

THE PUBLIC/PRIVATE DISTINCTION AND CONSTITUTIONAL LIMITS ON PRIVATE POWER

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In this paper I consider whether and how the Constitution governs private activity. The topic has been made more complex by recent attacks on the distinction that it presupposes, namely, the distinction between exercises of public power and exercises of private power. Thus, I begin by attempting to untangle and analyze separately the different arguments attacking the public/private distinction. I then turn to the implications of my analyses for the issue of when private activity should be subjected to constitutional constraints.

I. THE PUBLIC/PRIVATE DISTINCTION(S)

In recent years there has been a frequently voiced criticism of something called the public/private distinction. The criticism goes like this: Many legal decisions purport to turn on whether a given activity should be assigned to the realm of the public or to the realm of the private. Yet the assumption that there are these distinct realms is false. Therefore, the legal decisions in question cannot be justified on the grounds asserted. They may or may not be incorrect, but they are surely confused or deceptive.

The gist of the criticism is that there can be no distinction between the public and private realms that would support a legal argument for a particular decision. The distinction between the public and the private collapses because of the interpenetration of one realm by the other.

At this point the general criticism of the public/private distinction divides into several separate and sometimes inconsistent arguments. One group of arguments focuses on the interpenetration of the private by the public. Another group focuses on the interpenetration of the public by the private. These groups of countervailing arguments about the relative priority of the public and private come

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in three types. One focuses on the *legal* interpenetration of the public and private, one on the *material* interpenetration and one on the *conceptual* interpenetration.

I shall attend to the legal, material and conceptual claims about public/private interpenetration in that order. I shall conclude that the legal and conceptual claims have a good deal of validity but have virtually no normative bite. On the other hand, the material claim has a good deal of normative potential, but it does not support criticism of the public/private distinction. Rather, it cautions us to attend to the consequences for both public life and private life of any line we might draw to separate those realms. The problem is finding anyone who needs to be so cautioned.

A

The Supreme Court has said on numerous occasions that key constitutional provisions—the Bill of Rights and the Fourteenth Amendment—apply only to “state action” and not to private action.¹ The line between state action and private action is sometimes difficult for the Court to draw, and in many contexts the Court has divided over its location.² But in many other contexts there is no question whether the action in question is state action or private action, and the rule is that only the former is subject to constitutional constraints.

The “state action” issue has been the locus of one of the criticisms of the public/private distinction.³ The criticism goes as follows: All private actions take place against a background of laws and have a legal status under those laws. Thus, private actions may be legally forbidden, legally required or legally permitted. If they are legally permitted, moreover, that permission can be cashed out in terms of legal prohibitions and legal immunities. If we couple this fact about private actions—that they occur against a background of various legal duties and immunities, which background gives them their legal status—with another fact—that these various background legal duties and immunities are paradigmatic “state action”—we come to the conclusion that all private action implicates

1. *The Civil Rights Cases*, 109 U.S. 3, 11 (1883).

2. See, e.g., *Flagg Brothers v. Brooks*, 436 U.S. 149 (1978) (dividing over whether a bailee's sale of goods in pursuance of New York's commercial code was or implicated unconstitutional state action).

3. See, e.g., Larry Alexander and Paul Horton, *Whom Does the Constitution Command?* 73-79 (Greenwood Press, 1988); Erwin Chemerinsky, *Rethinking State Action*, 80 Nw. U. L. Rev. 503 (1985); Paul Brest, *State Action and Liberal Theory: A Casenote on Flagg Bros. v. Brooks*, 130 U. Pa. L. Rev. 1296 (1982); Frank Goodman, *Professor Brest on State Action and Liberal Theory, and a Postscript to Professor Stone*, 130 U. Pa. L. Rev. 1331, 1335 (1982).

state action. Therefore, no case involving a constitutional challenge can be lacking in state action.

This criticism of the public/private distinction can be best illustrated by focusing on the creditor self-help cases that came before the Supreme Court, particularly *Flagg Brothers v. Brooks*.⁴ In *Flagg Brothers*, New York had adopted section 7-210 of the Uniform Commercial Code, which permits a warehouseman to sell the bailor's goods if the bailor defaults on his obligation to the warehouseman. Flagg Brothers sold Brooks's goods in pursuance of that statute, and Brooks in turn sued Flagg Brothers for violating her constitutional rights, specifically, her right against deprivation of property without due process of law. She cited to earlier creditor repossession cases in which the Court had required, as a matter of due process, some kind of judicial hearing prior to the repossession. According to Brooks, because Flagg Brothers had just "adjudicated" Brooks's default on its own and had not sought a judicial hearing on the default prior to selling Brooks's goods, Flagg Brothers had violated the Due Process Clause.

The Supreme Court, in a divided opinion, held there was no state action present and, therefore, no constitutional violation.⁵ But the criticism I am adumbrating would say that the Court was in error. There was state action. Indeed, it was ubiquitous. Section 7-210 of the Uniform Commercial Code, enacted as a statute of the State of New York, is surely state action. (If statutes aren't state action, nothing is.) So, too, were the laws of New York that created an exception to the law of conversion for Flagg Brothers's sale, that prevented Brooks from interfering with it, and that passed good title to the purchasers of Brooks's goods.

