wish to vindicate rights against private infringement can find a way to do so, even if the constitutional provision at issue seems to apply only to state actors.²¹⁶ Perhaps as a result of such problems, few courts to date have been willing to base their conclusions regarding the application of such guarantees to non-governmental actors on any subtle parsing of text or appeal to the asserted "plain meaning." Instead, the operative decisions appear to depend more on the courts' views as to the role of constitutional guarantees in general or on one or more of the arguments considered below.²¹⁷

B. Arguments from Constitutional History and Framers' Intent

In some cases, state courts have marshalled persuasive evidence that their respective framers and ratifiers considered the issue and knowingly chose to limit the reach of particular constitutional guarantees to governmental action only.²¹⁸ In such circumstances, the argument for retaining a

recognized in *Hartford Accident and Indem. Co. v. Insurance Comm'r*, 505 Pa. 571, 586, 482 A.2d 542, 549 (1984). *See supra* notes 127-29. *See Skover, supra* note 3, at 245 n.58, arguing that such language should be interpreted to refer to an extension of protection under the "law of the land" clause rather than as an identification of the targets of the constitutional prohibition.

214. *See supra* note 195 and accompanying text.

215. *See, e.g.*, *United States Jaycees v. Richardet*, 666 P.2d 1008 (Alaska 1983). *See also supra* notes 111-12 and accompanying text.

216. *Lloyd Corp. v. Whiffen*, 89 Or. App. 629, 750 P.2d 1157 (1988). *See also supra* notes 89-91 and accompanying text.

217. A few courts have reached conservative results by explicitly rejecting arguments based on language alone. *See, e.g.*, *Southcenter Joint Venture v. National Democratic Pol'y Comm.*, 113 Wash. 2d 413, 424, 780 P.2d 1282, 1287-88 (1989) (while an early draft of the state's speech guarantee contained explicit state action language, the court refused to attach significance to the change in language); *Richardet*, 666 P.2d at 1012-13 & n.14 (rejecting petitioner's attempt to distinguish between state constitutions guaranteeing "equal protection of the laws" and those, like Alaska's, which are phrased more broadly).

218. *See, e.g.*, *Woodland v. Michigan Citizens Lobby*, 423 Mich. 188, 208-09, 378 N.W.2d 337, 345-46 (1985), in which the court quoted the chairman of the relevant drafting committee for the state's recently revised constitution as stating the committee's intent to generally retain a state action limit for the state bill of rights. Although the debate focused on the Michigan equality rather than the speech guarantee, it still provided strong evidence that the drafters consciously considered the issue and decided to treat the rights

state action limit is certainly compelling. However, arguments that the historical record and the intentions of the framers require courts to infer a state action limit on otherwise ambiguous state constitutional rights guarantees do not always rest on such compelling factual bases. For example, several courts have based arguments in favor of imposing a state action limit on nothing more than some indication that those drafters regarded the government as the primary source of potential infringement of the rights they sought to protect.²¹⁹ But while the primary impetus for drafting state bills of rights may have been a concern to limit the powers of governments, such an argument does not, by itself, show that the primary purpose also was intended to be the sole purpose.

The same is true for arguments based on the existence of analogous federal provisions or on evidence that state constitutional draftsmen intended to incorporate substantive protections already protected by cognate federal guarantees.²²⁰ While such evidence may have some value in eliciting the drafters' intentions, it is far less probative than evidence that the draftsmen considered the issue and decided to restrict the application of such guarantees to traditionally defined state actors. Direct federal inspiration for state bills of rights is relatively rare; the original colonies adopted their respective bills of rights long before the federal version was ever drafted. Subsequently admitted states generally drew inspiration for their charters from other states, rather than from the Constitution.²²¹ Moreover, to the extent that the Constitution may have provided the inspiration for including certain additional substantive guarantees, there is a significant difference between agreeing that a particular interest is worthy of constitutional protection in general, and agreeing with all of the specifics as to precisely how and against whom that right will be protected.

Nor does the absence of affirmative evidence that the framers considered state action issues necessarily suggest an intent to restrict the reach of state constitutional rights.²²² In light of the difficulty of ascertain-

enumerated as privileges against governmental interference rather than as "rights" in the Hohfeldian sense.

219. See, e.g., *Cologne v. Westfarms Assocs.*, 192 Conn. 48, 469 A.2d 1201, 1207-08 (1984); *Jacobs v. Major*, 139 Wis. 2d 492, 511-12, 407 N.W.2d 832, 840 (1987).

220. See, e.g., *Lockwood v. Killian*, 172 Conn. 496, 501-04, 375 A.2d 998, 1001 (1977) (arguing that state and federal equality provisions impose similar substantive restraints and, therefore, state provisions also must be interpreted to require state action). See also *supra* note 118.

221. Linde, *supra* note 31, at 380-82 (1980); Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. 491, 496-97 (1984).

222. See, e.g., *Schreiner v. McKenzie Tank Lines, Inc.*, 408 So. 2d 711, 716 (Fla. Dist. Ct. App. 1982), *aff'd*, 432 So. 2d 567, 569 (1983) (absence of discussion of state action in

ing any general sense of the will of a diffuse group of constitutional draftsmen,²²³ and the frequently incomplete nature of the historical record, such a lack of evidence may reflect no more than an inevitable degree of uncertainty as to what the framers' intentions were. Or it may mean no more than that the issue was never considered. It does not necessarily demonstrate that the draftsmen intentionally chose to retain a state action requirement.

But the essential difficulty goes beyond any of these particular arguments. Attempts to rely upon historical evidence of framers' intent in order to decide whether to retain a state action limit generally founder on the fact that the requisite evidence is often contradictory, unclear or nonexistent.²²⁴ The problem is particularly acute where the state bills of rights were drafted long ago and remain unamended or where the relevant language has been carried forward without substantial change. But even where state constitutions have been recently revised and extensive records of the drafting history and debates have been kept, it is rare to find any overt discussion of the state action issue.²²⁵

Nevertheless, these problems of proof are not necessarily conclusive. Though arguments such as these are generally cast in terms of framers' intent, they can be viewed more sympathetically as articulating a set of presumptions that courts use to guide their interpretation of constitutional rights. If there was a general understanding in the legal community at the time state constitutions were drafted that constitutional rights by their nature applied only to restrict the activities of governments, then it would make sense to accept indirect indications that the framers of a particular

the records indicates that the framers intended that the relevant constitutional provisions apply only to government actors).

223. See generally Brest, *supra* note 26, at 209-17 (exploring the difficulties of "framers' intent" arguments in general).

224. A good example of the practical difficulty of such a historical or intent-based analysis of the state action issue can be found in the debate between Justices Utter and Dolliver of the Washington Supreme Court. Compare Utter, *supra* note 42, at 163-66 & 178-80, arguing that the historical record concerning the framers' overall intentions and specific proposals clearly indicate that they intended to bind individuals as well as governments, with Dolliver, *supra* note 3, at 450-54, arguing that the framers instead shared a basic, though not always expressed, foundation premise that constitutions bind only governments.

225. Half of the current state constitutions are a century old or more. Even those constitutions that have been recently redrafted have in most cases carried forward provisions in their bills of rights without significant change or discussion. While the completeness of the records vary, it is not surprising that many do not reflect any express discussion of such current issues as the definition of state action. See Note, "Malling" of *Constitutional Rights*, *supra* note 22, at 110, noting the absence of express discussion of state action with respect to the speech guarantee in the Michigan Constitution of 1963.

constitution shared that common view or to impose a burden of production and proof on those arguing for a different result.²²⁶ But this analysis assumes that there was a common agreement on some general principle or understanding of the role of bills of rights — that they apply not merely primarily, but solely to the actions of government. It remains to be seen if such an absolute principle ever existed in so strong a form.

C. Arguments from the “General Principle” that Constitutions by Their Nature Bind Only Governments

In addition to arguments about a specific state’s drafting history, many courts and commentators have raised the related argument that it is a traditional foundation principle of American constitutional interpretation that guarantees of individual rights, state or federal, are properly understood as directed to limiting only government action, at least in the absence of explicit textual or historical evidence to the contrary.²²⁷ Courts have found authority for this principle both in nineteenth century treatise writers such as Thomas Cooley²²⁸ and modern commentators.²²⁹ But while the argument contains some element of truth — fear of governmental power was a major motivating force for creating bills of rights — it remains considerably overstated.

If the argument is taken as a claim that constitutional rights by their inherent nature can *never* apply to private action, it is demonstrably incorrect. By the latter half of the nineteenth century, it was established that a state’s plenary power over citizens could in principle be exercised by imposing constitutional restraints on individuals in their dealings with each other.²³⁰ Today it is clear that state constitutional provisions can be

226. See, e.g., Dolliver, *supra* note 3, at 453-54.

227. See, e.g., Aldridge v. Boys, 98 Ill. App. 3d 803, 807-09, 424 N.E.2d 886, 889 (1981) (noting laconically that “[i]t is fundamental that constitutional restraints apply only to governments and not to individuals”); Shad Alliance v. Smith Haven Mall, 66 N.Y.2d 496, 502-03, 488 N.E.2d 1211, 1215, 498 N.Y.S.2d 99, 103 (1985); Alderwood Assocs. v. Washington Env’tl. Council, 96 Wash. 2d 230, 247-51, 635 P.2d 108, 118-19 (1981) (Dolliver, J., dissenting); Jacobs v. Major, 139 Wis. 2d 492, 506-08, 407 N.W.2d 832, 837-38 (1987); Dolliver, *supra* note 3, at 447-54; Ragosta, *supra* note 3, at 23.

228. T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (1868) (cited in Southcenter Joint Venture v. National Democratic Pol’y Comm., 113 Wash. 2d 413, 780 P.2d 1282 (1989)).

229. *Shad Alliance*, 66 N.Y.2d at 503, 488 N.E.2d at 1216, 498 N.Y.S.2d at 103; *Alderwood Assocs.*, 96 Wash. 2d at 248, 635 P.2d at 118 (Dolliver, J., dissenting); *Jacobs*, 139 Wis. 2d at 508, 407 N.W.2d at 838.

230. See Utter, *supra* note 42, at 163-66, noting that this principle was well

explicitly drafted and consistently interpreted to protect some rights against private as well as governmental infringement.²³¹

The principle that state constitutions bind only governments never has been consistently followed. On the contrary, decisions from several states show that even before the current interest in state constitutions as sources of individual rights, considerable precedent already existed for the direct application of a wide range of state constitutional guarantees against some private parties. Labor unions were a frequent target of such decisions. Courts in Pennsylvania,²³² California,²³³ New Jersey²³⁴ and Massachusetts²³⁵ all held that state guarantees of inherent and inalienable rights of life, liberty, property and the pursuit of happiness prohibited unions from attempting to interfere with the freedom of non-members to pursue their livelihood, or with the freedom of employers to hire non-union members. Similarly, New York courts held that a state constitutional right to procedural due process independently and directly precluded labor unions,²³⁶ as well as other private voluntary associations,²³⁷ from expelling members without affording them notice and an opportunity to be heard.

Other state constitutional rights likewise received at least occasional protection from private infringement during the pre-incorporation era. Courts in several states held that state guarantees of freedom of speech, press, petition, and assembly prohibited private citizens from interfering with the publication of a newspaper,²³⁸ precluded a labor union from

established and popularly understood when the Washington state constitution was adopted in 1889.

231. See, e.g., LA. CONST. art. I, § 12 and provisions cited *supra* note 27.

232. *Erdman v. Mitchell*, 207 Pa. 79, 56 A. 327 (1903).

233. *Jordahl v. Hayda*, 1 Cal. App. 696, 82 P. 1079 (1905).

234. *Cameron v. International Alliance of Theatrical Stage Employees & Moving Picture Operators*, 118 N.J. Eq. 11, 176 A. 692 (E. & A. 1935); *Collins v. International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators*, 119 N.J. Eq. 230, 241, 182 A. 37, 43-44 (E. & A. 1935); *Walsche v. Sherlock*, 110 N.J. Eq. 223, 159 A. 661 (E. & A. 1932); *Brennan v. United Hatters of N. Am.*, 73 N.J.L. 729, 65 A. 165 (E. & A. 1906).

235. *Reeves v. Scott*, 324 Mass. 594, 598, 87 N.E.2d 833, 835 (1949).

236. *Holmstrom v. Independent Dock Builders' Benevolent Union*, 164 A.D. 267, 149 N.Y.S. 771 (1914).

