

Flagg Brothers, Inc. v. Brooks

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The Supreme Court's opinions on the "state action" problem have received much criticism for doctrinal incoherence. Professor Rowe suggests that underlying recent decisions may be a structure that brings some measure of order to the field. The analysis rests on a distinction between "ordinary" state action situations, which are by definition governed by the Constitution's restraints on governments, and all other, "nonordinary" cases. These latter situations involve both governmental and private ingredients, with exercise of private choice necessary to bring about the challenged action; in such cases, state action is normally found only upon satisfaction of one or another of a quite restrictive set of criteria. However useful the "ordinary"- "nonordinary" distinction may be for organizing and understanding the Supreme Court's state action doctrines, though, Professor Rowe argues that there appears to be no adequate way of defining and justifying a line separating the two categories. The article concludes that the only workable approach to the area may be one suggested by some previous commentators—that there is always "state action" at least in the form of state policy applicable to a litigation, and that the only issue should be the constitutional merits of the state's action or policy.

One of the most frequently quoted—and still, after more than a decade, quite accurate—descriptions of the state action field is that it is a "conceptual disaster area."¹ The Supreme Court has virtually thrown up its hands at its own inability to provide general and principled guidance.² The response of

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1. Black, *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69, 95 (1967). For a listing of several major articles on the subject, see Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221, 227 nn.24-25.

2. As the Court once put it:

This Court has never attempted the "impossible task" of formulating an infallible test for determining whether the State "in any of its manifestations" has become significantly involved in private discriminations. "Only by sifting facts and weighing circumstances" on a case-by-case basis can a "nonobvious involvement of the State in private conduct be attributed

some commentators has been to propose the abandonment of the effort to distinguish between situations in which there has or has not been state action for purposes of determining the applicability of the many restraints in the federal Constitution that apply only to governments.³ They have argued, rather persuasively, that the conventional effort to find the requisite state action before proceeding to the merits is misdirected; instead, they contend, there is always state action in some sense in any court case, including when the state law or policy affects the legal relations between private persons. From this perspective the appropriate question is simply whether the challenged governmental action or policy is constitutionally permissible.⁴

In a slightly larger nutshell, the argument that there is always state action runs along these lines: even when the state has not initiated the challenged action immediately giving rise to a litigation (when it has done so, everyone seems to agree that there is no "state action" problem), the state always acts—at least in the sense that its courts resolve the resulting dispute according to a state policy. The policy may be enunciated in statute, regulation, or common law. It may be either well established in advance or evolved by a court dealing with a novel claim or set of facts. But policy there is, even if it is one of trying not to disturb the results of private action or ordering.

The conclusion drawn from this argument is that however private a *transaction*, the *policy* the courts apply to litigation arising from it should be subject to judicial scrutiny and tested for consistency with the restraints that the Constitution imposes upon governments. For example, a state's common law of defamation is subject to first amendment challenge without regard to the official or private capacity of the actors.⁵ Many state policies, of course, would survive constitutional scrutiny without the slightest difficulty. The major elements of such private law fields as tort, property, and contract, for instance, would normally be of such unquestionable constitutionality that no litigant would bother to raise a constitutional challenge. Even when such challenges are worth raising, as in defamation cases, the courts can hold that the state's law squares with the constitutional restraints applicable to governments.⁶

its true significance."

Reitman v. Mulkey, 387 U.S. 369, 378 (1967) (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961)).

3. See, e.g., U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974) (affirming dichotomy between state action, which is subject to fourteenth amendment scrutiny, and private conduct, which is not); *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) (fourteenth amendment inhibits only action attributable to the state, not private conduct however discriminatory or wrongful).

4. See, e.g., Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208, 209 (1957) (whenever state gives legal consequences to transactions between private persons, state action is present for fourteenth amendment purposes); Van Alstyne, *Mr. Justice Black, Constitutional Review, and the Talisman of State Action*, 1965 DUKE L.J. 219.

5. E.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (reviewing decision denying recovery under Illinois law for defamation of private individual); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (reversing Alabama court decision allowing recovery for defamation of public official).

6. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345-48 (1974) (Constitution permits states to define standards for media's defamation of private individual, provided liability without fault not imposed).

Whatever the merit of this approach, the Supreme Court over the past several years has made it increasingly clear that it will have none of it.⁷ Most prominently, in three opinions by Justice Rehnquist, *Moose Lodge No. 107 v. Irvis*,⁸ *Jackson v. Metropolitan Edison Co.*,⁹ and *Flagg Brothers, Inc. v. Brooks*,¹⁰ the Court at least in form has followed the traditional analysis that treats state action as a threshold question. When no state action is present, the Court does not reach the constitutionality of a challenged act or policy under constitutional provisions that restrain only governments.

This article considers the approach the Court appears to be following and some of the criticism it has provoked. It begins with a brief discussion of the recent cases and notes the difficulties they seem to present. It proceeds to suggest that, unperceived in the critical commentary (and also, concededly, not articulated or adopted by the Court), there is an understandable, coherent, and rather useful analytical structure that is at least consistent with the Court's overall approach and may underlie it. After developing this framework, the article explores its usefulness in limiting or eliminating some of the apparent difficulties in the opinions and its implications for certain aspects of state action doctrine. The article also suggests, however, that there are some as yet unfronted problems that demonstrate the limitations of a threshold analysis and that ultimately may force the Court to abandon its current approach.

That approach may be described as follows. It presumes a rough division between "ordinary" state action situations, in which state action usually presents no difficulty, and all others. In most of the ordinary cases, the state is unambiguously the sole initiator of the particular challenged action, as when it is running a segregated public school or prosecuting a speaker for subversive advocacy. Under the current approach, state action determinations get harder when a mixture of governmental and private ingredients produces the challenged state of affairs, with some scope for private choice that determines whether the problem arises or not. Nonetheless, some precedents that remain viable, particularly *New York Times Co. v. Sullivan*,¹¹ indicate the existence of a second type of ordinary case in which the Court still finds the state action threshold easily cleared. In these cases, the considerable scope for private decisions seems to present little or no obstacle to a finding of state action.

In the remaining "nonordinary" cases, there appears in effect to be a presumption of no state action. If it goes unrebutted, constitutional restraints on official conduct do not govern the situation. There are, however, a few restrictive criteria applicable to such nonordinary cases which, if satisfied,

7. *Cf. Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978), in which the Court said:

It would intolerably broaden, beyond the scope of any of our previous cases, the notion of state action under the Fourteenth Amendment to hold that the mere existence of a body of property law in a State, whether decisional or statutory, itself amounted to "state action" even though no state process or state officials were ever involved in enforcing that body of law.

Id. at 169 n.10.

8. 407 U.S. 163 (1972).

9. 419 U.S. 345 (1974).

10. 436 U.S. 149 (1978).

11. 376 U.S. 254 (1964); see text accompanying notes 47-49 *infra* (common law of libel subject to constitutional restraints).

permit a finding that state action is present. The fundamental flaw of such a bifurcated approach is the difficulty of sorting out which situations involving a mixture of governmental and private ingredients giving rise to the challenged action do, and which do not, deserve treatment as ordinary state action cases. The Supreme Court has articulated no satisfactory basis for making the distinction. The article concludes that there may indeed be none, which suggests that the overall structure—although intelligible and to a considerable extent helpful—may in the end be an edifice that cannot stand.

I. THE REHNQUIST TRILOGY AND THE CRITICS

A. THE CASES

Moose Lodge No. 107 v. Irvis.¹² The first of the Rehnquist trilogy of state action cases involved racial discrimination by a private club holding a state liquor license. The licensing scheme included considerable regulation of the licensees' operations¹³ but was silent on the subject of discrimination. The Court's opinion began its treatment of the state action question by mentioning the "essential dichotomy between discriminatory action by the State, which is prohibited by the Equal Protection Clause, and private conduct, 'however discriminatory or wrongful,' against which that clause 'erects no shield.'"¹⁴ It then noted that its "holdings indicate that where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations' . . . in order for the discriminatory action to fall within the ambit of the constitutional prohibition."¹⁵ Mere licensing and comprehensive regulation of the club did not "foster or encourage racial discrimination,"¹⁶ "make the State in any realistic sense a partner or even a joint venturer in the club's enterprise,"¹⁷ or confer "upon club licensees a monopoly in the dispensing of liquor."¹⁸ Hence, the club's policy did not constitute state action and was not subject to the constraints of the fourteenth amendment.¹⁹

The state liquor regulations challenged in *Moose Lodge* did include, however, a requirement that club licensees adhere to all provisions of their own constitutions and bylaws. Even though the state regulations said nothing about discrimination, the bylaws of the club's national parent organization required racial discrimination. The effect of enforcing the regulation insisting on observance of the club bylaws thus "would be to invoke the sanctions of the State to enforce a concededly discriminatory private rule."²⁰ Because such enforcement would have involved state action in violation of the fourteenth

12. 407 U.S. 163 (1972).

13. See *id.* at 176 (listing requirements of state's regulatory scheme).

14. *Id.* at 172 (quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948)).

15. *Moose Lodge*, 407 U.S. at 173 (quoting *Reitman v. Mulkey*, 387 U.S. 369, 380 (1967)).

16. *Id.* at 176-77.

17. *Id.* at 177.