Moreover, if the state action present in earlier creditor repossession cases⁶ was unconstitutional state action, then so too must be the state action in *Flagg Brothers*. For the reasons the Court gave in those cases for holding that due process requires a pre-repossession hearing—reasons focused primarily on the error risk involved in a creditor's own evaluation of whether the debtor is in default and has

4. 436 U.S. 149 (1978).

5. Justice Rehnquist wrote the majority opinion. He correctly pointed out that Flagg Brothers was not a state actor, though in a subsequent case, *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), that fact alone did not bar recovery from a private actor for "acting under color of . . . law" to deprive plaintiff of a constitutional right. Rehnquist also implied that the state laws permitting Flagg Brothers to act as it did, by virtue of being permissive and not mandatory, could not violate the Constitution. Justice Stevens, writing for three dissenters, disagreed on the latter point, and would have held the New York laws in question unconstitutional, subjecting Flagg Brothers to a damages claim.

6. See *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Co.*, 395 U.S. 337 (1969).

no defenses⁷—apply with full force to the self-help sale in *Flagg Brothers*.

Now I agree with the criticism of the public/private distinction when it takes the form of this critique of the state action requirement in constitutional law. I have given this critique of the state action requirement myself;⁸ and, unlike other positions I have taken in print, this is one with which I still agree.

Nonetheless, there's less—perhaps much less—to this criticism than meets the eye. This criticism makes a conceptual claim; and one can grant its conceptual claim without yielding on any normative point, because nothing normative follows from the “there's always state action” criticism of the public/private distinction. As with most conceptual critiques, its acceptance entails less than one might imagine.

First, even if there *is* always state action, it does not follow that the *defendant* is a state actor subject to constitutional duties.⁹ Flagg Brothers acted in pursuance of the laws of New York, but Flagg Brothers is not the *State* of New York. New York may have violated Mrs. Brooks's constitutional rights through its laws permitting Flagg Brothers to sell her goods and pass good title to them. It doesn't follow, however, that Flagg Brothers violated any constitutional duty to her: the constitutional duty may run only from New York. Mrs. Brooks may have been correct in claiming a constitutional violation but incorrect in claiming that Flagg Brothers committed it. The issue here is complicated by the Court's holding that creditors acting in pursuance of unconstitutional repossession laws can be sued for violation of their debtors' constitutional rights.¹⁰ It is conceivable that although only a state may violate duties under the Fourteenth Amendment, the remedies for such violations may include remedies addressed to private actors who have invoked the unconstitutional state laws and procedures.¹¹ In any event, it is not crystal clear whether the majority in *Flagg Brothers* failed to see that there was a constitutional attack on state laws—paradigmatic state action—or whether the majority saw this but believed that the wrong defendant was before the Court.

7. See, e.g., *Fuentes*, 407 U.S. at 83-84; *Sniadach*, 395 U.S. at 341-42.

8. See Alexander and Horton, *Whom Does the Constitution Command?* at 73-79 (cited in note 3); Lawrence A. Alexander, *Cutting the Gordian Knot: State Action and Self-Help Repossession*, 2 Hastings Const. L.Q. 893 (1975).

9. See Alexander and Horton, *Whom Does the Constitution Command?* at 69-72, 74-75 (cited in note 3); Alexander, 2 Hastings Const. L.Q. at 896-97, 901 (cited in note 8).

10. See *Lugar v. Edmondson Oil Co.*, *supra* note 5.

11. See Alexander and Horton, *Whom Does the Constitution Command?* at 63-69 (cited in note 3).

Second, to say state action is omnipresent because all acts take place against a legal background and have some legal status raises a second conceptual issue: is it only "laws" that can be unconstitutional, or can acts that are not lawmaking acts, and perhaps even illegal acts, be unconstitutional as well? Consider, in this regard, acts of government officials that enforce unconstitutional laws,¹² or acts of private citizens that invoke unconstitutional laws.¹³ Or consider acts that violate constitutionally valid laws and that could not be made legally permissible without the laws making them so being unconstitutional.¹⁴ Can these types of acts violate the Constitution, or can only lawmaking acts do so? And how is the class of lawmaking acts defined so that it can be distinguished from other acts?¹⁵

These conceptual issues regarding what kinds of acts—lawmaking, official or private, legal or illegal—can violate constitutional duties are interesting and difficult. But their practical import is less than one might expect. Their resolution theoretically affects neither whether a complainant should win her lawsuit, nor what her remedy should be; their resolution only affects what court, state or federal, may hear the suit.¹⁶