237. *Gallaher v. American Legion*, 154 Misc. 281, 277 N.Y.S. 81 (N.Y. Sup. Ct.), *aff'd*, 242 A.D. 604, 271 N.Y.S. 1012 (1934) (expulsion of a member from American Legion); *Williamson v. Randolph*, 48 Misc. 96, 96 N.Y.S. 644 (N.Y. Sup. Ct. 1905) (member expelled from the Consolidated Stock and Petroleum Exchange of New York); *Stein v. Marks*, 44 Misc. 140, 89 N.Y.S. 921 (N.Y. Sup. Ct. 1904) (expulsion of a member from a social and literary club).

238. E.g., *Ulster Square Dealer v. Fowler*, 58 Misc. 325, 111 N.Y.S. 5 (N.Y. Sup. Ct. 1908). The private defendants in this case acted in combination with public officials and, therefore, might be held to be "state actors" under current doctrine. What is striking about

expelling a member who signed a petition opposing a union supported law,²³⁹ and prevented the American Legion from taking retaliatory action against a member who publicly spoke out against a position favored by that body.²⁴⁰ In Ohio, the state constitutional guarantee of freedom of religion was held to prevent a private school from requiring a Jewish student to attend Christian services.²⁴¹ The California constitutional right to the pursuit of happiness was held to include a right of privacy, which was violated when a private film company made a film about the plaintiff's sordid life.²⁴² The New Jersey constitutional guarantee of workers' rights to organize and bargain collectively was held to create enforceable rights against interference by either a private employer²⁴³ or a labor union.²⁴⁴

It is certainly true that most court decisions involving state rights have involved challenges to government acts, and that some earlier state court decisions explicitly hold that particular state bills of rights have no application to private infringements. Nonetheless, the fact that a substantial number of pre-incorporation precedents for applying state constitutions to private infringers exist at least disproves any claim that applying state constitutional guarantees to private action would be fundamentally contrary to the nature or spirit of American constitutions. Such precedents also may demonstrate that such guarantees retain at least the potential for contemporary use in dealing with violations of fundamental interests by non-governmental entities. Even if the cases applying state guarantees to private infringers constitute no more than relatively rare responses to unusual problems, it could still be argued that the size and power of some

this case is that the court did not find it necessary to inquire into the question of the degree of "state" involvement in the violation. Rather, the court quite evidently regarded state constitutional rights as rights good against the world, which no one could violate: "The plaintiff has the constitutional right to publish its newspaper. . . . *No one* can take unto himself the right of suppressing in advance the publication of the printed sentiments of *another citizen* on any public or private question." *Id.* at 327, 111 N.Y.S. at 17-18 (emphasis added).

239. *Spayd v. Ringing Rock Lodge No. 665*, 270 Pa. 67, 113 A. 70 (1921).

240. *Gallaher v. American Legion*, 154 Misc. 281, 277 N.Y.S. 81 (N.Y. Sup. Ct. 1934). *See also Zelenka v. Benevolent & Protective Order of Elks*, 129 N.J. Super. 379, 324 A.2d 35 (App. Div.), *certif. denied*, 66 N.J. 317, 331 A.2d 17 (1974).

241. *Miami Military Institute v. Leff*, 129 Misc. 481, 220 N.Y.S. 799 (City Ct. 1926). *See also Barry v. Order of Catholic Knights of Wisconsin*, 119 Wis. 362, 96 N.W. 797 (1903) (holding that an association's rule that limited membership benefits to practicing Catholics did not violate the state constitutional right to freedom of religion because membership in the association was voluntary).

242. *Melvin v. Reid*, 112 Cal. App. 285, 297 P. 91 (1931).

243. *Cooper v. Nutley Sun Printing Co.*, 36 N.J. 189, 175 A.2d 639 (1961).

244. *Independent Dairy Workers v. Milk Drivers & Dairy Employees Local No. 680*, 23 N.J. 85, 99-100, 127 A.2d 869, 876-77 (1956). *See also Comite Organizador de Trabajadores Agricolas v. Molinelli*, 114 N.J. 87, 552 A.2d 1003 (1989).

private institutions in the modern world call for an equally creative application of fundamental principles of law.

Beyond whatever may be inferred from these precedents, the underlying reality is that the claims made in the name of this asserted traditional general principle greatly overstate the conceptual distinctions on which it is based. To be sure, as Cooley and his contemporaries stated, the major motivating purpose for state bills of rights was to put limits on the ability of state governments to legislate or otherwise infringe the rights of individuals.²⁴⁵ This admittedly central purpose, however, is not the only purpose that such provisions might address. On the contrary, American state constitutions were conceived by their framers as "horizontal" compacts among citizens rather than as "vertical" agreements between citizens and some pre-existing governing authority. Thus, nothing prevented those citizens from binding themselves as well as the government they created, and no reason compels the conclusion that they did not do so.

The standard view shared by Cooley and his contemporaries was that state bills of rights generally did not confer or create rights of any kind. Rather, they declared rights that citizens already possessed by virtue of the common law, and by virtue of the natural law on which the common law was based.²⁴⁶ In the natural law tradition, the distinction that modern

245. T. COOLEY, *supra* note 228. See also H. BLACK, HANDBOOK OF CONSTITUTIONAL LAW 9-10 (1895); J. POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 145 (1870). Note that in Cooley and Pomeroy, quoted above, the commentators were speaking of issues other than whether state constitutional rights can be protected against private infringement.

246. T. COOLEY, *supra* note 228.

In considering state constitutions we must not commit the mistake of supposing that, because individual rights are guarded and protected by them, they must also be considered as owing their origin to them. The instruments measure the powers of the rulers, but they do not measure the rights of the governed. . . . [A constitution] grants no rights to the people but is the creature of their power, the instrument of their convenience. [It is d]esigned for their protection in the enjoyment of the rights and powers they possessed before the constitution was made. . . .

Id. at 36-37 (quoting *Hamilton v. St. Louis County Court*, 15 Mo. 1, 14 (Bates, *arguendo*)).

It is to be observed of [state constitutional provisions regarding freedom of speech and the press], that they recognize certain rights as now existing, and seek to protect and perpetuate them, by declaring that they shall not be abridged, or that they shall remain inviolate. They do not assume to create new rights, but their purpose is to protect the citizen in the enjoyment of those already possessed. We are at once, therefore, turned back from these provisions to the pre-existing [common] law, in order that we may ascertain what the rights are which are thus protected, and what is the extent of the privileges they undertake to secure.

Id. at 415-17.

See also, to similar effect, H. BLACK, *supra* note 245, at 7-9; J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1858, 1860 (tracing bills of rights to

lawyers draw between the body of law governing relations between individuals and the state and the body of law governing relations among individuals was far less rigid or defined. On the contrary, natural law provided the revolutionary generation with a unified foundation both for the common law governing relations between individuals²⁴⁷ and for the fundamental public "liberties" that the colonists asserted against the perceived encroachments of the British authorities.²⁴⁸ Although the precise content of and remedies available under the law of the land as private law were certainly different than under the law as a restraint on King and Parliament, both aspects functioned as complementary parts of a single legal tradition that protected individual rights from unjust encroachments at the hands of fellow citizens and from violations by the "state."²⁴⁹ Thus, it would not be incongruous for those who drafted the initial state bills of rights to regard the interests listed in state bills of rights as "rights" good against the world, which individuals could vindicate even if the source of infringement were not the state.²⁵⁰

Such arguments may not, however, suffice for state guarantees drafted, amended or reincorporated at a later period, after the orthodox view became established that such guarantees apply only to state actors. Regardless of the views of the revolutionary era drafters of the initial state bills of rights, it could be argued that those who subsequently amended those early constitutions or who drafted and ratified the constitutions of later admitted states assumed that constitutions generally bind only governments, and that it is the beliefs and understandings of these subsequent framers that must guide interpretation of state constitutional guarantees. Despite this argument's force, it does not offer an independent reason why state rights must be construed to require state action. If the

common law sources and noting their use for curbing infringements by government organs and people mobilized as popular majorities).

247. On the natural law basis of private law in the revolutionary period, see generally M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780 - 1860* (1977), distinguishing between the colonists' acceptance of British common law as "the law of nature and its author," and their suspicion of British statutory law.

248. See generally E. CORWIN, *THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* (1955); Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 *STAN. L. REV.* 843 (1978).

249. See E. CORWIN, *supra* note 248, at 24. "Many of the rights that the Constitution of the United States protects at this moment against legislative power were first protected by the common law against one's neighbors." *Id.*

250. See generally Sherry, *The Founders' Unwritten Constitution*, 54 *U. CHI. L. REV.* 1127 (1987) (the framers of the federal Constitution did not intend that the document they drafted was to be considered the sole source of higher law to be applied by judges, but was to function only as a part of the broader tradition of natural law protection of individual rights).

historical record demonstrates that subsequent re-drafters or amenders consciously considered state action issues, their choice to limit the application of rights may well be entitled to deference. However, if the view that constitutions “inherently” limit only governments reflected an unexamined assumption by those later constitutional framers — an assumption that apparently diverged from the understandings of the very predecessors who these later drafters intended to follow — then any claim to deference seems much weaker.²⁵¹ If the latter day framers did err in their assumptions regarding the original framers’ intent, the purposes behind originalist interpretation would suggest that modern courts should give effect to the views of the original framers rather than the errors of their successors.

Finally, it could be objected that even if the individual rights protected by state constitutions were interpreted as part of a natural law tradition that also protected those interests from private infringement, this would not necessarily require the state constitutions themselves to be interpreted in such a fashion. On the contrary, courts have traditionally had authority to protect fundamental interests from some forms of private infringement. Such authority, however, did not derive from any written constitution and is irrelevant to interpretation of such a document.²⁵² The purpose of a written constitution was to provide the authority for courts to protect those rights from infringement by coordinate branches of government, an authority that was unclear at best under common law. Therefore, to speak of a right not only as “fundamental” but also as “constitutional” might imply that the specific right should be understood as a restriction on

251. Originalist approaches to constitutional interpretation emphasize that courts may not alter the framer’s initial intent; otherwise the document’s original, ratified political and philosophical legitimacy would be undermined. *See, e.g.*, T. COOLEY, *supra* note 228, at 68-70; J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 1-9 (1980). Although relevant to reconstruct the intent of later re-drafters or amenders, a background assumption is not a conscious choice and does not constitute a fundamental political act to which subsequent generations must defer.

252. For example, the fundamental right of equal treatment by private individuals wielding significant de facto power was vindicated by the nonconstitutional common law rule that requires common carriers or other providers of necessary services to treat all prospective customers equally. The fundamental rights of liberty and privacy were similarly protected from some forms of non-governmental infringement through the tort doctrine of defamation. *See generally* *Lombard v. Louisiana*, 373 U.S. 267, 275-81 (1963) (Douglas, J., concurring) (discussing the common law duties of businesses affected with a public interest).

The existence of this early body of non-constitutional doctrine was not lost on the nineteenth century commentators. *See, e.g.*, T. COOLEY, *supra* note 228 (the federal Constitution was based on the pre-existing legal order that already guaranteed a range of individual rights and personal freedoms).

government, regardless of whether the same or a cognate right against private infringement also may exist by virtue of another body of law.

Understood in this fashion, the argument that as a matter of general principle state "constitutional" rights apply only against governments may have considerable historical validity. But, so understood, the argument may express little more than a semantic distinction. At the very least, state and federal bills of rights serve as formal statements of what their drafters and the nation as a whole consider the most important natural and civil rights. Assume, *arguendo*, that state constitutional rights are independently protected against private infringement by other bodies of law and that when courts speak of "private infringement of constitutional rights" that they would be more correct if they referred to a private infringement of rights that are so fundamental that we have also given courts explicit constitutional authority to protect them against governmental infringement. Is this a distinction that makes a difference? In either case, the statement of the right in a constitution is merely declarative and does not create rights. In common parlance of lawyers and laymen alike, such rights are generally considered of "constitutional" magnitude regardless of who is infringing upon them.