18. *Id.*

19. See *id.*

20. *Id.* at 179.

amendment, the Court ordered an injunction against the enforcement of the regulation as applied to the discrimination requirement.²¹

*Jackson v. Metropolitan Edison Co.*²² In *Jackson*, a consumer challenged the failure of a private, regulated monopoly utility to afford opportunity for a hearing before it cut off electric service. Despite extensive regulation, the Court found the cutoff policy to be the private utility's own; there was no "sufficiently close nexus between the State and the challenged action of the regulated utility so that the action of the latter [might] fairly be treated as that of the State itself."²³ The majority rejected several arguments for a finding of such a nexus. First, the monopoly argument was not in itself dispositive; an "insufficient relationship [existed] between the challenged action[] of the [utility] and [its] monopoly status."²⁴ Second, the state's approval of the utility's general tariff containing the challenged policy was likewise insufficient because the state had not "put its own weight on the side of the proposed practice by ordering it."²⁵ Rather, the utility had simply exercised a "choice allowed by state law," with the "initiative com[ing] from it and not from the state."²⁶ Finally, the facts of the case did not establish the requisite degree of joint overall participation or "symbiotic relationship" to "make the [utility's] conduct attributable to the State."²⁷

*Flagg Brothers, Inc. v. Brooks.*²⁸ In the most recent of the state action cases, a private warehouseman allegedly had threatened to sell the goods of an evicted tenant in order to collect unpaid storage charges.²⁹ New York's Uniform Commercial Code (UCC) permitted such a self-help sale,³⁰ but no state official or agency had participated in the purported threat of sale or was a party in the case.³¹ The Court consequently viewed the only issue as being "whether Flagg Brothers' action may fairly be attributed to the State of New York."³² It dealt with two arguments for such an attribution.

The Court first rejected the contention that in authorizing resolution of private disputes by self-help remedies rather than requiring resort to the courts, the state had delegated a traditional public function. Reviewing the public function precedents, the majority extracted a requirement of "exclusivity," meaning a traditional government monopoly over the function at issue, and found that criterion unsatisfied.³³ After pointing to "the traditional place of private arrangements in ordering relationships in the commercial world,"³⁴ the *Flagg Brothers* Court concluded that "the settlement of disputes

21. See *id.*

22. 419 U.S. 345 (1974).

23. *Id.* at 351.

24. *Id.* at 352.

25. *Id.* at 357.

26. *Id.*

27. *Id.* at 358.

28. 436 U.S. 149 (1978).

29. See *id.* at 153.

30. *Id.* at 151.

31. See *id.* at 153, 157.

32. *Id.*

33. See *id.* at 157-63.

34. *Id.* at 160 (footnote omitted).

between debtors and creditors is not traditionally an exclusive public function."³⁵ Delegation of a function that did not meet this criterion thus did not turn private conduct into state action.

Next, Justice Rehnquist in his majority opinion dismissed the argument that New York had authorized and encouraged the proposed sale by enacting the UCC provision. He implied "that a State is responsible for the . . . act of a private party [only] when the State, by its law, has compelled the act."³⁶ Justice Rehnquist pointed to language in *Jackson* in which the Court noted the state's failure to "put its own weight on the side of the proposed practice by ordering it,"³⁷ and recalled the state regulation in *Moose Lodge* that had required compliance with the club's own discriminatory bylaws.³⁸ By contrast, the state's role in *Flagg Brothers* was one of "inaction" that amounted to "mere acquiescence in a private action," which is insufficient to "convert[] that action into that of the State."³⁹ Far from requiring or ordering the warehouseman to sell the stored goods, Justice Rehnquist reasoned, the UCC provision left the decision to "purely private choice," which state law "permits but does not compel"; hence, the state was "in no way responsible for" the decision.⁴⁰

B. THE CRITICAL REACTION

The commentators' responses to *Moose Lodge*, *Jackson*, and *Flagg Brothers* for the most part have been highly critical.⁴¹ A basic problem noted is that the Court is drawing lines between state "action" and "inaction" that seem arbitrary, confusing, and contrary to common usage, and that appear to obscure the real bases for decision. In *Flagg Brothers*, for instance, the Court held that the state had not "acted" even though the legislature had unquestionably enacted the statute relied on by the warehouseman. The Court's opinions leave many groping for the lines that separate different forms of governmental involvement into state action and inaction.

One critic of the Court's line-drawing is Professor Laurence Tribe. He argues that the Court is focusing solely on discrete government actions and refusing to consider governmental policy that involves deference to private choice:

[T]o the extent that [constitutional] rights impose restraints on governmental actors only, the appropriate question is whether the actors who make a challenged decision are in fact governmental actors or are simply private actors. But to the extent that such rights impose restraints on governmental rules and not on governmental actors, the proper question is whether the challenged

35. *Id.* at 161 (footnote omitted).

36. *Id.* at 164 (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170 (1970)).

37. *Flagg Bros.*, 436 U.S. at 164 (quoting *Jackson*, 419 U.S. at 357) (emphasis added by *Flagg Bros.* Court).

38. *See* 436 U.S. at 164.

39. *Id.*

40. *Id.* at 165.

41. This section does not attempt to reflect or evaluate all the main criticisms. Instead, as background to the effort to develop a workable framework from the Court's recent approach, it only raises several of the most serious difficulties presented by the decisions.

federal or state rule of law can validly distribute authority among governmental and private actors as it purports to do. Justice Rehnquist's opinion for the majority in *Flagg Brothers* illustrates the incomprehensible results of the still popular approach to the state action inquiry—an approach which continues to be marked by a single-minded search for the moving hand of a governmental actor in any action challenged as unconstitutional.⁴²

Furthermore, the Court's recent cases appear to some to impose arbitrary limits on previously established doctrines and to articulate criteria that appear gratuitously stiff. The "exclusivity" requirement of the public function doctrine, for example, has been criticized for frustrating the supposed purpose of the doctrine, to shield the people against abuse of governmental power via the subterfuge of delegating it to a private party exempt from constitutional scrutiny.⁴³ The apparent rejection in *Flagg Brothers* of "authorization and encouragement" arguments by requiring state compulsion has come under even more vigorous attack. This requirement can seem virtually to eviscerate "authorization and encouragement" doctrine by permitting a state to support private activity in ways that should be constitutionally suspect and yet are protected from review.⁴⁴ Although apparently assuming that some private initiatives may be treated as actions of the state, the Court nevertheless requires a finding of governmental compulsion, which seems to exclude private choice. Cases that might satisfy that state action criterion appear to constitute by definition an empty set.

The Court's recent decisions have raised still other questions. Its consistent refusal to find state involvement amounting to state action in instances of heavy regulation and other governmental-private interrelations has created doubt about the viability of the "joint participant" theory articulated in *Burton v. Wilmington Parking Authority*.⁴⁵ Finally, the Court's unwillingness to give weight to the effect of state licensing quotas or of state-fostered monopoly authority seems to gloss over the extent to which such schemes augment the adverse effects of the actions of the licensee or monopolist,⁴⁶ such as the discrimination of the private club in *Moose Lodge* and the utility service cutoff in *Jackson*.

42. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 105 (Supp. 1979) (emphases in original) (footnotes omitted).

43. See *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 127-28 (1978).

44. See *id.* at 129-30: "The Court's approach to the state encouragement doctrine is . . . unduly narrow. . . . The simplistic dichotomy of 'compulsion' and 'mere acquiescence' renders the state encouragement doctrine meaningless because the cases addressed by the doctrine are precisely those where the private act is not directly compelled by the state"; Note, *Creditors' Remedies as State Action*, 89 YALE L.J. 538, 559 (1980): "The dichotomy between mandatory and permissive state frameworks was a false one. . . . Given a sufficiently encouraging governmental framework, an independent private choice can reflect governmental priorities as certainly as if that choice had been mandated by the state." (footnote omitted) [hereinafter Note, *Creditors' Remedies*].

45. 365 U.S. 715 (1961) (state action in discrimination by private coffee shop operator in space leased in public parking structure).

46. See Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 671 (1974) (in free market, consumers' ability to purchase services elsewhere arguably would deter company from maintaining arbitrary procedures) [hereinafter Note, *State Action*].

II. "ORDINARY" STATE ACTION

As later sections will argue, many of these criticisms of the Court's recent decisions are well taken. But if the cases are viewed from a certain perspective, they become much less objectionable and confusing. What may be emerging from these and earlier decisions is a rough division of state action cases into two broad categories: a first classification of "ordinary" state action situations in which constitutional restraints apply directly; and a second of all other, "nonordinary" cases in which there is a presumption of no state action, rebuttable only on a showing that the case meets certain restrictive criteria. What is important is that the restrictive standards apply *only* to cases in the second category, and not across the board.

A. BORDERLINE CASES

In cases obviously involving ordinary state action, as when a state segregates public schools or prosecutes a speaker for subversive advocacy, no court would hesitate at the state action threshold; instead, analysis would proceed directly to the merits of the fourteenth or first amendment issues. If a lawyer in such a case tried to interject arguments about "exclusivity" or "compulsion," they would properly be dismissed as irrelevant. To generalize from these examples, at least if the state initiated the particular challenged action there is no state action problem. The borderline cases can be difficult and prominent enough to make it too easy to forget that much of the time, state action determinations are easy—so easy, indeed, that we often pay no attention to them.

In a few types of situations, however, although the state is *not* clearly the initiator of a challenged action, the Court has still given the state action question the same or similar near-automatic treatment as in the easy ordinary cases. The most prominent of such "borderline ordinary" cases is *New York Times Co. v. Sullivan*,⁴⁷ in which the Court paused only briefly on the state action question before holding state defamation law subject to first amendment scrutiny in a private libel action.⁴⁸ Normally, no official compels the victim of libel or slander to bring suit. The state leaves it to purely private choice whether to invoke its law and merely provides the legal standards governing otherwise private conduct and litigation. Yet in *New York Times*, the Court unhesitatingly recognized the applicability of constitutional restraints on government to such a state policy: "the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedom of speech and press."⁴⁹

The Court gave somewhat analogous treatment to *Norwood v. Harrison*.⁵⁰ In *Norwood*, the Court considered the constitutionality of Mississippi's continued inclusion of private segregated schools in its general program of lending textbooks to students. The program dated from well before the desegregation decisions,⁵¹ and the state's public schools had been found to be

47. 376 U.S. 254 (1964).

48. *See id.* at 265.

49. *Id.*

50. 413 U.S. 455 (1973).