Third, the ubiquity of state action as a conceptual matter does not affect the content of constitutional rights and duties. To say, for example, that the realm of the private is defined and buttressed by law—state action—is not to say that private choices within it are held to the same standards as the Constitution imposes on, say, the state police or welfare department. *Shelley v. Kraemer*¹⁷ is both a source and an illustration of this confusion. *Shelley* is usually criticized for its finding of state action in the Missouri courts' enforcement of private covenants. But on that point, *Shelley* was absolutely correct. The problem in *Shelley* was the Supreme Court's immediate jump from "judicial enforcement of private discriminatory covenants is state action" to "judicial enforcement of private discriminatory covenants is constitutionally tantamount to state discrimination." The latter simply does not follow from the former, and the Court never filled in the missing premises. State action stands behind private choices. But state action permitting and enforcing private choices of a type the state would be constitu-

12. See, e.g., *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986); *Ex Parte Young*, 209 U.S. 123 (1908).

13. See, e.g., *Lugar v. Edmondson Oil Co.*, supra note 5.

14. See, e.g., *Parratt v. Taylor*, 451 U.S. 527 (1981); *Monroe v. Pape*, 365 U.S. 167 (1961).

15. See Alexander and Horton, *Whom Does the Constitution Command?* at 15-20 (cited in note 3).

16. *Id.* at 73-74.

17. 334 U.S. 1 (1948).

tionally forbidden to make is not necessarily or even usually unconstitutional: the state has legitimate, often compelling, and sometimes constitutionally compelled reasons for permitting private actors to choose in ways that the state itself is constitutionally forbidden to choose.¹⁸

Take, for instance, the claim that the realm of family privacy is defined and supported by legal prohibitions and permissions, and that these legal prohibitions and permissions have important effects, not only on family members, but also on public life.¹⁹ The claim is beyond cavil, but what follows from it?

One thing that does not follow from it is that a legal regime that confers liberties and immunities on family members in order to create a zone of family privacy is, substantively speaking, constitutionally on a par with a regime of comprehensive regulation of acts within marriage. The former may be constitutionally compelled, which means the latter is constitutionally suspect. Nor does recognition that a legal regime of family privacy can have bad effects both for family members and for the public affect its constitutionally preferred status. All legal regimes regarding the family will have good and bad effects, and the question is which is most justifiable given constitutional values. That a regime is not perfect is not to say it is not justifiable or even best.

Thus, the state action critique is valuable insofar as it prevents confusion that may affect the merits of a case. *Flagg Brothers* and *Shelley v. Kraemer* are two examples where conceptual confusion may have affected the merits. But important as it is, the conceptual point has no direct normative implications. The ubiquity of state action does not necessarily entail greater constitutional constraints on private decisionmakers.²⁰

The same point applies to a companion critique, the argument that there is no natural baseline of legal entitlements from which to

18. For example, the state is constitutionally compelled to permit people to choose their spouses or religion on grounds forbidden to the state.

19. See Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. Mich. J.L. Ref. 835 (1985).

20. Nor does the absence of an explicit state action requirement affect the substance of constitutionally compelled duties, despite what Professor Amar seems to suggest with respect to the Thirteenth Amendment. Akhil Reed Amar, *Remember the Thirteenth*, 10 Const. Comm. 405 (1993). All it affects is whether the Constitution imposes the duties directly on private actors, or whether instead it imposes those duties on lawmakers and requires them to impose nonconstitutional legal duties on private actors. The substance of the private actors' duties will be the same in either case. All that will differ is whether the violations of the duties are constitutional wrongs or nonconstitutional wrongs and whether the suit can be brought in federal court or only in state court. The remedies should be the same. See generally Alexander and Horton, *Whom Does the Constitution Command?* at 64-66, 70-71 (cited in note 3).

gauge the constitutionality of legal changes and which itself should be considered beyond constitutional assessment.²¹ The point is correct. Constitutional analysis can and should be applied to any regime of legal entitlements, the common law regime or any other. None is beyond or prior to state action. All are the products of law and therefore of state action. But having said that, absolutely nothing follows about the constitutional validity of those legal regimes. The common law entitlements may be constitutionally privileged in a substantive sense even if they are not privileged in a conceptual sense as being beyond or prior to state action.²²

Thus, the claim of interpenetration of the private by the public in the legal realm is correct. The private realm is defined by and supported by the law, which is a public institution. But absolutely nothing follows from the claim as a matter of constitutional or moral imperative. Any constitutional or moral argument for legal revision must rest on material grounds, not conceptual ones.²³

B

There is a good deal of criticism of the public/private distinction that focuses, not on the legal relation between the public and private domains, but on the material relation. Some of that criticism is premised on the enormous impact on public life of decisions that occur in the private sphere. We want people in the public sphere to be public-spirited and to act for the general welfare. But the views of people in the public sphere may be warped by their experiences in the private sphere, experiences that may cause them to be racists, sexists, homophobes or xenophobes.²⁴ We want people in the public sphere to utilize their productive talents to the fullest. But people's ambitions and self-conceptions may be stunted

21. See, e.g., Cass R. Sunstein, *Lochner's Legacy*, 87 Colum. L. Rev. 873 (1987).

22. See Emily Sherwin, *A Comment on Cass Sunstein's Equality*, 9 Const. Comm. 189, 190 n. 9 (1992).

23. The reader whose sense of symmetry tells her that this section is asymmetrical is correct: I have not dealt with the claim that the private interpenetrates the public in the legal realm. One reason for this omission is that I can't find any clear examples of such a claim. The closest cousin to such a claim in the modern debate is the public choice literature that views laws and lawmaking as extensions of the market for goods and services. See William N. Eskridge, Jr. and Philip P. Frickey, *Cases and Materials on Legislation* 46-56 (West Pub. Co., 1988). As a conceptual matter, it is as possible to collapse lawmaking into private activity as it is to collapse private activity into lawmaking. See Alexander and Horton, *Whom Does the Constitution Command?* at 25-27 (cited in note 3). Again, however, no substantive conclusions follow from such a conceptual maneuver.