Nevertheless, there is one level on which a distinction between rights in their more general sense as pre-constitutional "natural rights" and in their strict "constitutional" sense as restrictions on government might make a critical difference. That is with reference to the willingness of courts to act on their own to vindicate those rights. Written bills of rights and the doctrine of judicial review provided a firm basis from which state and federal courts could assert authority to overturn governmental acts that violated the rights restated therein. In contrast, as the reliance on natural law gave way to the dominance of positivist concepts in the early nineteenth century, the traditional justification for courts to independently define and vindicate fundamental individual interests from non-governmental infringement declined. As a result, the role of defining the rights of individuals *inter se* was largely taken over by legislatures.²⁵³

For these reasons, the tradition that "constitutional" rights, narrowly defined, are directed at limiting the actions of governments — a tradition which some courts have ascribed to Cooley and other nineteenth century treatise writers — may well exist. Upon analysis, however, that tradition

253. See generally M. HORWITZ, *supra* note 247, at 4-30. This double movement demonstrates both the ultimate roots of the state action requirement as it has been applied outside of the fourteenth amendment context, and a reason why courts attempting to vindicate fundamental rights from private infringement cast their analysis in the form of constitutional interpretation.

has far less to do with whether the framers of the state bills of rights intended to restrict the scope and application of the rights restated therein, than it has to do with whether courts should share with legislatures the power to define those rights as they apply to interactions between private entities. The real issue is not an independent question of how constitutions themselves have traditionally been interpreted, but a question of the separation of powers between court and legislature — a question that will be taken up in part E, below.

D. Arguments from the Need to Avoid Interfering with the Liberties of Other Private Parties

The main instrumental reason advanced in favor of a state action limit on the reach of constitutionally protected rights is that in the absence of such a limitation courts seeking to vindicate the rights of one private party might infringe the equally important competing liberties of other private parties. This argument has been raised by the United States Supreme Court construing the Bill of Rights,²⁵⁴ by state courts construing state constitutional rights²⁵⁵ and by various commentators.²⁵⁶ But while such considerations suggest caution in expanding the reach of state constitutional rights, they do not necessarily require that any limits must take the form of a state action requirement.

On one level, the claim that state action limitations are freedom enhancing reflects the potential for conflict between specific competing rights. For example, in cases where individuals exercise their rights of speech or petition within shopping centers or other privately owned premises, a conflict arises between the expressive rights of one non-governmental party and the property rights of another. Similarly, attempts to require businesses or private associations to observe constitutional norms of equality or due process can infringe on those entities' rights of property, freedom of contract or freedom of association. In such cases, the

254. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982); *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973); *Peterson v. City of Greenville*, 373 U.S. 244, 249-50 (1963) (Harlan, J., concurring).

255. *See, e.g.*, *Woodland v. Michigan Citizens Lobby*, 423 Mich. 188, 211-12, 378 N.W.2d 337, 347 (1985); *Shad Alliance v. Smith Haven Mall*, 66 N.Y.2d 496, 503, 488 N.E.2d 1211, 1215, 498 N.Y.S.2d 99, 104 (1985) (Jasen, J., concurring); *Southcenter Joint Venture v. National Democratic Pol'y Comm.*, 113 Wash. 2d 413, 780 P.2d 1282 (1989); *Stephanus v. Anderson*, 26 Wash. App. 326, 340-41, 613 P.2d 533, 542, *rev. denied*, 94 Wash. 2d 1014 (1980).

256. *See, e.g.*, L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1149 (1978); Burke & Reber, *supra* note 150, at 1016; Skover, *supra* note 3, at 253-54; and Note, *Robins, supra* note 54, at 659.

state action doctrine arguably performs a valuable service by preventing courts from imposing constitutional obligations on either party, since any gain in liberty enjoyed by one party would inevitably be offset by the freedom lost by the other, a loss made even more egregious by the fact that it is coercively imposed by the court.²⁵⁷

This argument, however, rests on the unspoken assumptions that the legal realm is so densely filled with “rights” of constitutional dimension that no right can be expanded without immediately encountering and diminishing another, and that all of these conflicting rights are of roughly equivalent weight and importance. While this may be an accurate description of some areas of constitutional law, it does not accurately describe the particular countervailing rights at issue in most state constitutional “state action” cases. Neither rights of property,²⁵⁸ rights of group association,²⁵⁹ nor rights of contract and commercial freedom²⁶⁰ are so absolute as to preclude governmental regulation in furtherance of competing constitutional values. Whether this result is explained on the ground that the substantive content of these rights does not extend to the boundaries implicitly set by competing rights, or whether these rights are deemed less important than more favored rights, the result is the same: courts and legislatures have some freedom to impose burdens on the

257. These arguments have been frequently raised by commentators concerned with the loss of property rights suffered by owners required to allow speech and petitioning activities on their premises. *See, e.g.*, Ragosta, *supra* note 3, at 32-35; Comment, *supra* note 3. Similar arguments can be made with regard to other state constitutional rights. For example, any imposition of due process restraints on creditors necessarily diminishes their property rights in the collateral they seek.

258. *See, e.g.*, *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82-88 (1980) (property rights of shopping center owners are not so absolute as to preclude reasonable state regulation requiring those owners to provide access for speech and petitioning).

259. *New York Club Ass'n v. City of New York*, 487 U.S. 1 (1988) (local ordinance requiring certain private clubs to refrain from discrimination did not facially violate the associational interests of the clubs or their members). *See also* *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). *A fortiori*, large commercial establishments possess no absolute rights of association or managerial discretion that would immunize them from reasonable regulation by states in furtherance of similar constitutional goals. *Id.* at 634-38 (O'Connor, J., concurring) (distinguishing rights of “commercial” association). Only individuals engaged in intimate human relationships enjoy pure associational rights generally exempt from state restriction. *Id.* at 617-22.

260. *Fuentes v. Shevin*, 407 U.S. 67 (1972) (holding unenforceable so much of a conditional sales contract as purported to entitle the creditor to replevy the chattel without affording the debtor a prior notice and opportunity to be heard); *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972) (upholding the constitutionality of the cognovit provision of the contract, but indicating that such provisions are generally subject to regulation in order to preserve the due process rights of debtors).

interests of one set of private parties in order to further the constitutional-type interests of other private parties.²⁶¹

In any event, regardless of the accuracy of the assumptions underlying these arguments, they do not justify so broad and non-discriminating an approach to conflict avoidance as an across-the-board state action requirement. While some degree of "liberty" is inevitably lost whenever private parties are required to conform their conduct to constitutional norms, freedoms are also infringed when private parties violate those norms. The issue is to strike the correct balance. Any existing conflict could be more sensitively and appropriately resolved on the merits by weighing all relevant factors and balancing the interests actually at stake, rather than by any single threshold requirement, such as state action.²⁶²

In addition, state courts and state constitutions are appropriate organs for resolving the conflicts that arise in these cases. The countervailing private interests that would most often be subordinated in such cases — including the rights of property owners, employers or creditors — have traditionally been both founded upon and limited by state law. Consequently, there is nothing inherently inappropriate in the prospect of a state court finding that state constitutions as well as state statutory or common law principles must be considered when such private rights must be defined or limited.²⁶³

261. If the implicit assumption was correct that these potentially conflicting rights also were protected by the federal Constitution, the argument would prove far more than its proponents intend. If all constitutional rights "touch" at their margins, so that to expand one would necessarily contract another, then any decision by a state court attempting to balance conflicting private rights would deny the federal constitutional rights of the party losing the litigation. The supremacy clause, however, prevents this result. Under these assumptions, only the United States Supreme Court would have the power to define the boundaries between private rights, and state courts and constitutions would effectively be deprived of any independent role. This is not to dispute, as Professor Maltz has pointed out, that private interests conflict and that state constitutional adjudications may not increase the sum total of "rights" in the world. Maltz, *Dark Side*, *supra* note 22. The point is that state courts and state constitutions may have some legitimate role to play in balancing those competing interests.

262. The utility of a direct choice among competing interests rather than a mechanical application of the state action doctrine has been recognized even in the federal context. *See, e.g.*, Chemerinsky, *More Is Not Less: A Rejoinder To Professor Marshall*, 80 Nw. U.L. REV. 571, 572-73 (1980). Professor Skover also has argued that state action limits on state constitutional rights guarantees do not effectively preserve liberty, but merely render the operative definition of those rights systematically underinclusive. Skover, *supra* note 3, at 253-54.

263. A similar point was made by the United States Supreme Court in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). In that case, a shopping center owner claimed that the California decisions requiring it to allow expressive activities on its premises had the effect of depriving it of federally constitutionally protected property

The claim that a threshold state action requirement is freedom preserving also can be understood on another level as a claim that individuals should enjoy some realm of autonomy in which they are free to act arbitrarily, to refuse to listen to certain points of view for no better reason than because they happen to disagree, or to exercise private prejudices in their personal dealings with others. Arguably, these are important elements of individual autonomy that should never be sacrificed to the countervailing interests of others, or even questioned by any court.²⁶⁴ As applied to individual human beings, such arguments have great force²⁶⁵ and argue in favor of limiting the reach of state constitutional rights to ensure that an appropriate realm of personal individual autonomy can be maintained.

Nevertheless, while arguing in favor of some limits on the reach of state rights, these considerations do not necessarily favor defining that limit along the lines of "state action," as that term is ordinarily understood. Most courts relying on such arguments to justify reading a state action limitation into state constitutions, have done so in cases where the parties seeking to avoid constitutional restraint were not private individuals but business organizations or other relatively powerful and impersonal entities.²⁶⁶ By grouping all non-governmental entities into a single class of non-

rights. The Court had previously indicated that such an argument had merit in the context of an asserted first amendment right of access to such private fora. *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972). It sharply distinguished the situation presented, however, when the asserted right of access was based on state rather than federal constitutional principles. In the latter circumstance, the state merely is exercising, through its courts, an undisputed state police power to define and limit property rights. 447 U.S. at 81. The vindicated state constitutional right to speak thus becomes the functional equivalent of an easement imposed upon the property by operation of law, an easement states may freely impose unless it becomes so onerous as to constitute a "taking" of property without compensation.

264. The erosion of liberty that can result from unrestricted judicial inquiry into private conduct has been frequently noted. *See, e.g.*, Note, *Four Alternatives*, *supra* note 54, at 601; *Stephanus v. Anderson*, 26 Wash. App. 326, 340-41, 613 P.2d 533, 541-42, *rev. denied*, 94 Wash. 2d 1014 (1980). The United States Supreme Court has frequently noted that some personal choice and intimate conduct is a fundamental attribute of liberty and generally immune from state regulation. *See, e.g.*, *Roberts v. United States Jaycees*, 468 U.S. 609, 617-21 (1984); *Lombard v. Louisiana*, 373 U.S. 267, 274-75 (1962) (Douglas, J., concurring).

265. *Burke & Reber*, *supra* note 150, at 1016.

266. Defendants in cases raising speech and petition rights have most often been shopping centers and universities. *See supra* notes 50-91. In addition, they have included a state fair, a large private hospital and an agricultural labor camp. *See United Farm Workers v. Agricultural Labor Relations Bd.*, 201 Cal. App. 3d 1213, 236 Cal. Rptr. 38, *vacated on other grounds*, 237 Cal. Rptr. 576, 737 P.2d 779 (1987); *Oklahomans for Life, Inc. v. State Fair of Okla., Inc.*, 634 P.2d 704 (Okla. 1981); *Jones v. Memorial Hosp. Sys.*, 746 S.W.2d 891 (Tex. Ct. App. 1988). Defendants in cases raising equality rights have included insurance companies and other business entities, private clubs and high school

state actors, no matter how large, institutionalized or powerful, the state action doctrine has served primarily to divert attention from the need to protect the autonomy interests of private individuals. It has instead tended to protect the ability of relatively large and powerful business entities or private associations to act arbitrarily, to discriminate, to effectively muzzle others, or to infringe on those values of personal autonomy that they assert in their own defense.

Finally, abandoning a state action requirement need not sacrifice the autonomy interests of private individuals. On the contrary, those courts most active in abandoning or modifying state action requirements have consistently reaffirmed that the expansion they envisage is not without limit, and that the decisions of private individuals will remain free of constitutional scrutiny.²⁶⁷ While the debate continues as to how best to define alternative limits, all courts considering the issue have excluded from constitutional scrutiny any purely private decision by an individual in matters truly infringing personal autonomy.²⁶⁸

E. Arguments from Separation of Powers: That Private Infringement of Fundamental Rights Should Be Regulated by Legislatures, Not Courts

The most powerful argument employed in defense of reading state action limits into state bills of rights is one of separation of powers. This argument has been phrased and explained by various courts in different ways: that regulation of private relations is inherently a function of the

athletic associations. *See* *United States Jaycees v. Richardet*, 666 P.2d 1008 (Alaska 1983); *Jonathan Club v. California Coastal Comm'n*, 197 Cal. App. 3d 884, 243 Cal. Rptr. 168, *appeal dismissed*, 488 U.S. 881 (1988); *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979); *Schreiner v. McKenzie Tank Lines & Risk Mgmt., Inc.*, 408 So. 2d 711 (Fla. Dist. Ct. App. 1982), *aff'd*, 432 So. 2d 567 (Fla. 1983); *Burning Tree Club, Inc. v. Bainum*, 305 Md. 53, 501 A.2d 817 (1985); *Hartford Accident & Indem. Co. v. Insurance Comm'r*, 505 Pa. 571, 586, 482 A.2d 542, 549 (1984); *Lincoln v. Mid-Cities Pee Wee Football Ass'n*, 576 S.W.2d 922, 925 (Tex. Civ. App. 1979); Defendants in cases raising due process issues have generally been banks, business corporations and similar institutional creditors. *See supra* notes 166-67.