51. *See id.* at 458.

unitary;⁵² from all the record revealed, the impetus for the challenged discrimination was private. Nonetheless, the Court went straight to the merits and held this form of aid to be an impermissible support to the private discrimination.⁵³

The Court has shown no inclination to retreat from this aspect of *New York Times*,⁵⁴ and the *Flagg Brothers* opinion reaffirmed *Norwood*—albeit cryptically and in narrow terms.⁵⁵ The two decisions may suggest that the category of ordinary state action cases extends somewhat beyond obvious state-initiator situations. It may include as well at least some cases in which state policy leaves room for private choice, and the exercise of that choice in one way rather than another (for example, deciding to sue for libel) is essential for a constitutional issue to arise.

It is problematically unclear just what falls within and without this borderline subset of the ordinary category. Be that as it may, it is significant that the Court seems to treat cases such as *New York Times* and *Norwood* like all other ordinary ones and thus does not require them to clear the hurdles of *Flagg Brothers*, *Jackson*, or *Moose Lodge*. The requirements of these three cases then may be viewed as limited ways for cases outside even the extended ordinary category to avoid a presumptive finding of no state action. From this perspective, the Rehnquist trilogy becomes both more intelligible and less objectionable.

Although Justice Rehnquist has not clearly acknowledged this borderline type of ordinary state action case, the opinions do seem to leave open the possibility that it exists. The *Moose Lodge* opinion in particular is full of negatives pregnant implying that there might be state action if some of the “impetus for the discrimination”⁵⁶ were governmental, or if the state policy were “intended either overtly or covertly to encourage discrimination,”⁵⁷ or if the regulation could “be said to in any way foster or encourage racial discrimination.”⁵⁸ One might view these comments as nothing but early throwaways, and they may turn out to have been just that. Yet the later cases also contain at least some small hints of a continuing willingness on the part of the Court to consider state influence on private choice as sufficient for a finding of state action. For example, the *Flagg Brothers* opinion takes care to

52. See *id.* at 467-68.

53. See *id.* at 463-68.

54. See, e.g., *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 161 (1979) (forgoing state action inquiry and applying first amendment standards in challenge to state defamation law); *Time, Inc. v. Firestone*, 424 U.S. 448, 452 (1976) (same); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (same).

The *Flagg Brothers* opinion does not deal directly with the possibility of treating that case as one involving ordinary state action. Instead, seemingly on the basis of the observation that no state agency or official had been involved as a participant in the underlying transaction or remained as a party to the litigation, the Court went immediately to the inquiry whether any basis existed for treating the private conduct involved as that of the state. See 436 U.S. at 157. Avoiding the question whether to treat state policy as state action on this basis seems at best confused and at worst pretextual, because the same conditions normally prevail in private defamation litigation.

55. See *Flagg Bros.*, 436 U.S. at 163 (holding does not impair *Norwood*, which “arose in the context of state and municipal programs which benefited private schools engaging in racially discriminatory admissions practices following judicial decrees desegregating public school systems”).

56. *Moose Lodge*, 407 U.S. at 173.

57. *Id.*

58. *Id.* at 176-77.

include the qualifier "purely" in its reference to a "private choice."⁵⁹ Assuming, then, that the Court does not mean to limit the ordinary category exclusively to cases in which the state is unambiguously the sole initiator of the particular challenged act, the following sections explore some of the implications and problems of this approach.

B. PERMISSIVE STATE POLICIES AS "ORDINARY" STATE ACTION

If the Court remains willing to recognize as still qualifying for ordinary state action treatment at least some limited number of situations that do not plainly involve state initiation of a particular challenged act, that willingness has significant implications for the analysis of state action problems. It suggests that lower courts need not always regard themselves as limited to what Professor Tribe has characterized as "a single-minded search for the moving hand of a governmental actor"⁶⁰ in seeking a basis for a finding of ordinary state action. At least some state policies leaving room for private choice can be subject to constitutional restraints on government without qualifying as exceptional cases meeting the stringent requirements applicable to cases in the nonordinary category. Explicit recognition of such a borderline ordinary category would make sense: if the state has tilted the stage, a litigant should not be foreclosed from complaining about the tilt just because the state itself has not appeared, and is not appearing, on stage.

Indeed, approaching cases with a greater readiness to consider the applicability of constitutional guarantees to state policies that leave some room for private choice could make unnecessary the contortions that sometimes result from an insistence on the search for official "action." For example, this approach might justify the result in the troublesome landmark case of *Shelley v. Kraemer*⁶¹ while avoiding the sweeping implications that have since bedeviled courts and commentators. *Shelley* found judicial enforcement of racially restrictive covenants violative of the equal protection clause even though the only state actors in the case were the courts that enforced, at private behest, the privately formulated restrictive covenants on the property.⁶² The decision to have a law of covenants running with the land, like that to have contract and property law generally, is at least on its face racially neutral; in theory, covenants could stipulate against discrimination as well as in favor of it. But the common law disfavored restraints on alienation;⁶³ judicial willingness to enforce racial restraints on alienation thus had to reflect a governmental policy, embodied in common law, to favor racial

59. 436 U.S. at 165. See also note 117 *infra*.

60. L. TRIBE, *supra* note 42, at 105 (Supp. 1979).

61. 334 U.S. 1 (1948).

62. See *id.* at 13-14, 23.

63. See RESTATEMENT OF PROPERTY § 406, Comment a (1944) (common law favored free alienation, especially concerning indefeasible legal possessory estates in fee simple). See generally *id.* §§ 404-06. *Shelley* also involved restraints on occupancy. See generally C. VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES 148-50, 157-58 (1959). The general common law rule on such restraints was less hostile than that for restraints on alienation, requiring only that restraints on occupancy not be contrary to public policy. See RESTATEMENT OF PROPERTY § 437, Comment b (1944) (restraint on residence normally valid). Racial restraints on the use of property, however, were subject to the same treatment as racial restraints on alienation, see *id.* § 406, Comments l-m, thus exposing them when approved by state policy to the same constitutional objections.

discrimination.⁶⁴ Such a policy seems to be state action denying equal protection just as much as if a state were to decide that miscegenation, which the states may not forbid,⁶⁵ were a valid ground for annulment of marriage.

The example of *Shelley* does not imply that the justices have invariably been blind to the possibility of finding state action in a noncoercive state policy that private parties were free to invoke or not as they saw fit. Before *New York Times*, Justice Stewart, concurring in *Burton v. Wilmington Parking Authority*,⁶⁶ found a fourteenth amendment violation on the ground that a private coffee shop renting space in a public parking structure had prevailed against charges of unlawful discrimination in the state courts on the basis of a state statute interpreted as "authorizing discriminatory classification based exclusively on color."⁶⁷ Similarly, in his separate opinion in *Evans v. Newton*,⁶⁸ Justice White would have held unenforceable a testator's racial restriction on park use—even after transfer of the park from city to private control—because state law had "forbidden all private discrimination [in such situations] except racial discrimination"⁶⁹ and thus had departed "from a policy of strict neutrality in matters of private discrimination."⁷⁰

To conclude this portion of the discussion, a quotation from Judge Henry Friendly captures the spirit of the inquiry necessary in ordinary state action cases: "What is always vital to remember is that it is the *state's* conduct . . . not the *private* conduct, that gives rise to constitutional attack."⁷¹ This admonition provides a helpful reminder if taken to extend to at least some state policies that leave room for private choice, and to include the possibility that challenges to state policies may come in private litigation as well as in direct contests with the state. Nevertheless, it is too confining to apply in all cases.

In a way, Judge Friendly in his statement and Justice Rehnquist in *Flagg Brothers* have left themselves open to what may be complementary misun-

64. See L. TRIBE, *supra* note 42, § 18-6, at 1170 (state law permitting enforcement of racial restraints on alienation, but prohibiting enforcement of many other restraints on alienation, not racially neutral); Choper, *Thoughts on State Action: The "Government Function" and "Power Theory" Approaches*, 1979 WASH. U. L.Q. 757, 770 (by enforcing racial restraint on alienation, state court arguably made policy decision in favor of racial discrimination and acted with discriminatory intent); cf. W. LOCKHART, Y. KAMISAR, & J. CHOPER, *CONSTITUTIONAL LAW* 1535 (5th ed. 1980) (source of discrimination arguably public because restraints on alienation presumed void unless reasonable and consistent with public policy).

65. See *Loving v. Virginia*, 388 U.S. 1, 2, 12 (1967) (Virginia law prohibiting interracial marriage violates both due process and equal protection clauses of fourteenth amendment).

66. 365 U.S. 715 (1961).

67. *Id.* at 726-27 (Stewart, J., concurring).

68. 382 U.S. 296 (1966).

69. *Id.* at 311 (opinion of White, J.).

70. *Id.* at 306 (opinion of White, J.). See also *Hunter v. Erickson*, 393 U.S. 385 (1969). In *Hunter*, the Court considered a city charter provision requiring referendum approval for fair housing measures. See *id.* at 386 ("any ordinance dealing with racial, religious, or ancestral discrimination in housing" required majority approval by voters). Failure to clear this hurdle would thus leave housing discrimination to private choice. It would be one thing for states and localities not to enact fair housing laws, or to repeal them once enacted. See *id.* at 390 n.5 (declining to hold that repeal would violate fourteenth amendment). What states and localities could not do, however, was to favor discrimination by making it especially difficult to pass antidiscrimination legislation. See *id.* at 393 (state may not disadvantage any "group by making it more difficult to enact legislation on its behalf"). For the original proposal of this rationale, see Black, *supra* note 1, at 71-83 (state should not be allowed to erect special barriers to racial minority's attaining its goals through political process).

71. Friendly, *The Dartmouth College Case and the Public-Private Penumbra*, 12 TEX. Q. No. 2, at 17 (1969) (Supp.) (emphases in original).

derstandings. The Friendly guideline, which he stated in unqualified terms, makes excellent sense in ordinary state action cases, but not for all those falling in the nonordinary category. The Rehnquist discussion of standards applicable in the latter cases, on the other hand, has a good deal of merit, but was stated so generally that it appeared to undermine sound precedent for ordinary state action cases and to make applicable to them restrictive and inapposite criteria. What follows is an effort to elucidate these criteria in their proper context.