24. See Frank Michelman, *Universities, Racist Speech and Democracy in America: An Essay for the ACLU*, 27 Harv. C.R.-C.L. L. Rev. 339 (1992); Robert C. Post, *Free Speech and Religious, Racial, and Sexual Harassment: Racist Speech, Democracy, and the First Amendment*, 32 Wm. & Mary L. Rev. 267 (1991). See also Stephen Macedo, *Charting Liberal Virtues*, in J. Chapman and W. Galston, eds., *Virtue* 211-12, 222-23 (N.Y.U. Press, 1992).

by fear, self-hatred and false consciousness produced by physical and mental abuse or by oppressive conditioning in the private sphere.²⁵ We want people in the public sphere to be law-abiding. But people's respect for the law and for the rights of others may be diminished by their access in the private sphere to pornography, depictions of violence and hateful speech.²⁶

No one can gainsay the claim that what takes place within the private sphere has enormous material effects on the public sphere. Our private activities do shape our public identity and thereby shape public life. The recognition of the importance of the family to statecraft is as old as Plato's Republic.

Yet the example of Plato should be cautionary as well as confirmatory. It is one thing to point out that relegating choices to the private sphere may produce undesirable behavior and undesirable spillover effects in the public sphere. It is quite another to conclude, therefore, that the choices should be withdrawn from the private sphere and directly publicly regulated. Often, the undesirable behavior that the private sphere shelters is simply the price we pay for the desirable behavior and positive effects on public life that a strong private sphere encourages. The too hasty jump from bad private choices to shrinkage or eradication of the private sphere is a classic example of the best as enemy of the good. It is the jump of every totalitarian. Those who believe that because the public defines the private sphere, and because the private sphere materially affects the public, there is somehow no difference between a society with a private sphere and one without it should re-read Orwell's *1984*²⁷ or just study the historical examples of totalitarian states.

25. See Cass R. Sunstein, *Beyond the Republican Revival*, 97 Yale L.J. 1539 (1988).

26. See Catharine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U. L. Rev. 793 (1991); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320 (1989).

27. George Orwell, *Nineteen Eighty-Four* (Harcourt, Brace & World, 1949). For an excellent analysis of the criticism of the public/private distinction based on the material interpretation of the two spheres, see Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 Stan. L. Rev. 1 (1992). Gavison defends the distinction on both descriptive and normative grounds, pointing out the various meanings the distinction can carry and what normative claims are and are not warranted by the fact of material interpenetration. (She also touches at points on the claim of legal interpenetration. See, e.g., *id.*, at 16-17.) See also Burt Neuborne, *Ghosts in the Attic: Idealized Pluralism, Community and Hate Speech*, 27 Harv. C.R.-C.L. L. Rev. 371, 384-90 (1992) (distinguishing private activity that seeks to establish community, which should generally be protected from legal regulation, from private activity that seeks material gains from common enterprises); Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. Pa. L. Rev. 1, 104-08 (1991) (arguing for maintaining the distinction between the individual and society despite the latter's role in individual self-definition); contra Alan Freeman and Elizabeth Mensch, *The Public-Private Distinction in American Law and Life*, 36 Buff. L. Rev. 237, 256-57 (1987) (arguing for total effacement of the public/private boundaries). See generally

The bottom line regarding this claim about the material interpenetration of the public by the private is that the claim is correct, and that normative conclusions may in fact follow from it. Nonetheless, those normative conclusions must be purchased retail, not wholesale. Each normative proposal regarding how the private sphere should be altered must be examined on its own merits, with all of the costs and benefits of the proposal considered. No matter how enormous the effects of the private sphere on the public, and no matter how bad some of those effects, nothing immediately follows regarding altering the private sphere, much less eliminating it.²⁸ The spillover effects on both the public and private spheres can only be assessed case by case. And the existence of these spillover effects does not negate the separate existence of public and private spheres.²⁹

C

The final pair of attacks on the public/private distinction are conceptual attacks associated with postmodern thought. One attack is what I call perspectivalism. Its upshot is to reduce a common public sphere to a multiplicity of separate spheres and ultimately to nothing more than an extension of individual selves.

Hannah Arendt, *The Human Condition* 22-78 (U. of Chi. Press, 1958); Hannah Arendt, *The Origins of Totalitarianism* 129-34 (Harcourt, Brace & World, 1951).