267. In *Robins* and *Gay Law Students*, the California Supreme Court did not proclaim an absolute principle that state constitutional restraints apply across the board to all private infringers. Rather, it carefully weighed the particular facts of each case. *See supra* notes 50-53 & 138-40 and accompanying text. Where the competing rights of the defendant have been greater, California courts have found constitutional restraints inapplicable. *See, e.g.*, *Franklin v. Leland Stanford Jr. Univ.*, 172 Cal. App. 3d 322, 342 n.8, 218 Cal. Rptr. 228, 240 n.8 (1985). Courts in New Jersey, Washington, Alaska, Texas and Pennsylvania have achieved the same result through explicit balancing tests. *See infra* notes 299-304 and accompanying text.

268. *See infra* notes 316-18 and accompanying text.

legislative branch;²⁶⁹ that the complexity, fluctuating interests and variability of private relations demand flexibility that constitutional adjudication cannot provide;²⁷⁰ or that attempts to apply guarantees to the relations of non-governmental parties would cause judges to inappropriately impose their individual beliefs and philosophies on other branches of government.²⁷¹ The common thread is that, regardless of whether it would be desirable to require some non-governmental entities to observe constitutional norms, it is properly the business of legislatures, not courts, to define and impose those requirements.²⁷²

At the outset, it should be noted that state constitutions and state judges occupy a somewhat different position with respect to separation of powers issues than do their federal counterparts. Federal law provides a "floor" for all competing rights at stake in individual rights cases; no state decision can denigrate these federal rights, even in the name of the state constitutional rights of another party. Consequently, state courts have comparatively limited discretion to construe their state constitutions in ways that would impose burdens on private parties.²⁷³ Moreover, many separation of powers arguments apply with less force to state than to federal constitutional law. In states with judiciaries directly elected or subject to retention elections, institutional concerns over undemocratic decisionmaking should be lessened.²⁷⁴ And even in states with purely appointed judiciaries, the relative ease and frequency with which state constitutions have been amended significantly lessens the possibility that judicial decisions out of step with popular sentiments will be unchangeable.²⁷⁵ Of course, elected judges must respect the prerogatives of

269. See, e.g., *Woodland v. Michigan Citizens Lobby*, 423 Mich. 188, 211 n.28, 378 N.W.2d 337, 347 n.28 (1985).

270. See, e.g., *Cologne v. Westfarms Assocs.*, 192 Conn. 48, 469 A.2d 1201 (1984); *Western Pa. Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co.*, 512 Pa. 23, 31-32, 515 A.2d 1331, 1335 (1986); *Southcenter Joint Venture v. National Democratic Pol'y Comm.*, 113 Wash. 2d 413, 780 P.2d 1282 (1989).

271. See, e.g., *Shad Alliance v. Smith Haven Mall*, 66 N.Y.2d 496, 503-04, 488 N.E.2d 1211, 1216, 498 N.Y.S.2d 99, 104 (1985). See also Deukmejian & Thompson, *All Sail and No Anchor — Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975, 1001-04 (1979).

272. This point has been raised by academic commentators as well. See, e.g., L. TRIBE, *supra* note 256, at 1149; Note, *Robins, supra* note 54, at 659-60; Note, "Malling" of *Constitutional Rights, supra* note 22, at 116-18.

273. See *supra* note 27 and accompanying text.

274. See generally Skover, *supra* note 3, at 257-59; Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?*, 64 WASH. L. REV. 19 (1989).

275. The Louisiana Constitution, for example, was completely redrafted in 1974, and then amended some 22 more times between 1974 and 1988. See generally Williams, *In The*

coordinate branches, and the power to amend the state constitution, however easy, should not be taken lightly.²⁷⁶ Nevertheless, separation of powers arguments developed in the federal context in support of a state action requirement cannot be automatically transferred to the state constitutional context.

Viewed solely in terms of state constitutional law, the separation of powers question resolves into two related but separable aspects. The first focuses on the appropriate allocation of authority between courts and legislatures and asks whether there are historical or practical reasons requiring courts to systematically refrain, in the absence of explicit statutory direction, from requiring private entities to respect the "constitutional-type" rights of others. The second focuses on the differences between constitutions and other sources of law, such as statutes or common law, and asks whether constitutions have any legitimate role in regulating the relations between non-governmental parties.

Courts in the common law tradition do not seem restrained by any historical or inherent reason from playing a role in regulating the fundamental rights of private parties in their relations with each other. The task of regulating the ordinary relations of private parties was a major

Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result, 35 S.C.L. REV. 353, 382 (1984) (noting the ease and frequency of state constitutional amendments to "correct" unpopular judicial decisions); Comment, *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 CALIF. L. REV. 1473 (1987).

276. The negative consequences of political methods that overturn unpopular state judicial decisions are well illustrated by the recent retention election controversy that resulted in the ouster of California Supreme Court Chief Justice Bird and Justices Grodin and Reynoso. That campaign demonstrates the dangers of politicization of state constitutional decisions. See generally Grodin, *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969 (1988). As Dean Calabresi noted in a parallel context:

[T]he position that where procedures for amending constitutions are relatively easy courts can use constitutional adjudication to modify or eliminate anachronistic laws, as well as to uphold constitutional rights, is simplistic and wrong.

[Constitutional adjudications are] and should be more than an invitation to amend the constitution. Indeed, the easier the procedure for amendment, the more must the judicial decrees of unconstitutionality put to the people the seriousness of what an amendment means. Only in this way can constitutional rights be protected from temporary majorities. [Too easy a reliance on amendment to control judicial excess] cheapens, indeed destroys, the crucial moral force that underlies and protects true constitutional decisions.

G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 12 (1982). See also Note, *"Malling" of Constitutional Rights*, *supra* note 22, at 117. There is some evidence that controversial state constitutional judicial decisions only rarely result in responsive state constitutional amendments. Utter, *supra* note 274, at 36-40.

function of traditional common law courts.²⁷⁷ Courts' innate capacities do not change when fundamental rights are involved. American courts have in the past found no impediment to their application of fundamental principles (whether drawn from natural law or from written state constitutions) to controversies between private parties.²⁷⁸ The courts' capacity to deal with such questions cannot be viewed as permanently lost merely because the judicial function has become less common in recent decades.²⁷⁹

Nor can it be said that courts lack all democratic legitimacy when making decisions of this sort. To the extent that majoritarian choice constitutes the ultimate authority for allocating rights among private claimants, legislatures are, arguably, the single most appropriate forum for determining such issues. Courts should, therefore, exercise appropriate self-restraint. It does not follow, however, that courts cannot legitimately participate in the process of allocating basic rights among private parties. The authority of courts to order private relationships is ultimately founded on the longstanding consent of the people and their political leaders. This consent, while occasionally questioned in controversial cases, has never been substantially withdrawn. Moreover, even in those states where justices are appointed rather than elected, the judiciary as a group inevitably tend to reflect long term trends in majority sentiment. The creation of law by the process of case-by-case development is by definition incremental in nature and ultimately the result of many different judges confronting variations on a single problem over a period of time. As such, the ultimate results of the process can be expected to, and generally do, reflect long term societal consensus, rather than the potentially divergent views of one or more well-placed individuals.²⁸⁰

Similarly, the practical advantages that legislatures enjoy over the judiciary in the task of allocating rights among competing private claimants are not so overwhelming as to completely deprive courts of all ability to participate with legislatures as partners in fashioning the operative rules governing the circumstances under which non-governmental entities may be required to respect the fundamental rights of others. Although legislative bodies are generally better suited than courts to gather some kinds of information and to reconcile the conflicting interests

277. See generally L. FRIEDMAN, A HISTORY OF AMERICAN LAW 467-87 (1985).

278. See *supra* notes 232-44 and accompanying text.

279. See generally *Southcenter Joint Venture v. National Democratic Pol'y Comm.*, 113 Wash. 2d 413, 446-49, 780 P.2d 1282, 1299 (1989) (Utter, J., concurring).

280. J. ELY, DEMOCRACY AND DISTRUST 67-68 (1980); G. CALABRESI, *supra* note 276, at 93-95.

of different segments of society,²⁸¹ courts have some compensating advantages of their own. As has been recognized in other contexts, the case-by-case process of judicial decisionmaking permits greater flexibility of response to unforeseeable or subtly varying factual circumstances and allows tentative solutions to difficult or closely balanced issues of fact and principle to be worked out in practice without committing the decisionmaker to the same result in future cases.²⁸² Moreover, because case-by-case decisionmaking is constrained by the need to justify results by reference to principles previously announced, it is more likely to ultimately result in consistent and intellectually defensible results rather than from ad hoc political horse trading. Finally, to the extent that one may fear the ability of powerful private entities to wield disproportionate influence over political representatives, the relative political isolation of courts may provide a practical additional safeguard.

Moreover, even if concerns over the lack of immediate democratic sanction or the practical incapacities of courts constitute a reason for courts to defer to legislatures for policy choices, the dividing line between the role of legislatures and courts need not necessarily be drawn on the basis of whether "state action" is involved. Certainly Americans expect most of the rules governing the daily activities of private parties to be set by elected representatives. But they equally expect most of the rules governing the activities of government and its officials to be set by those same representatives. Judges seem to enjoy, if anything, more practical insight and a historically better sanctioned role as partners with legislators in cases concerning private rights and duties than in cases concerning government operations. The undoubted necessity of judicial self-restraint in all situations does not dictate that permissible judicial activity should depend on the presence of state action.

Such arguments address only half of the problem, however, and can be construed as fundamentally misleading insofar as they posit a real "partnership" between courts and legislatures. The more difficult question is the proper role of state constitutions in allocating rights among private claimants. As many courts and commentators have pointed out, judicial decisions based on constitutional interpretation, unlike those based on

281. *See, e.g.*, Deukmejian & Thompson, *supra* note 271, at 1000.

282. In the analogous situation where an administrative agency can choose between quasi-legislative rulemaking and quasi-judicial case-by-case adjudication as alternative ways of developing policy, the Court has noted that the latter method has significant practical advantages of its own. *See, e.g.*, National Labor Relations Bd. v. Bell Aerospace Co., 416 U.S. 267, 292-94 (1974); Securities & Exchange Comm'n v. Chenery Corp., 332 U.S. 194, 202-03 (1947).

other sources of law, cannot be changed by ordinary legislative processes. Such decisions contemplate a complete displacement of legislative authority and majoritarian decisionmaking, not a cooperative effort by courts and legislatures.²⁸³ Such objections do constitute additional reasons for judicial self-restraint in interpreting the substance of constitutional rights. However, these arguments do not demonstrate that constitutionally based rights are totally different in kind from those based on other sources of law, and are not dispositive of whether fundamental constitutional rights must be interpreted as rights against only governmental interference.²⁸⁴

The claim that decisions grounded in constitutional interpretation are permanently beyond majoritarian control significantly overstates reality. No judicial decision can do more than establish a provisional "interim" rule. Majoritarian processes can overturn any decision; the only issue is the relative difficulty of this task. Decisions based on statutes or common law can be overturned relatively easily by legislative enactment. Those based on the federal Constitution can be overturned only with great difficulty by amendment or by the slow and uncertain process of replacing outgoing Justices with successors holding different views. As noted above, state constitutional decisions fall in the middle of this spectrum. They can be overturned by the relatively easier process of state constitutional amendment or, in many states, by electing justices likely to reconsider controversial decisions. Such methods of state constitutional change are not "easy" in any absolute sense, nor should they be. But the state process is considerably easier than that required to produce equivalent changes on the federal level. These methods are sufficiently easy to significantly lessen the danger that judicial decisions based on state constitutional rights guarantees will long or often hamstring popular will in the area of private rights.²⁸⁵ Thus, the real issue is not whether state constitutions preempt majoritarian decisionmaking, but whether the somewhat increased difficulty of overturning decisions based on state constitutions requires that state action requirements be systematically read into state rights guarantees.