III. "NONORDINARY" CASES: PRIVATE CONDUCT AS STATE ACTION

A temptingly easy response to some of the numerous problems of state action doctrine would be to adopt a bright-line rule that in the absence of ordinary state action, the constitutional restraints on government do not apply. As the Supreme Court precedents to be discussed in this part make clear, however, such an approach would be inconsistent with numerous decisions. Over the years the Court has encountered several types of situations that do not involve ordinary state action but which it has nevertheless held subject to constitutional restraints on government. In such cases the Court has asked at the threshold whether the actor, in the words of the *Flagg Brothers* opinion, is "a private person whose action 'may be fairly treated as that of the State itself.'"⁷²

The Court's characterization of its approach to such cases is somewhat misleading because it often focuses not on the private ingredient but on the nature and the degree of government involvement. Moreover, when unconstitutional state action is found in some types of nonordinary cases, the Court does not treat the private action as if it were the state's. Rather than telling the private actor to cease discriminating, the Court tells the government to cease its involvement.⁷³ The *Flagg Brothers* articulation may also stack the deck against a finding of state action. If what is ostensibly involved is the application of constitutional restraints on government to private actors, judges are likely to construe the doctrines narrowly for fear of subjecting wide ranges of private conduct to constitutional regulation.

Despite these difficulties with the Court's articulation in *Flagg Brothers*, as a practical matter its approach is reasonably comprehensible and defensible. Given as a starting point the absence of ordinary state action, it is at least understandable for the Court to erect a threshold presumption against a finding of state action because private initiative and decision are necessary to present a problem at all. The Court's precedents establish, though, that the presumption is rebuttable in certain types of situations. The *Flagg Brothers* majority opinion dealt with two such categories, the "public function" and "authorization and encouragement" doctrines.⁷⁴ The Court mentioned just

72. 436 U.S. at 157 (quoting *Jackson*, 419 U.S. at 351).

73. See *Moose Lodge*, 407 U.S. at 179 (not enjoining private discrimination but directing injunction against enforcement of state regulation requiring compliance with lodge bylaws containing racially discriminatory provisions). In some situations involving the private exercise of government-like or perhaps monopolistic power, however, the Court would apparently treat the private actor's conduct as state action for some purposes; its approach would entail the granting of relief not against the government's involvement but against the challenged private action. See generally Choper, *supra* note 64, at 781.

74. See notes 78-102 *infra* and accompanying text.

these two possible bases for rebutting the presumption in that nonordinary case, but apparently only because it viewed those arguments as the only ones before it. Consequently, *Flagg Brothers* should not be read as casting doubt on the possibility of other approaches to rebutting the presumption against a finding of state action; to varying extents the case law has indeed recognized further exceptions, most prominently the "joint participant,"⁷⁵ "augmentation,"⁷⁶ and "double standard"⁷⁷ theories. This part briefly discusses each of these several grounds in turn.

A. THE FLAGG BROTHERS CATEGORIES

The Public Function Doctrine and the "Exclusivity" Requirement. In *Marsh v. Alabama*⁷⁸ and the "white primary" cases,⁷⁹ the Court developed what has come to be known as the public function doctrine. The doctrine can sometimes support a finding of state action in a nonordinary case when a private party is exercising a governmental function either in circumstances of government default or by delegation from the government. Underlying the doctrine is the view that although the state itself has not taken the challenged action, the private actor is, for state action purposes, a sort of substitute state. The theory that the state should not escape constitutional restraints by turning powers over to the private sector requires that restraints on state conduct stay with the function when it is exercised by the private actor.⁸⁰ The parties challenging the use of the New York warehouseman's lien law in *Flagg Brothers* relied principally on a public function argument that the state had delegated to private parties its traditional function of settling private disputes.⁸¹ After reviewing the prior cases, the Court emphasized its view that

75. See notes 104-19 *infra* and accompanying text.

76. See notes 120-28 *infra* and accompanying text.

77. See notes 129-31 *infra* and accompanying text.

78. 326 U.S. 501 (1946) (distributor of religious literature on streets of company town entitled to first amendment protection).

79. See, e.g., *Terry v. Adams*, 345 U.S. 461 (1953) ("preprimary" elections of white Democratic club that produced normally unopposed candidates in official Democratic primary violated fifteenth amendment by excluding black voters); *Smith v. Allwright*, 321 U.S. 649 (1944) (official party primary, whose winners were included by state law on state general election ballot, held to be delegated state function; party rule excluding black voters from primary violated fifteenth amendment). For articulations that can help explain how the white primary situations may satisfy the *Flagg Brothers* exclusivity requirement, see Choper, *supra* note 64, at 777 ("conducting the only meaningful election of public officials in a particular area") (footnote omitted); Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083, 1094 (1960) ("voting [is] a purely governmental function. No private organization can decree that a majority vote shall entitle a candidate to public office . . ."). But see Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 28-29 (1959) (questioning whether determination "in effect that primaries are a part of the election" is supported by "neutral principles that satisfy the mind").

80. See, e.g., *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 139 (1975):

Since a state cannot be allowed to absolve itself of responsibility in all cases merely by assigning to a private party the decisionmaking role with regard to unconstitutional action, it must also be determined whether the allocation itself is permissible. The public function doctrine is in part designed to prevent such an attempted abdication in traditionally public areas.

Id. at 150-51 (footnote omitted).

81. See 436 U.S. at 157.

in order to support a finding of state action under the public function doctrine, the function being exercised by a private party must be one “traditionally *exclusively* reserved to the State.”⁸² The settlement of debtor-creditor disputes, the Court concluded, did not satisfy this criterion.⁸³

This exclusivity requirement may seem at first excessively rigid, and it may also present practical problems of definition and application.⁸⁴ There seems, however, to be some measure of sense to it. Underlying the Court’s reasoning could be the idea that if a function has a history of not being exclusively governmental, we are accustomed as a practical matter to its being exercised at least some of the time without being subject to constitutional restraints on official action. For instance, if President Reagan returns some of Amtrak wholly to the private sector, it would not strike most as an impermissible evasion of constitutional protections for the railroad to function as free from constitutional restraints as other private concerns. But if a function has been uniquely governmental, then a principal concern of the framers—protection against the awesome power of government and its potential abuse—is more directly involved. Such a function is normally exercised only under the Constitution’s checks on the exercise of government authority.⁸⁵

The exclusivity criterion, then, reflects a major concern underlying traditional state action doctrine—the abuse of power by government—and identifies those cases presenting the greatest reason for concern about exempting nominally private actors from constitutional restraints on government action.⁸⁶ The requirement thus provides an answer to Judge Friendly’s criticisms of the public function doctrine as “unconvincing” and, given government’s at least partial assumption of many formerly private functions, “much too expansive,”⁸⁷ because it isolates the core cases and pares off those

82. *Id.* (quoting *Jackson*, 419 U.S. at 352) (emphasis added). See 436 U.S. at 157-64 (interpreting prior cases as establishing exclusivity requirement).

83. See 436 U.S. at 160-63. But see *The Supreme Court, 1977 Term, supra* note 43, at 128 (authoritative resolution of disputes over property rights a central governmental function); Note, *Flagg Bros. and State Action: Foreclosing The Fourteenth Amendment*, 10 LOY. CHI. L.J. 811, 821-24 (1979) (both binding conflict resolution and lien enforcement exclusive public functions).

84. See *Flagg Bros.*, 436 U.S. at 172 n.8 (Stevens, J., with White & Marshall, JJ., dissenting) (majority description of exclusivity “incomprehensible”); *The Supreme Court, 1977 Term, supra* note 43, at 128-29 (absence of conceptual framework in *Flagg Bros.* leaves exclusivity test “fraught with ambiguities”).

85. Cf. Note, *State Action, supra* note 46, at 691: “[P]rivate persons . . . exercising certain peculiarly governmental functions threaten . . . rights [protected by the Constitution against state infringement] as effectively as government itself. Thus, the purposes for which the constitutional amendments were ratified justify imposing restraints on the parties who wield such powers.”

86. For example, a government could delegate its usual monopoly on the lawful initiation of the use of force by authorizing private breaches of the peace necessary for self-help repossession of chattels in occupied dwellings. The *Flagg Bros.* Court distinguished this type of delegation from the UCC provision under review. See 436 U.S. at 160 n.9 (no state authorization of private breach of peace in *Flagg Bros.*); cf. *id.* at 163 (“such functions as education, fire and police protection, and tax collection . . . have been administered with a greater degree of exclusivity by States and municipalities than has the function of so-called ‘dispute resolution’”) (footnote omitted).

87. Friendly, *supra* note 71, at 24. If the government’s assumption of a generally private function comes under judicial scrutiny, there should be no difficulty in dealing with a possible reverse of the public function argument—that government should be exempt from normal constitutional restraints in the exercise of the function because in that situation it behaves like a private actor. The constitutional text and precedents are quite explicit in applying their restraints to government generally, and such cases should be treated as ordinary state action situations. Cf. Van Alstyne, *Cracks in “The New Property”*: *Adjudicative Due Process*

in which the justification for judicial intervention may be more well-meaning than analytically defensible.⁸⁸

The "Authorization or Encouragement" Strand and the Requirement That Private Action Be "Ordered or Compelled" by Government. The challengers' second argument in *Flagg Brothers* was that the proposed sale should be treated as state action "because the state ha[d] authorized and encouraged it in enacting" the UCC warehouseman's lien provision.⁸⁹ The Court, however, approached this issue from a different angle, indicating that a practice initiated by a private party is seemingly not to be treated as state action unless the government has "put its own weight on the side of the proposed practice by ordering it."⁹⁰ This standard at first seems self-contradictory: if the initiative is private, the government can hardly be ordering or compelling the practice. Most often this conclusion will hold true, but that will not always be the case.