28. Although most of the material attacks on the public/private distinction have focused on the claim that the private sphere interpenetrates the public, I should mention briefly the converse claim regarding material interpenetration, namely, that the public sphere materially interpenetrates the private. There is no question but that how public life is conducted affects the quality of private life. Relations inside the family and the general texture of family life are affected by economic policies, the mobility of capital and labor, public education, medical insurance, family leaves, abortion policy, childcare, neighborhood crime and many, many other facets of public life. Other activities currently considered to lie within the private sphere, such as church membership and involvement in other mediating institutions, are similarly affected by public policies of all sorts.

Again, the fact that public and private realms are not hermetically sealed off from one another in terms of effects tells us to be conscious of those effects in making public policy and in assessing the constitutionality of public policy. The constitutionality of public policy should turn in part on both the public effects of laws maintaining the private sphere and on the private effects of laws clearly located within the public sphere.

29. In addition to the literature that challenges the separate existences of public and private spheres, there is an abundant literature that draws overstated distinctions between them. Thus, the new civic republicans tend to view the public sphere as a realm of civic virtue and the private sphere as a realm of avarice and other forms of self-absorption. See Sunstein, 97 *Yale L.J.* at 1541, 1561 (cited in note 25); Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 *U. Pa. L. Rev.* 1567 (1988).

On the other hand, there are many who overly romanticize the private sphere as a realm of altruism, commitment and ultimate meaning while denigrating the public sphere as one of naked self-interest. See Will Kymlicka, *Contemporary Political Philosophy: An Introduction* 247-58 (Clarendon Press, 1990).

The public sphere is a construct. Its features depend upon who the perceiver is. Thus, the public will be a projection of male experiences and values or female experiences and values, of Eurocentric experiences and values or Afrocentric experiences and values, of heterosexual experiences and values or homosexual experiences and values and so forth.³⁰ Ultimately, the logical conclusion of perspectivalism is the complete disintegration of the public sphere into Lucy's, Ricky's, Fred's and Ethel's solipsistic experiences and values.

The opposite conceptual attack on the public/private distinction is the postmodernist claim that the private subject is a social construction. What we as subjects can experience, what we can value, and what we can think are determined by our language and culture. The private self is created by a public culture that it can distance itself from only with the conceptual tools that that public culture provides.³¹

Both of these conceptual attacks on the public/private distinction, carried to the extreme, completely collapse the public and private spheres into one another. The first attack asserts the conceptual primacy of the private sphere, while the second asserts the conceptual primacy of the public sphere. Both attacks, because of their sweeping, radical nature, ultimately result in self-undermining skepticism. The first attack leads to extreme relativism: nothing can be good or bad, right or wrong, true or untrue, but only good or bad for my group or for me, right or wrong for my group or for me, and so forth. Since neither the world nor any one of us can operate on the basis of such thoroughgoing relativism, the world and we will go on just as before even if we agree with this line of attack. Similarly, agreeing with the proposition that we as subjects are completely socially constructed does not entail any course of action different from what disagreeing would entail. Life will go on the

30. See Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 Harv. L. Rev. 10 (1987).

31. See Nicola Lacey, *State Punishment: Political Principles and Community Values* 144-45 (Routledge, 1988); Charles Taylor, *Philosophy and the Human Sciences* 187-210 (Cambridge U. Press, 1985); Roberto Unger, *Knowledge and Politics* 29-144 (The Free Press, 1975); Steven L. Winter, *The Meaning of "Under Color of" Law*, 91 Mich. L. Rev. 323, 387 (1992); Pierre Schlag, *The Problem of the Subject*, 69 Tex. L. Rev. 1627 (1991); Stanley Fish, *Almost Pragmatism: Richard Posner's Jurisprudence*, 57 U. Chi. L. Rev. 1447 (1990). The postmodernist position is a direct descendant of Kant's claim that the phenomenal world is a construct of our categories of understanding, categories that Kant assumed to be invariant but that post-Kantians relativized to history and culture. See Immanuel Kant, *The Critique of Pure Reason* (N.K. Smith, transl., 2d ed. Macmillan, 1933); Charles Taylor, *Hegel*, 141-47, 225-31, 528-33 (Cambridge U. Press, 1975); Richard Rorty, *The World Well Lost, in Consequences of Pragmatism* 16 (U. of Minn. Press, 1982); Richard Rorty, *Foucault and Epistemology*, in D. Hoy, ed., *Foucault: A Critical Reader* 41, 44-45 (Blackwell, 1986).

same way whether or not we are socially constructed, and whether or not we see that we are. How could things be otherwise?³²

In short, both the relativism of perspectivalism and the determinism of postmodernism are skeptical claims that, like all strong forms of skepticism, are ultimately self-undermining and normatively impotent.³³ Relativism and social construction leave everything unchanged.

* * *

There is a public/private distinction. We perceive matters as appropriately assigned to one or the other of these domains in part because we are socially constructed to do so.³⁴ And we will differ over the appropriate assignment of matters because we will look at them from different perspectives.³⁵ Moreover, however we assign matters, whatever is assigned to the private domain will have effects on the public domain and vice versa. Finally, to the extent that the private domain is protected by legal rules, its definition will be a public matter. All of this is true, but only some of it is important.