283. See, e.g., G. CALABRESI, *supra* note 276, at 11-12; Deukmejian & Thompson, *supra* note 271, at 986; Maltz, *Dark Side*, *supra* note 22, at 1000.

284. See Skover, *supra* note 3, at 259 (suggesting that the proper primacy of state legislatures in allocating private rights can be maintained best by substantive judicial deference, rather than by threshold tests like the state action doctrine, which removes whole categories of cases from effective judicial review).

285. See *supra* note 275. Cf. Deukmejian & Thompson, *supra* note 271, at 986 (decrying the anti-democratic impact of expansive interpretations of state constitutions, but noting that the greater ease of amending state constitutions permits state courts greater leeway than federal courts should exercise in similar cases).

Reformulated in this way, the question becomes whether the risks of permitting constitutionally based judicial input outweigh the risks of depriving courts of any independent role to determine the extent to which fundamental rights can be vindicated against private infringement. This may ultimately be a matter of judgment. But the same rationales that have been traditionally used to justify judicial actions as a second line of defense for fundamental rights when democratic processes fail to prevent governmental violations of those rights would appear to equally justify similar protection when legislative processes fail to protect those rights from private-party infringement.²⁸⁶ Whatever the source of infringement, the legislature concededly has the primary role in determining the operative rules. But in both cases, courts applying constitutional norms may be able to play a useful role by supplementing or tentatively reversing political decisions in those relatively rare instances where the political branches fail to protect substantive rights. In the context of state constitutional law, where judicial errors are relatively easy to correct, the risks of judicial abdication seem greater than the risks of judicial domination.

Undeniably, the substance of what a state constitution commands may differ depending on whether state or private infringement is alleged, and the range of permissible results may be significantly broader where private rights conflict. But this difference involves the substantive question of how a constitutional right to free speech, equal treatment or due process is defined in particular circumstances. It does not demonstrate that constitutions are irrelevant simply because a private rather than a government infringer is at bar. While such arguments may thus counsel judicial self-restraint, they too do not demonstrate that the line between permissible and impermissible judicial activity must be drawn along the "state action" frontier.

The remaining arguments against reliance on state constitutions as sources of law to protect rights from non-governmental interference are essentially arguments of prudence: that constitutions are inherently too rigid and unchangeable to provide workable rules for an area so complex

286. Some state constitutional rights guarantees clearly express this view of the role of courts by explicitly providing that they are self-executing; courts are thereby empowered to enforce them regardless of whether the legislature acts. *See, e.g.*, TEX. CONST. art. I, § 3a. Even where the texts are not explicit, several state courts have implicitly embraced this view, holding that certain rights guaranteed by their constitutions are also to be construed as self-enforcing grants. *See, e.g.*, *Harley v. Schuylkill County*, 476 F. Supp. 191 (E.D. Pa. 1979) (citing *Erdman v. Mitchell*, 207 Pa. 79, 56 A. 327 (1903) (PA. CONST. art. I, § 1 is self-executing)). *Cf. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (construing a cause of action directly under the fourth amendment).

and fast changing as private relations are alleged to be;²⁸⁷ and that expanding the reach of state constitutional rights will likely have the effect of diluting their substantive content.²⁸⁸

As to the first point, while constitutional principles are inappropriate instruments for regulating the details of private conduct, it is far less evident that placing constitutional outer bounds on such conduct would require excessively detailed regulation. Nothing is so inherently “complex” or “changeable” about deciding on the merits whether privately owned public gathering places should be closed to speech and petitioning activity, whether large employers may invidiously discriminate against homosexual job applicants, or whether financial institutions should notify their debtors before engaging in self-help seizure of the debtor’s property.

Respecting the second point, it is surely true that the substantive constitutional rules that bind government may not always be transferable without change into the realm of private interactions. However, protections against government action need not be weakened or diluted. Rather, all that is necessary is to recognize that the substantive meaning of constitutional norms may change depending on the nature of the violator, and to make distinctions accordingly.²⁸⁹

* * *

For the reasons discussed above, it is evident that state constitutional rights guarantees should not be applied across the board to all types of interactions among private parties; limiting principles are necessary. However, except in rare cases where the state constitutional text or history is explicit, such arguments do not demonstrate that those limits should be based on a requirement of state action, instead of some other criterion. The construction of alternative limits on the application of state bills of rights on a basis other than a “state action” requirement, and whether such limits are preferable to state action, are thus open to consideration on their merits.

IV. CONSTRUCTING LIMITS FOR STATE CONSTITUTIONAL RIGHTS GUARANTEES: ARE THERE BETTER ALTERNATIVES TO “STATE ACTION?”

Courts that have considered the applicability of state rights guaran-

287. Maltz, *Dark Side*, *supra* note 22, at 1003-05 (noting that this argument is flawed).

288. See Marshall, *Diluting Constitutional Rights: Rethinking “Rethinking State Action,”* 80 NW. U.L. REV. 558 (1985).

289. See *infra* note 296.

tees, regardless of their position on the state action question, have recognized that some limits must be placed on the application of state constitutional rights; they disagree only as to defining those limits. They have, for example, uniformly agreed that in certain factual situations — such as where anti-abortion demonstrators intrude on the private property of abortion clinics — expressive activity is not protected by state constitutional speech and assembly guarantees. Courts that require state action concluded that this activity is not protected on the ground that the clinics are not sufficiently connected with the government.²⁹⁰ Courts not requiring state action reached identical results by balancing the competing private interests at stake.²⁹¹

Despite such convergences, the distinction between states that interpret their constitutions to contain an implied state action limit on the reach of rights guarantees and those that do not remains important. If a showing of state action is required before state rights guarantees become operative, then those guarantees will be ineffective as a basis for systematic protection of individual rights from powerful non-governmental infringers. Constructing an alternative set of limits on those provisions may extend their operative reach, and thus provide a means to control nominally private institutions that wield significant *de facto* power over individuals. What must be determined is whether an alternative set of limits can be constructed and whether such limits would be preferable to the state action requirement as a means of limiting the application of state rights.

A. *Constructing Alternative Limits: What Factors Are Relevant?*

As was discussed above, some limits on the reach of state constitutional rights guarantees must be imposed to preserve the autonomy of individuals,²⁹² to maintain an appropriate scope for legislative choice in

290. See, e.g., *Ingram v. Problem Pregnancy of Worcester, Inc.*, 396 Mass. 720, 488 N.E.2d 408 (1986); *Kugler v. Ryan*, 682 S.W.2d 47 (Mo. Ct. App. 1984); *State v. Horn*, 139 Wis. 2d 473, 407 N.W.2d 854 (1987). But see *Parkmed Co. v. Pro-Life Counselling, Inc.*, 91 A.D.2d 551, 457 N.Y.S.2d 27 (1982) (injunction that prohibited any anti-abortion demonstrations on the privately owned plaza fronting a large office building was overbroad).

291. See, e.g., *State v. Brown*, 212 N.J. Super. 61, 513 A.2d 974 (App. Div.), *certif. denied*, 107 N.J. 53, 526 A.2d 140 (1986); *Planned Parenthood of Monmouth County, Inc. v. Cannizzaro*, 204 N.J. Super. 531, 499 A.2d 535 (Ch. Div. 1985); *Crozer Chester Medical Center v. May*, 352 Pa. Super. 51, 506 A.2d 1377 (1986); *Right to Life Advocates, Inc. v. Aaron Women's Clinic*, 737 S.W.2d 564 (Tex. Ct. App. 1987), *cert. denied*, 488 U.S. 824 (1988); *Bering v. Share*, 106 Wash. 2d 212, 721 P.2d 918 (1986), *cert. dismissed*, 479 U.S. 1050 (1987); *City of Sunnyside v. Lopez*, 50 Wash. App. 786, 751 P.2d 313 (1988).

292. See *supra* notes 254-63 and accompanying text.

balancing the competing rights and interests of private parties,²⁹³ and, in general, to avoid sacrificing more liberty than would be gained by such an expansion of constitutional reach.²⁹⁴ These considerations suggest some of the factors that should contribute to any alternative set of limits.

First, to avoid impermissible infringements on zones of personal autonomy, state constitutional rights guarantees should be construed to bind, in addition to government, only corporations, associations or other similar entities, and natural persons only to the extent those individuals are wielding impersonal power. "Impersonal power" used in this context means not the authority enjoyed by all individuals to make personal choices but the power that some individuals enjoy — by reason of wealth, position, or some other factor — to exercise control over public or business related matters that affect many people. It is, for example, one thing for a Donald Trump to decree that political discussion is not permitted at his dinner table. It would be something quite different for that individual to decree that political discussions are not allowed among employees in his hotels.²⁹⁵ State constitutional rights should not be applied in any manner that would restrict choices of individual persons acting in private capacities with respect to matters that personally affect them.

Second, to preserve the dominant role of legislatures in the definition and allocation of private rights, courts should be cautious in expanding the substantive reach of state constitutional guarantees as applied to non-governmental infringers. This caution should encompass both a recognition that only the most important and fundamental state constitutional rights furnish a sufficiently important basis for judicial intervention, and a strong resistance to intervention even in support of these core values unless those rights are violated in some important respect. Detailed prescriptions of private conduct should be avoided and minor or technical violations that might not be tolerated if state action is involved should be considered *de minimis* if a private infringer is at bar.²⁹⁶

Finally, to maximize the liberty of all private parties involved in

293. See *supra* notes 269-89 and accompanying text.

294. See *supra* notes 264-68 and accompanying text.

295. The distinction is similar to those drawn by other commentators who have attempted to define a sphere of public life to which constitutional rights should apply. See, e.g., Heins, *supra* note 3, at 351 (Massachusetts equal rights amendment should apply to "discrimination that injures its victims in public, social, economic, or political affairs" but not to "discrimination causing injuries that are private, personal, insulting perhaps, but without material impact on public life").

296. The purpose and effect of such a restriction is similar to the goal of judicial restraint, which also has been advocated by others. See, e.g., Deukmejian & Thompson, *supra* note 271, at 981. See generally Skover, *supra* note 3, at 277-79.

disputes of this type, infringement of the plaintiff's rights cannot be considered in a vacuum or on any absolute scale. Instead, those rights must be balanced against the competing rights of the alleged infringer. Restraints should be imposed only when the imposition on the fundamental liberties caused by the challenged action outweigh the imposition of constitutional restraints on the liberties of the defendant.²⁹⁷

State decisions holding that state constitutional guarantees of fundamental rights can apply in the absence of state action lend support to such an alternative set of limiting principles. Contrary to the fears of some critics, those decisions have not indicated that state constitutional rights guarantees should be binding on all private parties regardless of the circumstances. Rather, these courts appear to be in the process of articulating a different set of limiting principles, not rooted in a threshold consideration of whether the infringer is connected to the government. Though the arguments have not been completely expressed, these cases are strikingly similar to the above three-factor test both in their common goal of defining a category of arguably "private" actors who can justifiably be required to observe state constitutional norms and in their results.

For example, in *State v. Schmid*,²⁹⁸ a case involving the exercise of speech and assembly rights at a privately owned shopping center, the New Jersey Supreme Court held that its state constitutional guarantee of freedom of speech was not limited by any requirement of state action. The court did not, however, hold that the constitution binds all private parties. Instead, the court held that three factors must be considered to determine when private property owners would be required to permit such activity on their premises: 1) the nature and ordinary use of the property at issue; 2) the extent of the owner's invitation to the public to enter those premises; and 3) the purpose and nature of the expressive activity at stake.²⁹⁹

Other states have taken a similar approach to cases involving free speech and private property. For example, in *Alderwood Associates v. Washington Environmental Council*,³⁰⁰ another shopping center case, the

297. Approaches to state rights that involve balancing competing interests on the merits also have been advocated by others. See, e.g., Note, *Four Alternatives*, *supra* note 54, at 608-12; Note, *supra* note 30, at 1522-31. However, such balancing tests are usually proposed as part of a flexible or shifting definition of state action rather than an alternative to the state action requirement. See, e.g., Glennon & Nowak, *supra* note 6; Comment, *supra* note 49, at 95-99; Note, *Robins*, *supra* note 54, at 660-62.

298. 84 N.J. 535, 423 A.2d 615 (1980), *appeal dismissed*, 455 U.S. 100 (1982). See *supra* note 59.

299. *Id.* at 563, 423 A.2d at 630.