Justice Rehnquist appears to have had in mind a rare situation, but one properly treated as state action when it does arise. In *Flagg Brothers*, he referred to the aspect of *Moose Lodge* in which the Court forbade enforcement of a state requirement that private club liquor licensees observe all their own rules, when the rule in question excluded nonwhites.⁹¹ In effect, the state said to the club that it didn't care whether the club discriminated but that if the club adopted rules calling for discrimination, then it had better discriminate. Though such combinations probably are unusual, when they do occur it makes sense to break them up.⁹²

in the *Administrative State*, 62 CORNELL L. REV. 445, 445-48 (1977) (tracing rejection of right-privilege distinction, which had in effect exempted governments from constitutional restraints on state action when they acted in roles more characteristic of private than of public sector).

88. For an illustration of the sort of situation to which the exclusivity criterion might apply and in which it might provide a useful basis for discussion of the state action issue, see *North Shore Right to Life Comm. v. Manhasset Am. Legion Post No. 304*, 452 F. Supp. 834 (E.D.N.Y. 1978). In *North Shore*, a town granted the local Legion post permission to organize the Memorial Day parade on the public streets, and the post invited several civic groups to participate. An uninvited antiabortion group sought permission to join; the post turned it down on the ground that the Legion constitution required it to be nonpolitical and nonpartisan, and the town refused to interfere. The court first dismissed the claim against the town on the ground that it had not acted discriminatorily in any way. *Id.* at 836-37. Within the Supreme Court's apparent framework, this decision seems correct because of the town's complete hands-off position. The *North Shore* court, however, went on to hold that the post's decision could be treated as the state's. *Id.* at 837-38. The *North Shore* decision, handed down within a few weeks of *Flagg Brothers*, does not cite the case but seems tenable under its exclusivity criterion. The town had, in effect, put the Legion post in the position of controlling access to a public forum, normally an exclusively governmental function. See also Note, *Private Searches and Seizures: An Application of the Public Function Theory*, 48 GEO. WASH. L. REV. 433 (1980).

89. 436 U.S. at 164.

90. See *id.* (quoting *Jackson*, 419 U.S. at 357) (emphasis added by *Flagg Bros.* Court).

91. See *Flagg Bros.*, 436 U.S. at 164.

92. The logic behind this explanation would apply as well if the state, having taken no position on the content of a private party's policy, somehow encouraged the private party to follow the policy by means short of what might fairly be characterized as "compulsion." Such situations, however, are likely to be vanishingly rare; it is even hard to suggest a hypothetical illustration without coming up with something that seems strained and implausible, such as a tax bonus to a regulated utility for adhering to its posted tariff, in whose content the government takes no interest. Technically, in any event, the compulsion standard of *Flagg Brothers* is thus unduly confining, even for nonordinary cases.

A consequence of this line of reasoning is that whenever there is state compulsion or encouragement,

If applied to a limited range of cases and understood with an important qualification, this aspect of *Flagg Brothers* is defensible. The limitation on applicability is that the "ordering" or "compelling" criterion cannot sensibly be relevant to ordinary state action cases. Normally a prospective defamation plaintiff, for example, is under no official compulsion to bring suit. Yet that fact is not and should not be an obstacle to constitutional review of the defamation law. To give a different example, if a state were to allow a larger tax break for segregated private schools than for integrated ones, the absence of formal compulsion should be irrelevant and ordinary state action should be found, despite the presence of some room for private choice. This result could be justified either on an "encouragement" theory or more simply by finding the policy a plain violation of the equal protection clause.⁹³ In contrast, the state in *Flagg Brothers* provided a means of lien enforcement but apparently did not in any way pressure the warehouseman to use it or to adhere to a freely chosen policy concerning its use.

Some commentators have viewed *Flagg Brothers* as virtually eliminating the authorization and encouragement strand of state action doctrine.⁹⁴ If applicability of the compulsion requirement can be limited to nonordinary cases as suggested above, the decision need not have that effect. What the authorization and encouragement doctrine seems to deserve, under the approach this article suggests the Court is following, is a limited degree of survival. On the one hand, there are good reasons, within the Court's apparent framework, for construing the doctrine rather narrowly and perhaps for confining it primarily to what would probably be somewhat rare cases of significant encouragement of private activity. A vast range of private conduct is authorized by law yet does not seem properly subject to the constitutional restraints on governments,⁹⁵ and the *Flagg Brothers* Court reflected a legitimate concern that advocates not be able to convert a hands-off state policy (or "inaction"⁹⁶) into state action by the facile rhetorical device of labeling it authorization or encouragement.⁹⁷ On the other hand, however, there remain types of situations involving state policies with significant effects on private decisions for which it seems essential that the authorization and encouragement doctrine retain vitality.⁹⁸

either to adopt a particular policy or to adhere to one freely chosen, a finding of state action should follow. In the former situation, there seems to be ordinary state action; in the latter case, the logic of *Moose Lodge* would dictate the state action finding.

93. Cf. text accompanying notes 66-70 *supra* (discussing rationales for finding state action when state policy favored racial segregation without requiring private parties to segregate).

94. See sources cited in note 44 *supra*.

95. See Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment* (pts. 1 & 2), 46 S. CAL. L. REV. 1003, 1104-09 (1973).

96. *Flagg Bros.*, 436 U.S. at 164.

97. See *id.* at 164-65.

98. For example, consider a possible variation on the facts of the recent case of *Stone v. Graham*, 101 S. Ct. 192 (1980) (*per curiam*). In *Stone*, the Court invalidated a Kentucky statute requiring the posting of a privately purchased copy of the Ten Commandments in every public classroom in the state. *Id.* at 193. If Kentucky were to respond to this decision with a new statute merely authorizing but not requiring the posting, complete abandonment of the authorization and encouragement approach might shield the statute from constitutional scrutiny. Yet the hypothetical statute and postings pursuant to it would apparently violate constitutional norms: The Court said in the course of voiding the actual law that "the mere posting of the copies under the auspices of the legislature provides the 'official support of the State . . . Government'

Although the *Flagg Brothers* Court relied on disturbingly narrow grounds for viewing the case as one not involving ordinary state action,⁹⁹ the Court did not face a situation fairly treatable as involving significant state encouragement in the sense of influence on a private choice left open by state policy. Consequently, the obituaries for the encouragement strand of state action doctrine may be at least premature; within the Court's framework, significant encouragement should be one ground to support a finding of ordinary state action. All *Flagg Brothers* need be read to say is that once a case is correctly classified as *not* involving ordinary state action, there is no room for talk of authorization or encouragement. This interpretation seems eminently sensible in nearly all nonordinary situations because the state will have taken a hands-off position toward the challenged private decision.¹⁰⁰

Flagg Brothers' compulsion criterion must also be significantly qualified: it can be only one of several possible alternative routes to a finding of state action in nonordinary cases, *not* a requirement for all of them. The *Flagg Brothers* Court implicitly so acknowledged by considering whether the warehouseman's proposed sale could be treated as action of the state under *either* the public function doctrine or the compulsion requirement.¹⁰¹ Some *Flagg Brothers* "compulsion" rhetoric was cast in broad terms, but it makes sense only if qualified as suggested here;¹⁰² there need not, for example, be any official compulsion to support a finding that a private entity is performing an exclusively governmental function. So understood, as one of several alterna-

that the Establishment Clause prohibits." *Id.* at 194 (quoting *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222 (1963)). See also text accompanying notes 50-53, 93 *supra* (discussing actual case involving textbook aid to private segregated schools and hypothetical tax preferences for segregation); Note, *The Presence of State Action in United Steelworkers v. Weber*, 1980 DUKE L.J. 1172, 1193-99 (federal agencies' pressure on private employers and unions to adopt affirmative action plans).

The reader would be justified in noting that I offer no basis for determining when state policies have the amount or kind of impact on private choice that would support a finding of state action on an authorization or encouragement theory. The difficulty—or perhaps impossibility—of making such distinctions is one reason why this article concludes that the Court's apparent approach may ultimately be unworkable. See text accompanying note 141 *infra*.

99. See note 54 *supra* (no state agency or official action involved in underlying transaction).

100. Encouragement short of compulsion in nonordinary state action situations seems likely almost never to arise, so as a practical matter the *Flagg Brothers* rejection of the relevance of encouragement seems appropriate for such cases. For what may be only hypothetical exceptional circumstances, however, the rejection is open to question. See note 92 *supra*.

Other language in *Flagg Brothers* concerning the absence of state action when there is merely state "approval" without "ordering," see 436 U.S. at 164, should also be confined to nonordinary state action cases. If the so-called approval is purely formal, such as a process involving a filing with a public authority without its substantive scrutiny, see *Jackson*, 419 U.S. at 354-55 (no state action when state public utility commission approved general tariff without hearing or other scrutiny), then the state's failure to require adherence to the privately chosen policy eliminates the last vestige of official involvement with the challenged private decision. But if the private choice is effective only when official action reflects agreement, then official approval should qualify as ordinary state action. See *Public Utils. Comm'n v. Pollak*, 343 U.S. 451, 462-63 (1952) (private, regulated bus line's playing of recorded music on buses held state action when regulating authority conducted hearings on practice and ruled in its favor) (*semble*).

101. See 436 U.S. at 157-64, 164-66.

102. For an illustration of the sort of broad use of "compulsion" language that might cause confusion if taken literally, see *Langley v. Monumental Corp.*, 496 F. Supp. 1144, 1147 n.2 (D. Md. 1980) ("even if the County had 'approved' all [the challenged private] actions . . . no 'state action' would be present since the County did not *compel* [the private] conduct") (emphasis in original); *id.* at 1150 n.3 ("Under *Flagg Bros.* and *Jackson*, the crucial question is whether state law *compels* the challenged private conduct.") (emphasis in original).

tive routes to a finding of state action in nonordinary cases, the compulsion requirement is unexceptionable. If no ordinary state action is present, if no compulsion like that in *Moose Lodge* is found, and if none of the other state action criteria for nonordinary cases is satisfied, then within the Court's approach nothing justifies invoking the constitutional restraints on governments.