II. PRIVATE POWER AND THE CONSTITUTION

How does the foregoing discussion bear on the issue of private power and the Constitution? First, it establishes that all exercises of private power take place against a background of laws that are paradigmatic state action. Thus, any constitutional challenge to the

32. See Cass R. Sunstein, *On Analogical Reasoning*, 106 Harv. L. Rev. 741, 773 n. 113, 779-80 n. 130 (1993); Katharine T. Bartlett, *Minow's Social-Relations Approach to Difference: Unanswering the Unasked*, 17 Law & Social Inq. 437, 465-67 (1992); William Maker, *(Postmodern) Tales from the Crypt: The Night of the Zombie Philosophers*, 23 Metaphilosophy 311, 318-21 (1992); Schlag, 69 Tex. L. Rev. at 1700-01 (cited in note 31); Fish, 57 U. Chi. L. Rev. at 1464 (cited in note 31). Obviously, the force of the claim that a particular preference is socially constructed disappears if the claim is based on *all* preferences being socially constructed. No preference can be "inauthentic" if all are.

33. Skepticism and determinism, to the extent they purport to criticize knowledge claims, end up, because of self-reference, undermining their own claims. If we can never know whether any proposition is true, then we can never know whether the proposition "we can never know whether any proposition is true" is true. On the self-contradiction of skeptical claims, see Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 Stan. L. Rev. 871, 901-05, 912-13 (1989). See also Thomas Morawetz, *Understanding Disagreement, The Root Issue of Jurisprudence: Applying Wittgenstein to Positivism, Critical Theory, and Judging*, 141 U. Pa. L. Rev. 371, 445-46 (1992).

34. See Frederick M. Gedicks, *Public Life and Hostility to Religion*, 78 Va. L. Rev. 671, 680-81 (1992). I think the "in part" is the point to emphasize. I believe that the postmodern version of Kantian epistemology is largely true, but I don't accept the thoroughgoing determinism of social categories. See Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 Stan. L. Rev. 1371 (1988).

35. Again, perspectivalism, like postmodernism, contains a core of truth but overstates its case. That we each have a different perspective on the world doesn't mean that there is no world but only perspectives.

exercise of private power can and should be recharacterized as a constitutional challenge to those background laws.

Second, the foregoing discussion establishes that exercises of private power will undoubtedly have public effects, including effects on values that are embodied in constitutional norms. Third, however, the discussion establishes that altering the laws and constraining private power will also have effects on both the public and private spheres, effects which themselves may be of constitutional moment.

The upshot is that constitutional challenges to private choices should be assessed as follows. First, if the choices in question were not private choices permitted and enforced by the state through its laws, but were the choices of the state itself or choices mandated by the state, would they represent unconstitutional state action? In almost every case where the answer to that question is "no," the state's permission and enforcement of the analogous private choices should be deemed constitutional.

If the state's analogous choices would be *unconstitutional*, the analysis then proceeds to a second question: Are the negative effects on constitutional values of the state's permitting and enforcing the private choices comparable to the effects on constitutional values of the state's analogous choices? If the negative effects of the state's choices are different in kind or in large degree from the effects of the private choices, the state's permitting the private choices should again pass constitutional muster in most cases.

Finally, if the negative effects of private choices on constitutional values are comparable to the effects of the state's analogous choices, the analysis proceeds to a third question: Are the state's justifications for permitting the private choices weightier than its justifications for its own analogous choices, and sufficiently weightier to support a different constitutional verdict?

Let me illustrate this three-step analysis by considering various exercises of private power that might be thought constitutionally dubious. I shall divide the examples into two main groups, one in which the state merely permits and enforces the private choices, the other in which the state in addition subsidizes the private choices.

In the first group, consider these cases: a large civic organization, important for business and political contacts, excludes blacks from membership; a "Christians only" political party bars non-Christians from membership; a large farm operation refuses to allow its migrant workers who live in farm-owned housing to display political posters or distribute political pamphlets on the premises; a large newspaper requires its reporters to "spin" their stories to favor

Republicans; a large corporation requires its employees to disclose their political affiliations and submit to random drug testing, and reserves the right to fire the employees without a prior hearing; a private university restricts student speech and interracial dating; a church refuses to allow women to be clerics; and a private creditor engages in self-help repossession when it believes its debtor is in default.

In the second group, add to the "Christians only" political party example the fact that it receives federal election funds; to the large corporation example the fact that it has contracted with the state to provide a service, such as running prisons or providing utility service, that had previously been provided by the state itself, and that it has been granted monopoly status during the term of the contract; to the private university example that it has tax-exempt status and receives federal work-study money; and to the church example that it has tax-exempt status.

If we assume that in none of these examples would the state itself be able to act as the private chooser is acting or mandate that the private chooser act as it is acting (though in fact there is no state analogy to a political party or a church), then the analysis moves to the second question: What are the negative effects on constitutional values of permitting and enforcing the private choices, and how do those effects compare to the negative effects of the analogous state choices? Being excluded from the large civic organization because of race has no direct analogy with respect to state choices, though its effects may be comparable to state exclusion from the polity, from high level jobs, or from the best schools and neighborhoods. There will be stigma, inequality of opportunity, and other setbacks to interests.