300. 96 Wash. 2d 230, 635 P.2d 108 (1981). See *supra* note 61. In its subsequent decision in *Southcenter Joint Venture v. National Democratic Pol'y Comm.*, 113 Wash. 2d

Washington Supreme Court also rejected a state action requirement and substituted a multi-factor balancing test of the competing interests involved. Like the *Schmid* test, the *Alderwood* test focused on the nature and use of the private property and the nature of the expressive activity. Unlike the New Jersey version, however, the Washington test explicitly considered the possibilities of effective time, place and manner regulation of the activity.³⁰¹ The California Supreme Court, in *PruneYard*, though less clear in rejecting the state action concept in its entirety,³⁰² also proposed a multipart test for speech and petition access to shopping centers. This test included the factors listed in *Alderwood*, plus consideration of the availability of alternative fora.³⁰³ Other state courts, while not explicitly articulating the precise nature of the test used, also have explicitly balanced competing private rights to resolve claims under state guarantees of speech and assembly.³⁰⁴

Moreover, it appears that decisions abandoning state action limits for other state constitutional rights also may be interpreted like *Schmid*, *Alderwood* and *PruneYard* as imposing instead a different and more expansive — but nonetheless real — set of limits on the applicability of those rights. For example, as noted above, a series of Pennsylvania cases held that rate setting decisions by private insurers are subject to the constraints of the state constitution's equal rights amendment.³⁰⁵ Although those decisions appear to suggest that those rights apply without limit,³⁰⁶ both the unique status of the automobile insurance business³⁰⁷ and

413, 780 P.2d 1282 (1989), the Washington Supreme Court rejected the *Alderwood* analysis for claims based on the state guarantee of free speech and other rights set forth in the Washington Declaration of Rights. It did, however, retain that analytic approach for claims against private actors who infringe upon rights contemplated by that state's initiative and referendum procedures. *Id.* at 426, 780 P.2d at 1289. Before *Southcenter* limited its application, the *Alderwood* test was successfully applied by lower courts in Washington. *Id.* at 454-57, 780 P.2d at 1303-04 (Utter, J., concurring).

301. 96 Wash. 2d at 244-45, 635 P.2d at 116.

302. *See supra* notes 52-58 and accompanying text.

303. *Robins v. PruneYard Shopping Center*, 23 Cal. 3d 899, 910, 592 P.2d 341, 347, 153 Cal. Rptr. 854, 860 (1978), *aff'd*, 447 U.S. 74 (1980).

304. *See, e.g.*, *Johnson v. Tait*, 774 P.2d 185, 190 (Alaska 1989); *Crozer Chester Medical Center v. May*, 352 Pa. Super. 51, 506 A.2d 1377 (1986); *Right to Life Advocates, Inc. v. Aaron Women's Clinic*, 737 S.W.2d 564 (Tex. Ct. App. 1987).

305. *See supra* notes 127-29 and accompanying text.

306. *Hartford Accident and Indem. Co. v. Insurance Comm'r*, 505 Pa. 571, 586, 482 A.2d 542, 549 (1984); *Welsch v. Aetna Ins. Co.*, 343 Pa. Super. 169, 173-74, 494 A.2d 409, 412 (1985); *Bartholomew v. Foster*, 115 Pa. Commw. 430, 437, 541 A.2d 393, 396 (1988).

307. As several courts have noted in the context of claims arising under state constitutional due process provisions, automobile insurers benefit directly from the legal requirement in all states that drivers must have such insurance. This "captive market," combined with the special degree of regulation they are subjected to under either "no fault"

the failure of the courts to extend this rationale to other factual situations, suggest an alternative explanation. These cases could be reinterpreted to hold that some limits on the application of state equality rights may be required but that the requirement may be met where the defendant provides a necessary public service, derives benefits from the state, has traditionally been subject to significant regulation, and is alleged to be infringing on important constitutional values.³⁰⁸

In similar fashion, the pre-*Schmid* decisions of the New Jersey Supreme Court in *Peper v. Princeton University Board of Trustees*³⁰⁹ and *King v. South Jersey National Bank*,³¹⁰ also may be interpreted to intimate that non-state action limits may be applied to state guarantees of equal protection and due process. The holding in *Peper*, that Princeton University was bound by New Jersey's equal protection provision despite its private status, appears to turn on the importance of the right to pursue one's livelihood.³¹¹ More importantly, the significant economic and cultural power wielded by Princeton University and its multiple ties to the state and federal government, though not relied on by the court, also may be grounds for distinguishing that defendant from others. The holding in *King*, that financial institutions engaging in self-help repossessions must afford their debtors some minimal due process rights, also may be seen to have depended, at least implicitly, on the importance of the right at issue, the perceived power of such institutions and the coercive impact of summary seizures.

Thus, both the results and reasoning of the cases lend support to the three-factor analysis derived above. Although these decisions do not discuss whether state constitutional rights guarantees bind private individuals or whether the other, arguably less fundamental, rights should be interpreted to apply to non-governmental actors, the results in these cases are consistent with such principles. In each case, the private entity required

laws or state mandated "assigned risk pools," renders them even more "entangled" with the state than other insurers. *Compare* *Shavers v. Kelly*, 402 Mich. 554, 267 N.W.2d 72 (1978) (relying on such facts for its finding that such an insurer was a state actor for Michigan constitutional due process purposes) with *King v. Meese*, 43 Cal. 3d 1217, 743 P.2d 889, 240 Cal. Rptr. 829 (1987) (noting the same facts but declining to find state action under the California due process guarantee).

308. The decision in *Gay Law Students* is similar in structure. Although that decision was phrased in terms of an expanded definition of state action rather than an abandonment of such a concept, the court also found that the state constitutional right of equality applied only after considering the significant power wielded by the defendant and its multiple connections with the state. See *supra* notes 138-48 and accompanying text.

309. 77 N.J. 55, 389 A.2d 465 (1978).

310. 66 N.J. 161, 177-78, 330 A.2d 1, 9-10 (1974).

311. 77 N.J. at 77-80, 389 A.2d at 476-77.

to observe state constitutional norms was not an individual, but a large and relatively impersonal entity that wielded significant *de facto* power over individual lives. The individual rights at stake in these cases — the right to engage in political speech and activity in a forum that would assure that such speech would reach its intended audience, the right to equal treatment by large entities that control access to necessary public services or to a significant number of jobs, and the right to notice before private property is seized by a creditor — all involved important liberties that were significantly infringed. The multifactor tests in *Schmid* and *Alderwood* are attempts to balance, in a particular factual setting, the competing private rights at stake. It requires little imagination to see them as instances of a broader requirement of balancing competing rights in all cases where private parties allegedly infringe state constitutional rights.

Though additional factors may require consideration, these three factors may provide the outline of an alternative to the state action doctrine as a limit on the applicability of state constitutional rights guarantees.

B. Constructing Alternative Limits: How Should They Be Applied?

If the factors outlined above do provide a workable alternative to state action, the next issue that must be determined is how those factors should be applied.

A requirement that state constitutional rights should not be applied to limit the autonomy of individuals acting in a purely personal capacity must, if that limit is to be effective, operate as a threshold requirement. Regardless of the eventual outcome of litigation, the mere fact that one's actions can be questioned in court is in itself a significant burden on that individual's privacy and autonomy. Maximum freedom within this personal zone can be achieved only if the individual is guaranteed freedom from constitutional restraint and judicial inquiry.³¹²

In contrast, the other factors outlined above — the importance of the right allegedly infringed, the degree of infringement and the balancing of the competing rights at stake — can be considered only on the merits. All facts must be known to accurately assess the competing interests. Such a balancing involves inquiry into the relative importance of the competing rights and the degree to which alternative outcomes will infringe those rights.³¹³ However, this approach does not suggest that every case must be decided on an ad hoc basis after a full trial. The experience with the abortion clinic protest cases, for example, already suggests that courts are

312. See *supra* notes 194 & 264-65 and accompanying text.

313. See *supra* notes 257-63 & 297-303 and accompanying text.

capable of deriving general categories of similar cases in which the balancing of competing rights will usually result in similar decisions.³¹⁴

The final question addresses the order and manner in which such limits should be applied. The requirement that the alleged infringer not be a private individual acting in a personal capacity is a threshold requirement. The requirements that the right infringed be "fundamental" and that the infringement be significant also should function as required elements of the plaintiff's *prima facie* case. Since these facts should be within the plaintiff's knowledge and unnecessary judicial inquiry into the conduct of private parties should be avoided, the plaintiff should be required to make an initial showing along these lines. The last requirement that the rights gained by imposing judicial restraint must not outweigh the rights thereby lost, can of course be decided only on a review of the merits as a whole.³¹⁵

Looked at superficially, the cases appear to split on the issue of how alternative limits should be applied. *Schmid* and *Alderwood* considered all of the factors identified in their multi-factor tests before reaching their conclusions, and they treated those factors as part of the analysis of the merits of the plaintiff's claims.³¹⁶ However, subsequent lower court decisions in New Jersey may indicate a significant modification of those tests. These decisions apply the first element of the *Schmid* test as a threshold requirement rather than a single requirement among several parts of an inquiry on the merits. Only if it is shown at the outset that "the owner has devoted his property to some public use" will it be necessary to balance the competing interests by taking the other elements of the *Schmid* test into account.³¹⁷

Similar results were reached in Washington under the *Alderwood* test. Unless the property at issue is "open to the public," its owners need not accord state constitutional speech rights to others, apparently regardless of

314. See *supra* notes 290-91 and accompanying text.

315. See Note, *Four Alternatives*, *supra* note 54, at 608-12 (advocating such a direct balancing approach to the merits of cases involving private infringement of constitutional rights).

316. *State v. Schmid*, 84 N.J. 535, 563-69, 423 A.2d 615, 630-33, *appeal dismissed*, 455 U.S. 100 (1982); *Alderwood Assocs. v. Washington Env'tl. Council*, 96 Wash. 2d 230, 243, 635 P.2d 108, 116 (1981).

317. *Bellemead Dev. Corp. v. Schneider*, 196 N.J. Super. 571, 574, 483 A.2d 830, 832 (App. Div. 1984) (union members did not have a state constitutional right to leaflet on the private sidewalks of a commercial building not generally open for public use). Other New Jersey decisions applying the *Bellemead* version of the *Schmid* test include *State v. Brown*, 212 N.J. Super. 61, 513 A.2d 974 (App. Div.), *certif. denied*, 107 N.J. 53, 526 A.2d 140 (1986); and *Planned Parenthood Assoc. v. Cannizzaro*, 204 N.J. Super. 531, 499 A.2d 535 (Ch. Div. 1985), *aff'd*, 217 N.J. Super. 623, 526 A.2d 741 (App. Div. 1987).

the other factors.³¹⁸ Applied in this way, threshold requirements of “devotion to public use” or “open to the public” appear to be somewhat similar in function and content to an expansive version of the “public function” line of traditional federal state action analysis.³¹⁹ Like some of the early applications of the federal public function test, these new articulations of the *Schmid* and *Alderwood* standards seem to attempt to define at the threshold a category of private entities that are in some respects as important as a public entity is to the community, and are therefore subject to constitutional restraint.

The split among these courts may be more apparent than real, however. In *Schmid* and *Alderwood*, the impersonal nature of the alleged infringer and the importance of the right at issue were both clear. Once the court passed the state action issue, the only remaining issue was the need to balance the competing rights of the private litigants. Thus, it is not surprising that those courts constructed tests that only balanced those interests on the merits. In contrast, the appellate courts’ reading of a threshold requirement of “public-ness” into the *Schmid* and *Alderwood* tests reflects the same perceptions — that state rights should not be interpreted to bind all private parties and that the mere fact of judicial inquiry can in itself become an imposition on liberty — as underlay the conclusions regarding a threshold requirement barring most claims against individuals. In the appellate cases, the question of whether the defendants were the kind of entities that should be required to observe constitutional norms was much more problematic than it had been in *PruneYard*, *Schmid* or *Alderwood*. Those courts were more concerned with constructing a version of the test that would shield purely private relations from constitutional scrutiny. The method of analysis currently followed by the New Jersey and Washington courts does not exactly coincide with the analysis advocated here, but the results and concerns that motivated those decisions are nonetheless consistent with that analysis.

C. *Would Such Alternative Limits Be Preferable to State Action?*

One arguable virtue of analyses based on factors other than state action is that they permit individual rights to be vindicated in circumstances where such protection seems intuitively required, but where the

318. *City of Sunnyside v. Lopez*, 50 Wash. App. 786, 792-95, 751 P.2d 313, 317-19 (1988) (relying in part on the New Jersey appellate decision in *Brown* to hold that a private medical center was not so open to the public as to give antiabortion demonstrators a right to demonstrate on the privately owned premises).