B. OTHER BASES FOR TREATING PRIVATE CONDUCT AS STATE ACTION

The beginning of this part suggested that there is no need to regard the two theories discussed in *Flagg Brothers* as the only possible bases for finding state action in nonordinary cases. The relevant question, as the Court frames it, is what types of circumstances justify treating a private actor's conduct as if it were that of the state. There is no reason why two categories should automatically complete the list of possible answers. Because other commentators have discussed compendiously the types of situations that might support findings of state action,¹⁰³ I shall not repeat such a catalogue here. The following discussion explores briefly the implications of the Court's apparent approach for some of the prominent state action theories applicable to nonordinary cases beyond the two addressed in *Flagg Brothers*.

*Government as "A Joint Participant in the Challenged Activity."*¹⁰⁴ The *Flagg Brothers* opinion conspicuously omitted any mention of *Burton v. Wilmington Parking Authority*.¹⁰⁵ In the much-criticized *Burton* opinion,¹⁰⁶ the Court found state action in discrimination practiced by a private coffee shop operator in space leased in a public parking structure. The *Burton* majority relied on a combination of factors that left unclear the significance of any of them in isolation or in different combinations. It pointed both to the authority's failure to insist on a nondiscrimination clause in the lease and to several aspects of the leasing operation, the cumulative effect of which was that the "State ha[d] so far insinuated itself into a position of interdependence with [the shop] that it must be recognized as a joint participant in the challenged activity."¹⁰⁷ The present Court's treatment of *Burton* has been ambivalent. It has been reluctant to find state action on the basis of *Burton*,¹⁰⁸

103. See generally Burke & Reber, *supra* note 95, at 1041-114; Note, *State Action*, *supra* note 46, at 662-98.

104. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) (italics added).

105. 365 U.S. 715 (1961).

106. See, e.g., Choper, *supra* note 64, at 773 (*Burton* "exceedingly hard to justify"); Lewis, *Burton v. Wilmington Parking Authority—A Case Without Precedent*, 61 COLUM. L. REV. 1458, 1466 (1961) (Court failed to mold even "minimum, tentative rule").

107. 365 U.S. at 725. The Court mentioned, among other things, the public ownership and use of the land and building and the public financing of the project, *id.* at 723; the importance of rental income in the financial planning for the project, *id.* at 723-24; the "mutual benefits" resulting from the presence of the two operations in the same building, *id.* at 724; the shielding of the private lessee from rent increases due to improvements in the realty, because of the authority's tax exemption, *id.*; and the authority's financial reliance on the shop's success, which the shop alleged would be impaired if it did not discriminate. *Id.*

108. In only one case has the Burger Court even come close to doing so. *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974), involved a challenge to the use of recreational facilities by segregated private groups. The Court found the case similar to *Burton* in that the city made public property "available for use by private entities," *id.* at 573, and remanded for findings on the degree of public involvement in the private discrimination, *See id.* at 573-74.

but it has continued to imply that at least part of the case is good law by referring in *Jackson* to the absence of the "symbiotic relationship" present in *Burton*.¹⁰⁹ With the Court having looked different ways in its reactions to *Burton*, it is worth assessing just what survives of that decision.

Jackson and *Flagg Brothers* appear to reject reliance on governmental inaction, without more, as a basis for a finding of state action.¹¹⁰ To the contrary, in the Court's evolving approach state inaction raises a presumption of no state action and places the case in the nonordinary category requiring special justification to permit treatment of private conduct as state action. If *Burton* provided support for the view that state inaction in the face of a felt private wrong could amount to state action, that aspect of the case seems not to survive. Rejection of that part of *Burton*, however, does not necessarily condemn the entire case. The other facet of the opinion focused on the nature and degree of public involvement with the private activity. Despite governmental inaction concerning the particular challenged private action, degrees of governmental involvement in other parts of the operation could, in ways the courts have struggled to define,¹¹¹ justify overcoming the presumption of no state action. The Supreme Court still recognizes this aspect of *Burton*,¹¹² if grudgingly, and lower courts continue to apply it.¹¹³

Supreme Court phrasings of the *Burton* test have never risen beyond the level of brief generalities: "symbiotic relationship,"¹¹⁴ or "joint participant in the challenged activity."¹¹⁵ Yet in some situations rather different from *Burton* itself, at least the latter formulation is fairly readily applicable.¹¹⁶ For

109. See 419 U.S. at 357.

110. See *De Malherbe v. International Union of Elevator Constructors*, 476 F. Supp. 649, 657 (N.D. Cal. 1979) ("*Burton's* emphasis on the government's inaction seems at odds with *Jackson's* focus on whether the government affirmatively supported the challenged activity, particularly in light of the statement in *Flagg Bros.* that inaction cannot be characterized as support or encouragement").

111. See *Downs v. Sawtelle*, 574 F.2d 1, 6 (1st Cir.) ("For the past sixteen years courts have struggled to follow the admonition of the Supreme Court in *Burton* . . . that '[o]nly by sifting facts and weighing circumstances' can the legal significance of state involvement in private conduct be determined"), cert. denied, 439 U.S. 910 (1978).

112. See *Jackson*, 419 U.S. at 357 ("symbiotic relationship" found in *Burton* absent).

113. See *Downs v. Sawtelle*, 574 F.2d 1, 9 (1st Cir.) ("The essence of *Burton* which survives *Jackson* is that the relationship between the state and the private institution may be so intertwined that the state will be held responsible for conduct of the institution with which it had no direct connection") (emphasis added) (footnote omitted), cert. denied, 439 U.S. 910 (1978).

114. *Jackson*, 419 U.S. at 357.

115. *Burton v. Wilmington Parking Auth.*, 365 U.S. at 725.

116. The text is not meant to imply that *Burton* was wrongly decided. Justice Stewart's concurrence in *Burton* identified one possible basis for finding ordinary state action in the lower courts' interpretation of a state statute as placing the weight of the state behind private decisions to discriminate. See text accompanying notes 66-67 *supra*. A second basis may be the authority's scheme to let commercial space in the building by competitive bidding. See 365 U.S. at 719. Quite possibly, the authority's sole motivation in choosing this method was to raise as much money as possible. Given the authority's failure to adopt a nondiscrimination requirement, however, see *id.* at 725, the authority also may have been aware that discriminating store owners would be at a competitive advantage over those who would not discriminate. Cf. *id.* at 724 (allegation by coffee shop that nondiscrimination would hurt its business). If so, they could outbid their nondiscriminating competitors. And if support for racially discriminatory businesses was a motivating factor in the decision to use a competitive bidding system with no antidiscrimination requirements, the forbidden motivation would establish a prima facie violation of the equal protection clause despite the facial neutrality of the system. See *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265-66, 270 n.21 (1977) (proof that governmental decision was motivated in part

example, governments have found themselves running a park or school segregated not by their own design but by the will of a private donor.¹¹⁷ The joint participant concept not only describes such situations accurately, but also captures the idea that the state should not run segregated or otherwise unconstitutional operations by hiding behind the will of a private donor or the conduct of an ostensibly private employee.¹¹⁸ To hold otherwise would threaten to allow the state to use cleverly concealed pretexts to evade its constitutional obligations.

The joint participant formulation, however, would not classify as state action instances of lesser state involvement, such as when a policeman enforces a trespass law in favor of a discriminating club. Given a threshold approach to the state action problem, there probably would be considerable agreement that such a case should not proceed past the threshold; an emphasis on the nature and degree of state involvement rationalizes that intuition.¹¹⁹ These examples may help give content to the *Burton* formulation by focusing on the presence or absence of a substantial governmental role in the management or operation of the challenged activity. When so defined, the joint participation idea deserves its continued vitality within the Court's present approach to state action questions.

Government Augmentation of Private Power. One argument that has not fared well in recent cases nevertheless retains considerable persuasiveness as a justification for holding exercises of private power subject to the constitutional restraints on government. By such measures as granting or protecting a monopoly, limiting the number of persons eligible to perform a

by racially discriminatory purpose overcomes judicial deference to legislators or administrators and establishes prima facie case of equal protection deprivation).

117. See *Evans v. Newton*, 382 U.S. 296, 301-02 (1966) (park segregated under will of private donor cannot operate on segregated basis with municipal maintenance); *Pennsylvania v. Board of Directors of City Trusts*, 353 U.S. 230 (1957) (per curiam) (government cannot run segregated school as trustee under will establishing trust for school and imposing segregation requirement).

In *Flagg Brothers*, the majority opinion refers in passing to *Evans* as a case involving "ordinary state action under extraordinary circumstances." 436 U.S. at 159 n.8. Analytically, it may make more sense to view *Evans* as *not* involving ordinary state action as this article uses the phrase, because the impetus for the discrimination was apparently private. In any event, the Court's reference may indicate some willingness to extend the boundaries of ordinary state action beyond those situations in which the state is unambiguously the originator of a particular challenged act. See notes 47-71 *supra* and accompanying text (discussing borderline cases of ordinary state action).

118. For an example of the sort of joint participant case likely to continue to arise despite the general disappearance of state involvement in formal segregation, see *Downs v. Sawtelle*, 574 F.2d 1, 6-10 (1st Cir.) (although community hospital primarily financed by private funds, hospital and its chief of staff subject to suit as state actors for involuntary sterilization because hospital's board of directors appointed by town selectmen), *cert. denied*, 439 U.S. 910 (1978).

119. Indeed, an interpretation of the joint participant theory that emphasizes the nature and degree of state involvement in the challenged conduct may be necessary to save the Court from some of its own rhetoric. In holding the Pennsylvania regulation requiring private club liquor licensees to adhere to their own bylaws unenforceable as to discriminatory rules, the *Moose Lodge* Court stated in unqualified terms that invoking "the sanctions of the State to enforce a concededly discriminatory private rule . . . would violate the Fourteenth Amendment." 407 U.S. at 179. Nevertheless, if the enforcement took the form of police ejection of a trespasser excluded by a private club's discriminatory rule, the Court likely would not apply its statement literally and find unconstitutional state action.