The effect on constitutional values of exclusion of non-Christians from a political party are more difficult to assess. Is the party a significant electoral force, as the Jaybirds were in *Terry v. Adams*?³⁶ What other parties are open to non-Christians? Exactly what constitutional value is at stake? The vote? Free exercise of religion? Equality?

The large firm that limits the political speech of tenant migrant farmers has effects on speech comparable to a municipality's limiting sign posting, pamphleteering and so forth. The newspaper's effects on its reporters' free speech is similar to the effects of a government-run newspaper's similar policy. The large corporation that fires its employees without prior hearings, runs random drug

36. 345 U.S. 461 (1953) (holding that electoral activities of all-white Jaybird Club were unconstitutional state action).

tests on them, and looks into their political associations will affect the employees' speech, privacy, and procedural due process interests no differently from how those interests would be affected by a government employer. The private university with a speech and racial code will cause effects on constitutional values comparable to those a public university would cause.

The church that excludes women from the clergy is a little different in that the state does not and cannot operate a church. But if we look at clergy in the church as persons employed in an important occupation, then the state has many comparable positions from which it might attempt to bar women and the exclusion from which will affect women in comparable ways.

Finally, the creditor who takes the debtor's car or washing machine without a prior hearing on the default will affect the debtor the same way whether or not a marshal accompanies the creditor.

How are these effects on constitutional interests exacerbated or altered by coupling the state's permission and enforcement of the private choices with a subsidy or grant of monopoly status? Does the presence of federal election funds make the political party's exclusion of non-Christians more of a setback of constitutional interests? Similarly, does tax-exempt status or work-study money worsen the effects of the university's speech and racial codes, or the church's ban on women clergy? Perhaps the extra harm in the cases is to the taxpayer. Or perhaps the use of the monies dries up resources that would otherwise be available to ameliorate the harms to those dispreferred by the political party, the university and the church. Alternatively, perhaps the harm to constitutional values that the subsidies effect is a symbolic one.

Any marginal harm due to the private corporation's being granted a monopoly status may be a product of its increased leverage in bargaining with its employees, especially if the employees have firm-specific skills. An employee in a competitive market may bargain over hearings prior to discharge, random drug tests or intrusion into political affairs. If the firm has a monopoly, however, the employee's bargaining position is worsened.³⁷

It is the third step in the analysis where most of the action lies. For the question here is whether the state has reasons for permitting, enforcing, and perhaps subsidizing private choices that it lacks with respect to its own choices.

For example, one reason the state has for allowing private organizations to discriminate in determining membership, on grounds

37. See Stephen F. Williams, *Liberty and Property: The Problem of Government Benefits*, 12 J. Leg. Stud. 3 (1983).

on which the state itself might be constitutionally prohibited from discriminating, is that private organizations have associational and ideological interests of constitutional significance that the state itself does not have or is constitutionally barred from having. Of course, the Supreme Court in *Roberts v. United States Jaycees*³⁸ held that those interests were not sufficiently at stake in the case of the Jaycees to render unconstitutional Minnesota's attempt to ban the Jaycees' discrimination against women. Whatever we think of that decision, it is a leap from saying that the state *may* constitutionally ban the discrimination to saying that the state *must* ban it or violate the Constitution. The constitutional interests on the side of the right to discriminate, when added to the omnipresent state interest in avoiding the enforcement costs of making one more course of conduct illegal, may tip the balance in favor of the private organization.

The state's interest in allowing political parties to determine their membership is, I believe, quite formidable. *Roberts v. Jaycees* notwithstanding, the ideological position of a party is always altered by its membership.³⁹ (Even if young men and young women hold the same political views as a statistical matter, the Minnesota Jaycees after *Roberts* will never again express the views of young men qua young men.) And although *Terry v. Adams*,⁴⁰ the Jaybird Party white primary case, suggests that a state's recognizing and permitting a whites-only political party is unconstitutional, the case for a Christians-only political party has the constitutional interest of religious freedom on its side, an interest missing in *Terry*. (*Terry*, in any event, is a precedent of dubious value for anything beyond its unique facts, and arguably was incorrectly decided.) Finally, adding the federal matching funds to the analysis does not obviously alter the state's interest in permitting the discrimination since its interest in funding elections does not and may not turn on what *it* thinks of the candidates and parties.

The state's interests in allowing the farm to control certain political activities of worker-tenants are probably as follows. First, there is the interest in protecting the prerogatives of property owners over how the property is used and who is invited on the property on what conditions; and, second, there is the interest in not having to adjudicate the various fact-sensitive cases that would result if private property owners were made subject to constitutional restric-

38. 468 U.S. 609 (1984).

39. The majority in *Roberts* appeared to deny this because of evidence that young men and women held similar views on most issues. See 468 U.S. at 627-28.