319. See *infra* notes 328-29 and accompanying text.

infringing party is not part of or connected to the government. Not everyone agrees that such an expansion of judicial activity is good. Nevertheless, it appears that the recurring efforts by some courts to expand the scope of constitutional rights, whether by redefining or by abandoning state action limits, reflects a belief that individuals sometimes suffer *de facto* infringement of important individual liberties at the hands of powerful private entities and existing legal controls on the arbitrary exercise of non-governmental power are inadequate. To the extent one shares that perception, a theory of limits based on other elements provides what no state action based theory can: the possibility of systematic judicial protection of basic rights from some forms of private infringement.³²⁰

A related, but less controversial, virtue inheres in the ability of such an analysis to focus the attention of courts on the real interests at stake in particular circumstances and avoid anomalous distinctions between functionally identical cases. State action doctrines, no matter how defined, create distinctions between cases that do not track any practical differences but depend solely on the incidental factor of whether the infringer is a state actor. For example, it is not obvious why speech and petition rights in a municipal stadium, public park or other gathering place should depend on who holds the deed to the forum, or why the right of a truckdriver to refuse to provide urine samples to his employer should depend on whether he is employed by a private firm or by a state department of transportation. In such cases, the public or private nature of the infringer makes no difference in terms of the effects of that deprivation. There is little difference to the alleged victim. I do not argue that the claimed constitutional right should prevail in all such cases. But the decision whether individual rights should be vindicated should depend on the actual interests at stake in the particular case, not on the functional irrelevancy of the identity of the infringer. Analyses of the limits of constitutional rights similar to that proposed here have the virtue of forcing courts to decide cases on the basis of the competing interests, a process that at least holds out the possibility that like cases can be treated alike regardless of who owns or controls the alleged infringer.³²¹

Analysis along these lines also may rescue courts providing broader protection of individual rights from the charge that their decisions have been purely ad hoc, result-oriented and without theoretic justification.³²² On the contrary, it provides principled bases both for vindicating rights

320. See *infra* notes 334-42 and accompanying text.

321. See, e.g., Glennon & Nowack, *supra* note 6; Margulies, *supra* note 22, at 732-38; Note, *Four Alternatives*, *supra* note 54, at 608-12.

322. See, e.g., Hudnut, *supra* note 22, at 95; Simon, *supra* note 22, at 306-07, 313-14.

and, equally important, for limiting the reach of state constitutions short of some potential applications. By identifying the autonomy interests of individuals as a central limit on the applicability of constitutional rights, it provides a principled reason why those guarantees should control the activities of some private entities but not others.³²³ By focusing the decisionmaker's attention on such factors as the nature of the rights allegedly infringed, the degree of infringement and the competing interests of the private defendant, such an analysis at least provides a rational basis for litigants to argue, and courts to justify, conclusions as to whether and why one case should differ from another in its results.

Any system depending in part on a balancing of competing interests will never yield wholly predictable or determinate results. Courts applying such tests may find it difficult to articulate reasons why the balance is struck differently in different cases, or they may be tempted to disguise personal value choices in the weight they give various elements. Nonetheless, such problems are not different in kind than those afflicting balancing tests in other areas, and presumably can be handled through the good faith of judges and litigants. As experience is gained, generally agreed results will likely emerge for certain classes of cases.³²⁴

In comparison, the state action doctrine, as defined by the Burger Court and followed by some state courts, is a less satisfactory method of limiting the reach of state constitutional rights guarantees. As many critics have pointed out, that approach has proven difficult to justify conceptually and impossible to apply consistently,³²⁵ and does not adequately resolve the tensions between liberty and security of right that are inherent in our traditional theory of rights.³²⁶ Moreover, under current federal formulations, application of the state action doctrine has resulted in obvious

323. The need for such a stopping place on the slippery slope is evident. During the oral argument in *Alderwood*, counsel for the petitioners was driven to concede that: "[I]f a private person's home was on the busiest corner of the city and hence the best available place from which to gather signatures, the collector's alleged constitutional right would compel the homeowner to allow a card table to be set up on the front lawn." Comment, *supra* note 49, at 98. Such an absolute approach to state constitutional rights would seriously infringe the rights of individuals. *Id.*

324. See *supra* notes 290-91 and accompanying text.

325. See, e.g., L. TRIBE, *supra* note 6, at 1688-98; Black, Foreword: "State Action," *Equal Protection and California's Proposition 14*, 81 HARV. L. REV. 69, 84-91 (1967); Brest, *State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks*, 130 U. PA. L. REV. 1296 (1982); Phillips, *The Inevitable Incoherence of Modern State Action Doctrine*, 28 ST. LOUIS U.L.J. 683, 733-37 (1984); Thompson, *Piercing the Veil of State Action: The Revisionist Theory and a Mythical Application to Self-Help Repossession*, 1977 WIS. L. REV. 1, 19-21.

326. Skover, *supra* note 3, at 260-75.

functional anomalies, where the decision whether constitutional rights will be vindicated has little relation to any rational valuation of the competing interests at stake or the real world impact of the conduct under scrutiny.³²⁷

It is certainly no novel insight to point out that the United States Supreme Court has not interpreted the state action doctrine with much consistency over the years, or that the doctrine as presently interpreted has substantially narrowed the number and kind of entities that will be considered state actors. While the Court at one time took an expansive view, developing a number of rationales by which private entities could be sufficiently related to or dependent on the government to be required to respect the constitutional rights of others,³²⁸ the trend since 1972 has been to restrict the reach of federal constitutional rights by more strictly interpreting the requirements for a finding of state action.³²⁹ To be sure,

327. See, e.g., Chemerinsky, *Rethinking State Action*, 80 Nw. U.L. REV. 503, 519-35, 550-56 (1985); Horowitz, *The Misleading Search For "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208 (1957); Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3, 6-7 (1961).

328. One such rationale, the "public function" doctrine, posited that when a private entity effectively supplants the state as a provider of services and opportunities, that private entity must respect individual rights that relate to that service or opportunity. *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) (privately owned shopping center that had effectively replaced the traditional "downtown" as a public gathering place required to permit first amendment activities on its premises); *Evans v. Newton*, 382 U.S. 296, 301-02 (1966) (municipal park could not be run on a segregated basis even if it were privately owned); *Terry v. Adams*, 345 U.S. 461 (1953) (private political "club" that effectively controlled the local political process could not discriminate on the basis of race); *Marsh v. Alabama*, 326 U.S. 501 (1946) (private owners of a company town required to respect the first amendment interests of residents and visitors).

Alternatively, where the private entity was not performing any public function, a federal constitutional violation could be found if there was a sufficiently close connection between the private actor and some government body or official. This connection could take the form of official enforcement, authorization or encouragement of the private party's unconstitutional action. See, e.g., *Reitman v. Mulkey*, 387 U.S. 369 (1967) (state constitutional amendment purporting to permit private racial discrimination held to officially "encourage" otherwise private discrimination and thereby create state action); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (court injunction enforcing private racially restrictive covenant constitutes "state action" in violation of the fourteenth amendment). The connection also could form a sufficiently close "nexus" or degree of "entanglement" between the challenged private action and some government rule or official. *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974) (sufficient government entanglement where segregated school was granted temporary, exclusive use of public recreational facilities); *Norwood v. Harrison*, 413 U.S. 455 (1973) (sufficient government entanglement where segregated school was effectively subsidized by provision of free books); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (government "entanglement" with private activity held adequate for application of federal constitutional restrictions to a private restaurateur whose establishment existed on the property of and was in economic symbiosis with a public parking garage).

329. Since 1972, the Court has redefined the "public function" doctrine to include

where the federal constitutional violation occurred at the hands of a government employee acting in an official capacity,³³⁰ or where a state official acts in concert with or provides “overt significant assistance” to the private defendant,³³¹ government action will still be found and federal constitutional rights vindicated. However, in two recent cases the Court has again held large and powerful quasi-private entities generally free from federal constitutional restraints, despite what was in both cases a significant degree of government support of and involvement in their activities.³³²

Such vacillation in the definition of the state action doctrine is rooted

only those few entities that provide services or wield powers “traditionally exclusively reserved to the State” or “traditionally associated with sovereignty.” *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352-53 (1974). *See also* *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 544 (1987) (quoting *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982)) (government action will be found only if “the challenged entity performs functions that have been ‘traditionally the *exclusive* prerogative’” of the government) (emphasis in original).

The Court has similarly redefined the degree of state “encouragement” of or “entanglement” with private conduct necessary to engender constitutional scrutiny. To state a federal constitutional claim on this basis the plaintiff must show that the state is “responsible,” because of its exercise of coercive power or other significant encouragement, for the “specific conduct” constituting the complaint. *See, e.g.*, *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). Mere approval or acquiescence by the state in decisions independently reached by private parties is insufficient.

330. *West v. Atkins*, 487 U.S. 42 (1988). *But see* *Polk County v. Dodson*, 454 U.S. 312 (1981) (public defender under contract with local government to provide indigent legal services is not a government actor because, *inter alia*, the attorney acts as an adversary to, not an agent of, the state during the performance of his professional services).

331. *Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988) (intimate involvement of state probate court in triggering a statutory time bar for claims against an estate constituted sufficient “government action” to require affording due process protections to creditors of the estate). *See also* *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) (to same effect). *Cf.* *Texaco, Inc. v. Short*, 454 U.S. 516 (1982) (mere existence and private use of a state statute barring claims in certain circumstances did not constitute sufficient government involvement to require due process protections for creditors); *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978) (private creditor using self help remedies authorized by state law was not required to comport with any constitutional standards of due process).

332. *National Collegiate Athletic Ass’n v. Tarkanian*, 488 U.S. 179 (1988) (NCAA is not a government actor despite its composition as an organization of state as well as private universities, the Association’s coercive power over member schools, and the effective cooperation between the NCAA and the University of Nevada in investigating and imposing sanctions on the plaintiff); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522 (1987) (United States Olympic Committee is not a government actor despite its creation by federal law, extensive federal regulation, statutorily granted exclusive control of the use of the word “Olympic” and associated symbols, standby public financing, and role representing the nation in international athletic organizations).

in the inescapable reality that governments and laws pervasively regulate private as well as public relationships in society. Governments always decide, through law, which actions will be required, permitted or forbidden. A private party can infringe the rights of another only if the government, in its capacity as the author and enforcer of laws regulating private interactions, constructs the legal system to permit such action by that private party. The government is in this sense as responsible for the private infringements permitted as it is for the infringements directly commanded.³³³ Thus, any court seeking to base a conceptually consistent set of constitutional limits on the state action concept is presented with a Hobson's choice. A court can admit that state action is ubiquitous and that constitutional rights potentially apply universally, or it can reformulate the doctrine to impose essentially arbitrary restrictions on the particular types of relations between the government and the infringement that are sufficient to trigger application of constitutional rights.

The United States Supreme Court and some state courts are committed to using the state action doctrine to create a conceptual distinction between cases where constitutional rights are operative and cases where they are not. As a result, they have had to redefine the state action doctrine to impose limits on the kinds of state involvement with private activity that will satisfy the requirement. As defined by the Supreme Court, the state action concept no longer involves an inquiry into the relationship between the questioned private activity and the matrix of state power that

333. This point has been raised repeatedly in academic literature. See Brest, *supra* note 325, at 1315-22; Choper, *Thoughts on State Action: The "Government Function" and "Power Theory" Approaches*, 1979 WASH. U.L.Q. 757, 760; Glennon & Nowack, *supra* note 6, at 229-30; Horowitz, *supra* note 327, at 209.

On the federal level, the argument that governments have a constitutional obligation to act to insure the realization of rights has never prevailed. On the contrary, the Supreme Court recently reminded us that the Constitution imposes no affirmative obligation on the political branches of government to take positive action to support the constitutional rights of individuals, even where such aid or action "may be necessary to secure life, liberty or property interests of which the government itself may not deprive the individual." *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3051 (1989) (quoting *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998, 1003 (1989)). On the state constitutional level, in contrast, the issue is less clear.