Similarly, the joint participant articulation provides a principled basis for not finding state action in the myriad "private actions in which a governmental functionary plays some ministerial role." *Flagg Bros.*, 436 U.S. at 174 (Stevens, J., with White & Marshall, JJ., dissenting).

service, or requiring individuals to join and make payments to private organizations, government can enhance the power of one private actor in relation to other private individuals and entities. In such situations, even when government leaves the choice of how to exercise the enhanced power up to the private entity, the state is responsible for increasing the effectiveness of private action.

A monopolist's customer complaining of unfair treatment, for example, cannot look elsewhere for service.¹²⁰ As the Court put it three decades ago, "when authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself."¹²¹ Of course, a threshold approach could not treat *all* private action enhanced by state authority as state action. Too much of such enhancement exists, such as the state's general willingness to enforce private contracts. Some of the more major forms and degrees of enhancement, such as protection of a monopoly, nonetheless do present an appealing situation for treating private conduct as action of the state.

The present Court has shown only limited sympathy for these arguments. In *Moose Lodge* the state imposed a ceiling on the number of liquor licenses available in certain circumstances,¹²² but the Court held that the facts presented nothing close to an actual monopoly and concluded that the state was therefore not sufficiently implicated in the lodge's discriminatory guest policies.¹²³ Faced with an apparent monopoly in *Jackson v. Metropolitan Edison Co.*, Justice Rehnquist reinterpreted the precedents to require some significant "relationship between the challenged actions of the entities involved and their monopoly status."¹²⁴ It is not at all clear what the Court would view as satisfying this requirement;¹²⁵ in any event the Court's approach glosses over the point that monopoly power augments the adverse

120. Cf. Note, *State Action*, *supra* note 46, at 671 ("in a free market situation it is arguable that the consumer's ability to purchase services elsewhere would deter a company from maintaining such arbitrary procedures").

121. *American Communications Ass'n v. Douds*, 339 U.S. 382, 401 (1950).

122. *Moose Lodge*, 407 U.S. at 176.

123. See *id.* at 177 (limited effect of license ceiling and availability of liquor elsewhere make private club licensees less than actual monopoly). Justice Douglas disagreed:

This state-enforced scarcity of licenses restricts the ability of blacks to obtain liquor, for liquor is commercially available *only* at private clubs for a significant portion of each week. Access by blacks to places that serve liquor is further limited by the fact that the state quota is filled.

Id. at 182-83 (Douglas, J., with Marshall, J., dissenting) (footnote omitted) (emphasis in original).

Professor Tribe has questioned the ability of such a quota argument to support a finding of an equal protection violation. See L. TRIBE, *supra* note 42, § 18-7, at 1173 n.7 (mere inattention by government to adverse racial consequences of its licensing policy insufficient to mark government as constitutional violator). The state's imposition of the quota, however, would subject the private discrimination to treatment as action of the state. With the focus thus moved from the government's own contribution to the conduct of the private actor, Professor Tribe's difficulty would disappear.

124. 419 U.S. at 352.

125. For a suggestion of how to apply a monopoly theory see Choper, *supra* note 64, at 781 (private entity with "monopolistic, government-like power should be subject to the fourteenth amendment only in the exercise of the monopolistic, government-like control that it possesses," as when a monopoly utility cuts off service but not in its hiring and firing).

effect of many of the monopolist's actions, including the service cutoff in *Jackson*.

Another recent case, however, suggests some continued viability for the augmentation theory. In *Abood v. Detroit Board of Education*,¹²⁶ the Court accepted as a starting point prior decisions that had treated union use of legally required worker payments for political purposes as subject to first amendment review.¹²⁷ Despite this recognition in *Abood*, the augmentation theory deserves more careful treatment than the Court has given it in recent years. In particular, the Court should confront the force of the argument that at least certain forms and degrees of state augmentation of private power justify treating its exercise as subject to the Constitution's restraints on government.¹²⁸

"Balancing" or "Double Standard" Approaches. At least as a formal matter, the Court's evolving approach normally separates the state action finding from the merits of the claim. The state action determination is a threshold one: in theory the inquiry is the same regardless of the right invoked, and the result turns on factors unrelated to the merits. Some courts and commentators, however, have evolved very different approaches that take the substantive right at issue into account when making the state action ruling. Most notably, the Second Circuit has adopted a "double standard" doctrine, in essence a frank acknowledgement that it will find state action in race discrimination cases when it would not were the claim something else.¹²⁹ More broadly, some commentators have advocated different formulations of a balancing approach. Such analyses take into account both the significance of the right claimed and the value of the challenged practice or the extent to which the particular private choice merits protection from constitutional scrutiny.¹³⁰

Such approaches appear out of harmony with recent doctrine. The factors the Court has considered, such as performance of an exclusively governmental function, governmental compulsion, and the degree of public involvement in the operation of a joint activity, are threshold matters quite independent of the merits. The finding of no state action in most aspects of *Moose Lodge*,

126. 431 U.S. 209 (1977) (considering validity of agency shop clause and union political expenditures out of payments required from local government employees). In *Abood*, the Court went on to hold that the first amendment forbids compulsory employee contributions to ideological causes. See *id.* at 235.

127. See *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961); *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956).

128. See generally Choper, *supra* note 64, at 779-81; Note, *State Action*, *supra* note 46, at 663-72.

129. See *Jackson v. Statler Foundation*, 496 F.2d 623, 635 (2d Cir. 1973) (in state action inquiry, court must give stricter scrutiny to challenged mixture of private and government conduct when racial discrimination alleged), *cert. denied*, 420 U.S. 927 (1975). But see, e.g., *Golden v. Biscayne Bay Yacht Club*, 530 F.2d 16, 19 (5th Cir.) (en banc) (same state action principles govern in both racial and nonracial cases), *cert. denied*, 429 U.S. 872 (1976). See generally 2 N. DORSEN, P. BENDER, B. NEUBORNE & S. LAW, *EMERSON, HABER & DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 426-27 (4th ed. 1979) (lawyers' ed.) (listing cases dealing with double standard issue).

130. See, e.g., Glennon & Nowak, *supra* note 1, at 228-32 (in state action inquiry, courts should balance value of challenged practice against significance of harm to protected rights); Thompson, *Piercing the Veil of State Action: The Revisionist Theory and a Mythical Application to Self-Help Repossession*, 1977 WIS. L. REV. 1, 41-47 (revisionist approach balances nature and offensiveness of challenged conduct, relevant precedent on similar conduct, alternative means of achieving goal of challenged conduct, value of allowing private activity to be free from constitutional restraint, and relationship of state to challenged action).

despite the presence of a racial discrimination claim, provides the clearest indication of the current Court's rejection of a double standard approach. Although prior Supreme Court decisions had led some to think that courts should be especially inclined to find state action in race cases, the Court in *Moose Lodge* did anything but strain to hold the private discrimination there subject to the equal protection clause. There is, to be sure, ample ground for arguing that despite the formal separation of the threshold and merits inquiries, the merits do appear to affect the Court's willingness to find state action.¹³¹ The principles the Court has announced to guide lower courts, however, mandate a threshold inquiry and leave little or no room for explicit balancing or double standard approaches.

CONCLUSION

This article has suggested that a bipartite structure underlies the Court's recent state action cases and is necessary to make them coherent. The classification divides cases involving applicability of constitutional provisions addressed only to governments into more or less easy, "ordinary" state action situations and other "nonordinary" ones, with special requisites applicable for a finding of state action in cases in the second category. To be workable, such an approach requires that some definable, justifiable line separate the two categories. However helpful the structure may be for organizing and understanding the Court's state action decisions, this essential line may be one that cannot be intelligibly drawn and defended.

This concluding section briefly makes three arguments. First, the ordinary category cannot be confined to cases in which the state initiates the challenged action. In other words, the state action aspect of *New York Times Co. v. Sullivan* was rightly decided, and state *policy* that leaves a choice of action up to private parties must at least sometimes be reviewable as ordinary state action just as if the state itself were unambiguously the "actor." Second, however, once the ordinary category is stretched slightly beyond cases in which the state is the initiator, there may be no ready stopping point short of treating *all* state policies as state action subject to constitutional review on the merits. (Such review need not, of course, necessarily lead to invalidation.) Finally, recent developments in substantive equal protection law that require courts to focus on governmental decisionmakers' intent pose what may be insuperable difficulties for a threshold approach. The conclusion thus comes

131. The Court in *Flagg Brothers* ostensibly endorsed a threshold approach. See 436 U.S. at 156, 157 (constitutional rights protected only against infringement by government; first issue "whether Flagg Brothers' action may fairly be attributed to the state"). Nevertheless, the majority's views on the merits may have affected its ruling on the threshold issue. See *id.* at 161 n.11 (self-help remedies have played important role in system of property rights). The same may be said of *Moose Lodge*; without attributing to the majority any sympathy for racial discrimination, it is fair to say that the opinion appears to place considerable weight upon the right of private choice concerning private club membership and guest policies. See *Moose Lodge*, 407 U.S. at 171 (emphasizing fraternal nature of organization, private ownership and funding, and membership and guest policies). See also *Jackson*, 419 U.S. at 374 (Marshall, J., dissenting) ("I cannot believe that this Court would hold that the State's involvement with the utility company was not sufficient to impose upon the company an obligation to meet the constitutional mandate of nondiscrimination").

full circle to the possibility entertained at the beginning of this article—that “state action” is present in every court case.¹³²

Two examples can illustrate the difficulties that would confront any effort to exclude from the ordinary category borderline cases in which state policy leaves scope for private choice. *Flagg Brothers* contains language that might initially have appeal as making it possible to draw such a line. The Court’s opinion emphasized the presence of “purely private choice”¹³³ in the transaction immediately giving rise to the litigation as a justification for the finding of no state action. Suppose, though, that a state had a policy that miscegenation were good grounds for annulment. Without the “purely private choice” to seek annulment, no court case would arise. The spouse seeking annulment, not the state, would be initiating the challenged action, just as the warehouseman’s threat of sale gave rise to *Flagg Brothers*. Yet it seems unthinkable that in an annulment action any court today would hesitate to scrutinize and invalidate the antimiscegenation policy under the equal protection clause.¹³⁴

One might respond that in this hypothetical case the state is in fact acting by granting affirmative relief, as it also was doing in *Shelley* and *New York Times*. Surely a line can be drawn between a state policy of acting and one of not acting, as the Court suggests in *Flagg Brothers*.¹³⁵ Yet if a state adopted a policy of declining to grant relief in personal injury cases involving black victims, such plaintiffs would have the same complaint as the owner of the goods about to go on the block in *Flagg Brothers*, namely that the state had refused to act. Again, however, it seems certain and entirely correct that the courts would brush aside any arguments about inaction and hold the policy a plain denial of the equal protection of the laws.¹³⁶ Although this example may be extreme, it illustrates that a general action-inaction dichotomy cannot be viable.