40. See *supra* note 36.

tions regarding speech on the property. *Marsh v. Alabama*⁴¹ and *Pruneyard Shopping Center v. Robins*⁴² suggest that the property owner's property and expressive rights are not sufficiently strong to compel the state to cede the owner absolute control over others' speech. And *Marsh* goes further and holds that at least in some circumstances, the state must not cede such control, with *Hudgens v. NLRB*⁴³ refusing to extend *Marsh* to shopping centers. The question then becomes, where do large farms fall in comparison to company towns and shopping centers?

The state's interest in the newspaper example is easy: protecting the newspaper publisher's freedom of speech. If I may "spin" an article to favor Republicans, I may require the secretary I've employed to type the article to type it the way I've written it, even if she disagrees with it. And if I am constitutionally protected against contrary regulation to this extent, am I not also protected if I want to hire someone to write the story for me and require that person to write it the way I want it? If so, then the state has the strongest case it can have for allowing the newspaper to control its reporters as described: it is constitutionally compelled to do so.

The large corporation presents a more difficult case. To the extent that the corporation's interests in drug testing, in the politics of its employees, and in discharges without prior hearings are efficiency-driven, they are no different from the interests the state itself would have were it running the enterprise. But there are also usually interests that the state has in permitting the corporation to make such choices that it lacks with respect to its own choices. Some would hold that the corporation has the interests that ordinary property owners have in expression⁴⁴—"this is a Socialist-free and a drug-free company"—association, and dominion. And the state always has an interest in not adjudicating additional claims. The grant of monopoly status serves an independent state interest that does not affect the state's interests in permitting the monopoly to deal with its employees on terms of its choosing. The Supreme Court apparently agrees.⁴⁵

41. 326 U.S. 501 (1946).

42. 447 U.S. 74 (1980).

43. 424 U.S. 507 (1976).

44. See *Pacific Gas & Electric Co. v. Public Util. Comm'n*, 475 U.S. 1, 17-18 (1986); *Pruneyard Shopping Center*, 447 U.S. at 100; Nicholas Wolfson, *Corporate First Amendment Rights and the SEC* (Quorum Books, 1990).

45. Compare *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978) (holding a power shut-off without a prior hearing on default to be unconstitutional denial of procedural due process where the utility company was municipally-owned) with *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (reaching the opposite result from *Memphis Light* in the case of a privately-owned utility with state-granted monopoly status).

The state's interest in allowing the private university to impose a speech code is similar to its interest in allowing the newspaper to have a "speech code" for its reporters: respecting the university's academic freedom. And with respect to the university's code regarding interracial dating, the state's interest in permitting it may be its respect for institutional autonomy and associational interests.

If the university receives subsidies, the calculus may change. *Bob Jones University v. United States*⁴⁶ suggests that the state has no constitutional duty to subsidize universities whose racial policies it dislikes, and perhaps *Rust v. Sullivan*⁴⁷ extends this principle to speech of which the state disapproves. But there is still a step from arguing that the state has no constitutional duty to subsidize to arguing that the state has a constitutional duty to refuse to subsidize.

The case of the church that bars women from the clergy is similar. After *Employment Division v. Smith*,⁴⁸ it is not clear that the state is compelled to allow the discrimination by the Free Exercise Clause. Surely, however, the state may permit the discrimination out of concern for religious liberty. And although *Bob Jones* would support the state's denial of tax exempt status, it does not compel such a denial.

Finally, there is no state interest that I can discern in allowing self-help repossession that is lacking when the state sends a marshal along with the creditor. If state-assisted repossession without a prior hearing on default is unconstitutional, so, too, is the state's permitting self-help repossession.⁴⁹

III. CONCLUSION

Private power is subject to constitutional scrutiny. That is so, not because there is no public/private distinction, but because private power is a product of public laws and has effects on interests of constitutional significance. Some fear recognition of this rather banal point will lead to a nightmare of courts constitutionalizing all private decisionmaking. They would rather, instead, have the courts tell the noble lie that the choices of private actors are beyond constitutional scrutiny by omitting to acknowledge that those

46. 461 U.S. 574 (1983) (upholding denial of federal tax exempt status to private university with restrictions on interracial dating).

47. 111 S. Ct. 1759 (1991) (upholding ban on abortion counseling in family planning clinics receiving federal funds).

48. 494 U.S. 872 (1990) (holding that the Free Exercise Clause never compels religious exemptions from laws of general applicability).

49. See Alexander and Horton, *Whom Does the Constitution Command?* at 77 (cited in note 3).

choices are permitted and enforced by the state itself and thus circumscribed by laws that represent the *state's* choices.

What these people fear is indeed nightmarish, but it does not follow from a recognition of what is nothing more than a conceptual truth. Acknowledging the interpenetration of the private sphere by the public law that defines it and acknowledging the material effects of private choices on public values do not lead necessarily to the conclusion that private power should be any more constrained by constitutional norms than it is currently. To get to that conclusion, one needs a normative theory regarding what the Constitution requires the law regulating private choices to look like. If there are good reasons, themselves of constitutional provenance, for leaving private choices ungoverned by the constitutional constraints imposed on the state—and I believe in most cases that there are—then the public/private distinction will remain as significant in constitutional law as it is in the lives we actually lead.