Regardless of the merits of such arguments, however, the thesis presented here is not based on any obligation on the part of non-judicial governmental authorities to affirmatively intervene when private rights conflict. Rather, the argument is that the government always sets the rules of the game, and so is responsible for the results that those rules foreseeably engender. Thus, insofar as state action theory posits a class of infringements of rights where the government is not involved and bears no responsibility, it is an incorrect description of reality. See *Southcenter Joint Venture v. National Democratic Pol'y Comm.*, 113 Wash. 2d 413, 459-60, 780 P.2d 1282, 1305-06 (1989) (Utter, J., concurring).

authorizes that private activity.³³⁴ Rather, it involves separate and narrower questions: whether some government rule mandated the alleged violation; whether a government official actively willed or carried out the alleged violation; or, alternatively, whether the power wielded by the allegedly private infringer is “exclusively” committed to the government.³³⁵ Certainly some distinction may exist between government action or inaction that directly violates rights and that merely permits violations of rights by others. However, the difference inheres in only the manner and degree to which state officials directly participate in the violation, not in any clear distinction between whether state power is involved as a background element of that violation. Similarly, while a conceptual distinction may exist in principle between those activities conceded to be “traditionally” or “exclusively” governmental and other activities that are not, the line between the two is hazy at best and has further blurred over time.³³⁶

This shift of analytic focus from broadly defined state action to narrow concepts involving state officials and “exclusive” state functions has exacerbated two fundamental problems for the position that the state action doctrine is an appropriate mechanism to limit application of constitutional rights. First, to the extent that the existence of state action turns on the existence and actions of state officials, the determination of whether constitutional protections apply will necessarily depend on incidental facts in what are otherwise functionally identical cases. For example, assume a statutory scheme regulating self-help by commercial creditors or providing for the extinguishment of claims among private parties. If this scheme happens to require a state official to perform even a purely ministerial act, state action will be found and constitutional rights will apply.³³⁷ If the same result is achieved through a statutory scheme

334. See Phillips, *supra* note 325, at 719 (noting that the Supreme Court’s recent cases did not consider the relations between the government and the allegedly private infringer cumulatively; rather, each contact was examined separately and sequentially). See also Brest, *supra* note 325, at 1315-23 (arguing that the matrix of state power that supports the creditor’s actions is no different in *Sniadach*, where state action was found, than in *Flagg Bros.*, where it was not).

335. See *supra* note 329.

336. For example, mail delivery and prison operations were once exclusive and traditional functions of government. Today, mail is delivered by the semi-independent United States Postal Service and by a host of purely private corporations. Movements to “privatize” prisons and other once governmental functions are widely afoot. Conversely, other functions once performed entirely by private entities — such as providing “charity” for the poor or operating bridges — now are performed almost entirely by governments.

337. *Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. 478, 487 (1988); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982).

omitting the ministerial act or otherwise making the deprivation self-operative, state action will not be present and constitutional rights will not apply.³³⁸ As even so staunch an opponent of the expansion of constitutional rights as Justice Rehnquist has pointed out, such a distinction makes no sense.³³⁹

Second, adherence to a state action requirement, narrowly defined, significantly limits the effective constitutional protection of individual rights. The category of government functions sufficiently "traditional" and "exclusive" for finding state action under current federal definitions is small.³⁴⁰ Under both lines of analysis, the state action doctrine has rendered courts unable to vindicate basic rights in some circumstances where intuition and equity dictate otherwise.³⁴¹

These difficulties cannot be resolved simply by broadening the definition of state action for state constitutional purposes.³⁴² First, there is little theoretic reason to suppose that the content of the state action concept — assuming that such a requirement were to be imported into state constitutions at all — should systematically differ depending on whether a state or the federal constitution is at issue. Such differences do not, for example, appear to be supported by considerations of federalism or other criteria of the sort usually relied upon to justify state divergence from federal precedent.³⁴³

338. *Texaco, Inc. v. Short*, 454 U.S. 516 (1982); *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978).

339. 485 U.S. at 492-94 (Rehnquist, C.J., dissenting).

340. *See, e.g.*, Choper, *supra* note 333, at 778-80 (noting that schools, recreational parks, and public services would not fit within the current federal definition of "public function").

341. The results reached under the current federal definition of state action have, at one time or another, offended the perceptions of most of the Justices themselves. *See, e.g.*, *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988) (White, J., dissenting, joined by Justices Brennan, Marshall & O'Connor); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 548-73 (1987) (Brennan, J., dissenting, joined by Justice Marshall and, in relevant part, by Justices O'Connor and Blackmun); *Flagg Bros. v. Brooks*, 436 U.S. 149, 166-79 (1978) (Marshall, J., dissenting, joined by Justices Stevens and White). They also have engendered considerable academic criticism. *See supra* notes 325 & 327. Most disturbing are the results in *San Francisco Arts & Athletics* and *National Collegiate Athletic Association*, where entities capable of wielding great power within their respective spheres — power that was delegated in part by governments — were held to have constitutional obligations no different than those of the most private individual.

342. *See* cases cited *supra* notes 82-92, 138-49 & 178-92. *See also* Note, "Malling" of *Constitutional Rights*, *supra* note 22, at 120-25 (proposing a loosened version of the "public function" strand of state action analysis that would include shopping centers as "state actors" for state constitutional purposes).

343. *See generally* Comment, *Interpreting the State Constitution: A Survey and*

Second, courts that have retained state action requirements in broadened form have found that this approach also leads to arbitrary distinctions between functionally similar cases. For example, several courts rejected federal analyses and constructed a broad definition of state action in state due process challenges to creditors' self-help remedies by distinguishing statutes that expand common law remedies from those that merely codify pre-existing common law. The rationale for this distinction is that the former class of remedies involve "state action" because the remedy was created by the legislature's affirmative act.³⁴⁴ In contrast, remedies that do not alter common law, although codified, are not viewed as created by the legislature, and therefore do not involve state action.³⁴⁵ The distinction proved useful to courts that wanted to expand the application of state due process protections without abandoning the state action doctrine entirely,³⁴⁶ and was one of the grounds relied upon by the New York Court of Appeals to derive the "flexible" approach to state action announced in *Sharrock*.³⁴⁷

Such distinctions between remedies rooted in a state's common law tradition and those created or modified by statute are, however, no less arbitrary than the distinctions drawn in federal state action cases. The precise contours of common law creditors' rights varies from state to state. Thus, such a distinction may lead to anomalous results because identical remedies used in identical circumstances could be subject to constitutional restraint in one state, but not in another, depending upon how and when the remedy entered each state's jurisprudence.³⁴⁸ Furthermore, such a distinc-

Assessment of Current Methodology, 35 U. KAN. L. REV. 593, 604-11 (1987) (discussing various factors state courts have relied on to justify divergence from federal precedent). *But see* Williams, *supra* note 275, at 389-402 (arguing that state constitutional interpretation can be wholly independent of federal precedent and that divergence needs no justification).

344. *See, e.g.*, *Connolly Dev., Inc. v. Superior Court*, 17 Cal. 3d 803, 814-16, 553 P.2d 637, 644-46, 132 Cal. Rptr 477, 484-86 (1976), *appeal dismissed*, 429 U.S. 1056 (1977) (mechanic's lien and stop notice); *Adams v. Department of Motor Vehicles*, 11 Cal. 3d 146, 153 n.13, 520 P.2d 961, 965 n.13, 113 Cal. Rptr. 145, 149 n.13 (1974) (garageman's lien and sale).

345. *See, e.g.*, *Kruger v. Wells Fargo Bank*, 11 Cal. 3d 352, 359, 521 P.2d 441, 444-45, 113 Cal. Rptr. 449, 452-53 (1974); *USA I Lehndorff Vermoegensverwaltung v. Cousins Club, Inc.*, 64 Ill. 2d 11, 15-16, 348 N.E.2d 831, 832-33 (1976); *National Airport Corp. v. Wayne Bank*, 73 Mich. App. 572, 575-78, 252 N.W.2d 519, 521-22 (1977); *Jefferds v. Ellis*, 132 A.D.2d 321, 522 N.Y.S.2d 398 (1987), *appeal dismissed*, 70 N.Y.2d 1002, 521 N.E.2d 445, 526 N.Y.S.2d 438 (1988).

346. *See, e.g.*, *Martin v. Heady*, 103 Cal. App. 3d 580, 587, 163 Cal. Rptr. 117, 121 (1980). *See supra* note 191.

347. *Sharrock v. Dell Buick-Cadillac, Inc.*, 45 N.Y.2d 152, 161-62; 379 N.E.2d 1169, 1174-75, 408 N.Y.S.2d 39, 45 (1978).

348. *See, e.g.*, *Flagg Bros. v. Brooks*, 436 U.S. 149, 162-63 (1978); *Burke & Reber, supra* note 150, at 46-47. Louisiana draws its private law from civilian, rather than common

tion errs in that it regards statutes and case law as fundamentally different for state action purposes. Although there are differences between legislators and judges, when they act in their official capacities, it is on behalf of the state. All law is a creature of the state, regardless of the creator's official title. Thus, whether a private party who benefits from that law becomes imbued with state action should not depend upon which type of official made the law.³⁴⁹

Other cases attempting to formulate an expansive definition of state action provide similar potential for arbitrary distinctions. In *Jones v. Memorial Hospital System*,³⁵⁰ *Gay Law Students Association v. Pacific Telephone and Telegraph Co.*³⁵¹ and *Sharrock v. Dell Buick-Cadillac, Inc.*,³⁵² the Texas, California and New York courts based their respective conclusions that their broader standards of state action were met on a series of inquiries into the relations between the alleged infringer and various levels of government. All three purported to be close cases, such that any change in the degree of the relationship could change the result. Thus, minor differences in the relationship between the infringer and the state may create arbitrary differences in results, despite the irrelevance of the relationship to the nature of the rights at issue.

This is the fundamental problem. Any "state action" requirement, no matter how defined, will prove unsatisfactory because by definition it must divert attention away from real issues, such as the nature of the contending parties or conflicting rights, and focus attention instead on whether the requisite relationship between the government and the private party exists.³⁵³

V. CONCLUSION

Undoubtedly, the scope of state constitutional rights guarantees must be limited. Traditionally, such limits developed through the concept of state action. State guarantees were construed like their federal counterparts to prohibit only actions by state officials or by a limited class of private

law sources, therefore, this analysis might require courts to consider virtually all creditors' remedies as created by state action, and subject to the full rigor of state due process, regardless of the countervailing interests involved in particular cases. *See Comment, supra* note 150.

349. *Cf. Adickes v. S.H. Kress Co.*, 398 U.S. 144, 169-71 (1970) (state action can be found on the basis of mere custom having the *de facto* force of law).

350. 746 S.W.2d 891 (Tex. Ct. App. 1988). *See supra* notes 83-88.

351. 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979). *See supra* notes 138-48.

352. 45 N.Y.2d 152, 379 N.E.2d 1169, 408 N.Y.S.2d 39 (1978). *See supra* notes 178-89.

353. *See Skover, supra* note 3, at 272.

entities acting in concert with or in place of the government. But, while there are exceptions, the language and drafting history of most state rights guarantees are sufficiently indeterminate to permit alternative interpretations.

Despite these possibilities, the recent trend of decisions and commentary has tended to reaffirm the need for state action limits on state constitutional rights. Three rationales for this reaffirmation are prominent: 1) that the received American constitutional interpretation requires resolving ambiguities in favor of binding only government actors; 2) that construing constitutional rights guarantees to limit private parties impermissibly infringes on those actors' competing rights; and 3) that applying constitutional norms to private disputes usurps the primary role of legislatures to regulate private parties.

These arguments constitute powerful reasons for developing principled means to limit the application of state constitutional rights. However, they do not demonstrate that such limits should be cast in terms of state action. On the contrary, the asserted principle that state constitutions do not bind private parties rests upon sharp distinctions between private and public law, which would have been foreign to the original constitutional drafters, and have never been rigidly applied. Moreover, the goals of preserving individual autonomy, avoiding undue sacrifices between competing rights and securing the legitimate role of state legislatures can be better achieved by analyzing these factors directly, rather than focusing on a single inquiry into whether the infringing party is somehow connected to the government.

Alternative limits on the reach of state constitutional rights can be constructed and would more closely track the historical, individual and structural interests at stake. This article proposes a three-step process involving: first, a threshold determination of whether the alleged infringer was an individual acting within a sphere of personal autonomy; second, a *prima facie* showing by the complainant that an important right was significantly infringed by the defendant; and third, a balancing of the parties' competing interests on the merits. Such alternative limiting principles would provide workable boundaries that are preferable to limits based solely on state action concepts. Unlike state action theories, this analysis would not require state courts to accept or reject the federal definition of "state action;" nor would it require courts to draw arbitrary lines among the myriad ways in which the matrix of law and government regulates private activity. By focusing attention on the parties and the rights at stake, the proposed process would enable courts to protect individual rights from a broader range of infringements as well as promote

the development of a consistent and convincing theory regarding why and under what circumstances individual rights should be vindicated.