Formulations taking account of private choice and state inaction do further goals worthy of considerable respect—protection for a realm of individual or private group autonomy, preservation of scope for state policy in a federal system, and limitations on judicial interventionism.¹³⁷ This article does not question the *validity* of such considerations, but only the *feasibility* of using them in state action determinations rather than in judging what is constitutional state action or policy. The Court’s continued resort to verbal formulae that may work in one situation, but would produce plainly wrong and

132. The presence of state action in the state policies governing all court cases would not mean, as Professor Choper fears, that all private conduct would be treated as state action subject to the Constitution’s constraints on governments. See Choper, *supra* note 64, at 775-76. Normally, only the state’s contribution to the governmental-private mixture involved would be subject to review. For example, in case of a challenge to private racial discrimination, what would come under constitutional scrutiny would not be the private discrimination itself (if treated as state action, it would presumably be invalidated) but rather the state’s policy of permitting it. Though the state in most circumstances may not itself discriminate, it certainly may often permit private discrimination, as in private clubs.

133. 436 U.S. at 165.

134. *Cf. Loving v. Virginia*, 388 U.S. 1, 12 (1967) (states may not ban interracial marriage).

135. See 436 U.S. at 166.

136. The judicial inaction emphasis is also subject to the objection that it is overformalistic. In effect, the winner of a case in which the court declines to grant relief has won a declaratory judgment that his completed or proposed conduct is lawful.

137. See *Burke & Reber*, *supra* note 95, at 1012-18 (state action inquiry has significant impact on institutional values of federal system, including federalism, separation of powers, individual freedom, and judicial restraint).

unacceptable results if taken seriously in another, perhaps should be taken as a sign that the entire effort to maintain a threshold approach is misconceived. The Court can continue to deal with difficult state action problems on an essentially ad hoc basis, but only at great cost to coherence, predictability, and principled decisionmaking.

Indeed, the threat to principled adjudication is especially grave because the harder decisions on whether to treat a state policy that leaves room for private choice as ordinary state action seem to turn on veiled judgments about the merits.¹³⁸ If the miscegenation and personal injury claim discrimination hypotheticals and actual cases like *New York Times* move us to treat such policies as state action, it is probably because their potential or actual constitutional offensiveness is so apparent.¹³⁹ When we are less inclined under present approaches to find state action, as in the case of enforcing trespass law at the behest of a private discriminator, it seems that the state has in no sense "acted" any less than in the other situations but simply that the argument against the constitutionality of its act or policy *on the merits* is weaker.

It could be, of course, that a defensible limit to an ordinary state action category can be defined. If so, however, that limit would represent at least a piece of the Holy Grail that has eluded state action theorists for decades. This article has considered some possible lines of demarcation, such as the distinction between "action" and "inaction" and the "purely private choice" guideline with which the Court has been flirting, but they have not withstood counterexamples.¹⁴⁰ The latter concept is also contrary to the precedent of *New York Times*, in which the plaintiff on his own chose to exercise his right to sue for libel but the Court reviewed the common law of defamation as ordinary state action. More broadly, even a state policy of nonintervention does influence private choice, both because the state decides whether to permit the choice at all and because "[a]ny governmental framework has some nonneutral effects on private activities undertaken with reference to it."¹⁴¹

This last comment raises another major obstacle to maintenance of a threshold approach to the state action issue. In cases involving equal protection challenges to facially neutral state policies allegedly affecting private choices so that those choices work to the disadvantage of a race or gender, a threshold state action analysis appears unworkable. *Washington v. Davis*¹⁴² established that there must be a showing of intent to discriminate, not just disparate impact, for a court to apply heightened scrutiny to a governmental action that is not facially discriminatory along suspect classification lines (and that does not affect a fundamental right or interest).¹⁴³ Yet suppose that on facts like those of *Moose Lodge* the state acted with racially

138. See note 131 *supra* and accompanying text.

139. See also note 98 *supra* (hypothetical state statute permitting posting of privately financed copies of Ten Commandments in public schoolrooms).

140. Governmental "neutrality" likewise cannot serve as a general criterion for finding no state action. In the jurisprudence of the religion clauses of the first amendment, to cite just one difficulty, the government's fundamental obligation is to maintain "neutrality," see *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968), which thus goes to the merits rather than to any threshold determination of governmental involvement.

141. Note, *Creditors' Remedies*, *supra* note 44, at 549 (footnote omitted).

142. 426 U.S. 229 (1976).

143. See *id.* at 238-48.

discriminatory intent in adopting a license quota. Given the holding on state action in *Moose Lodge* itself, intent to discriminate would apparently be the only basis available for a finding of state action.¹⁴⁴ Such reliance on state intent, however, would begin to merge the state action ruling with the decision on the merits, resulting in abandonment of the threshold approach that the Court appears set on maintaining.¹⁴⁵

It would take another article to explore the details of an approach founded on the idea that state action is always present (or, more accurately, that the "state action" emphasis misfocuses the inquiry), and such a piece would largely duplicate work already done.¹⁴⁶ This article has instead sought, first, to elucidate a pattern behind the threshold approach the Supreme Court has been following, a pattern that may facilitate an orderly analysis of a doctrinally convoluted field; and, second, to suggest that despite this useful underlying framework, the Court's approach may have fundamental flaws that cause it to break down in crucial cases and that point to the superiority of a nonthreshold approach.

Most of the important provisions of the Constitution do impose their restraints only upon governments and thus implicitly do not subject private actors to the same fetters. Several decades of judicial gloss, however, may

144. *Moose Lodge* seems implicitly to reject the alternate possibility of treating disparate impact as relevant to the state action determination, for it brushed over the arguments of the dissent that the effect of the state's facially neutral liquor license quota was to restrict blacks' ability to buy liquor. See notes 122-23 *supra* and accompanying text. The rejection of the relevance of disparate impact to the state action question makes sense in the Court's apparent threshold approach, because its incorporation would circumvent the narrow criteria the Court has established for nonordinary state action situations. Moreover, there is no logical connection between whether a particular state policy has a disparate impact and whether the state should be viewed as having "acted."

145. For an additional illustration of how the intent requirement could complicate the state action issue in some equal protection cases, consider an approach sometimes suggested to justify the result in *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961). A possible rationale for upholding the result in *Burton* is that by leasing the space in the parking structure without insisting on nondiscrimination, given probable pro-segregation attitudes among the coffee shop's potential clientele, the authority conferred a bidding advantage to those who would segregate. To subject the act of leasing without condition to equal protection scrutiny under a threshold approach, however, there would have to be a preliminary finding that the act constituted state action that sufficiently involved the state in the private discrimination. The eventual disparate impact of the decision to lease without condition would not be a plausible basis for such a finding; laws generally protecting private property also help white people more than blacks because whites tend to own more property. See also note 144 *supra* (additional reasons for rejecting relevance of disparate impact to state action issue). The state action determination in this situation thus would require scrutiny of the authority's intent—whether it was to support segregation or to earn the highest rent without regard to considerations of race. Yet that intent is the very factor that would bear on the decision whether the leasing policy was constitutional.

Under a nonthreshold approach, the governmental policies in such cases as *Burton* would be subject to constitutional scrutiny without preliminary hurdle-clearing. Evidence going to intent would then bear on the constitutionality of the policy within the framework established by the *Washington v. Davis* line of cases.

146. See, e.g., sources cited in note 4 *supra*. To suggest that such an approach ultimately may be the only coherent one is not, of course, to imply that it would be without problems of its own. See, e.g., Choper, *supra* note 64, at 773, where Professor Choper suggests that under the *Washington v. Davis* intent rule, the approach that there is always state action would hold unconstitutional a legislature's failure to pass an antidiscrimination law when the purpose for inaction was to promote private acts of racial bigotry. It does not seem out of the question, however, that the judicial response to this problem could be that legislative inaction that was not facially discriminatory (which "inaction" can be, see text accompanying note 135 *supra* (hypothetical policy of refusing to act on damages claims of black victims)) simply did not constitute a denial of "the equal protection of the laws."

have obscured the fact that these provisions do not mandate a separate inquiry into whether the state has "acted" and whether it has acted unconstitutionally. As Judge Friendly suggests, the focus normally must be on the state's contribution to a governmental-private mix.¹⁴⁷ But once that contribution is identified, the courts' inquiry should proceed directly to whether it is constitutional. Until the millenium arrives in the form of such an overhaul of the judicial approach to state action, however, the framework suggested in this article may be useful to explain the Supreme Court's recent decisions in a way that can at least advance the terms of the disagreement about state action issues.

147. See text accompanying note 71 *supra*. This focus on the state's contribution would have to be expanded for those types of situations in which there is sufficient reason actually to treat private conduct as that of the state, such as those qualifying under the present "public function" doctrine.

